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OF THE UNITED STATES

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# CASES

## ARGUED AND DETERMINED

IN THE

### UNITED STATES CIRCUIT COURTS OF APPEALS THE DISTRICT COURTS, AND THE COMMERCE COURT

L. C. SMITH & BRO. TYPEWRITER CO. v. ALLEMAN.

(Circuit Court of Appeals, Third Circuit. October 11, 1912.)

No. 1,573.

**1. SALES (§ 454\*)—CONDITIONAL SALE—DISTINGUISHED FROM BAILMENT.**

Claimant delivered a typewriter to a bankrupt under a contract providing that it was hired for the term of seven months at a rental of \$100 payable in installments, the machine to be returned to claimant at the expiration of the term or on default of any payment, and that at the expiration of the term, on payment of \$1 in addition to the sum paid for rental, the claimant would execute a bill of sale of the machine to the bankrupt. *Held*, that the writing on its face constituted a good bailment, and not a conditional sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1324, 1325, 1333, 1334; Dec. Dig. § 454.\*]

**2. CONTRACTS (§ 170\*)—PRACTICAL CONSTRUCTION.**

Where the words of a written contract are equivocal, evidence of the subsequent acts of the parties thereunder is admissible to show how they understood the contract, on the theory that such acts are a binding practical construction thereof; but, if the meaning of the contract is clear, the intention of the parties must be determined by the language, and evidence of a practical construction is inadmissible.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 753; Dec. Dig. § 170.\*]

**3. SALES (§ 454\*)—CONDITIONAL SALES—DISTINGUISHED FROM BAILMENT.**

While the mere use of the words "lease" and "rental," in a written contract relating to personalty, will not convert into a bailment what would otherwise be a conditional sale, yet, even in a contest where execution creditors are concerned, if the contract by its term is a bailment, the courts will give it effect as such to the exclusion of the execution creditor.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1324, 1325, 1333, 1334; Dec. Dig. § 454.\*]

What constitutes a contract of conditional sale, see note to *Dunlop v. Mercer*, 86 C. C. A. 448.]

**4. SALES (§ 459\*)—CONDITIONAL SALE—ELEMENTS—TRANSFER OF TITLE.**

To constitute a contract a conditional sale of personal property, the title thereto must have passed to the buyer when the property was received into its possession.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1337-1347; Dec. Dig. § 459.\*]

**5. BANKRUPTCY (§ 140\*)—PERSONAL PROPERTY—BAILMENT OR SALE.**

Claimant leased a typewriter to a bankrupt under a written contract for hire for the term of seven months at a rental of \$105 payable \$30 on the execution of the agreement, and monthly installments thereafter. It also provided for the return of the machine at the end of the time or on default, and in case the payments were fully made the bankrupt was to be entitled, in consideration of the further payment of \$1, to a bill of sale at the end of the term. *Held*, that the fact that payments of unequal amounts were made and accepted at irregular intervals up to a time shortly before the intervention of bankruptcy proceedings and the failure of the bankrupt to return the machine at the end of the term, and of the claimant to pursue its remedy to retake the same until six months after the expiration of the term and after the intervention of bankruptcy, did not change the contract from one of bailment to a conditional sale so as to deprive the claimant of its right to recover the property against the bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.\*]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Bankruptcy proceedings against the Franklin Lumber Company, Incorporated. On petition to review a decree (187 Fed. 281) affirming a referee's order denying the application of the L. C. Smith & Bro. Typewriter Company for the return of a typewriter delivered to the bankrupt under a bailment contract. Reversed.

John G. Johnson, of Philadelphia, Pa., and Wm. F. Berkowitz, for appellant.

D. Hays Solis-Cohen and Albert L. Moise, both of Philadelphia, for appellee.

Before GRAY, Circuit Judge, and BRADFORD and WITMER, District Judges.

WITMER, District Judge. Whether the contract in suit is a bailment or conditional sale is here presented by this record. The writing was entered into between the L. C. Smith & Bro. Typewriter Company and the Franklin Lumber Company, Incorporated, on the 4th day of February, 1909. The latter having since been declared a bankrupt, its creditors are represented by S. H. Alleman, as trustee.

The contract discloses that the Smith Company delivered to the Franklin Company a certain typewriter, designated by factory number, for use and hire for the term of seven months, at a rental of \$105, payable as follows: \$30 upon the execution of the agreement, and \$10 per month thereafter, and one payment of \$15 at the office of the Smith Company, without notification or demand. The Franklin Company agreed to preserve the property in as good

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

order and condition as received, natural wear and use only excepted, to exhibit the same to the Smith Company when desired, and not to remove the machine without the consent of the latter. The contract also provides for the return of the property to the Smith Company at the expiration of the term. It furthermore provides, "upon default of payment or payments," the Franklin Company should return the machine to the Smith Company; otherwise the latter was authorized to retake the same. There is also this provision:

"It is further agreed between the parties that upon the return of the property at the expiration of the term, that upon the payment of one dollar by the party of the second part, in addition to the sum paid for rental, the party of the first part (Smith Company) will execute a bill of sale of the aforesaid property to the party of the second part (Franklin Company)."

Payments under this agreement aggregating \$70 were made in unequal amounts at irregular intervals up to May 4, 1910, shortly before the Franklin Company was declared a bankrupt.

The referee held that the "conduct of the parties" to the agreement, subsequent to its execution, referring to these payments, operated to convert what was once a bailment into a conditional sale. The learned court, in reviewing his decision, held that the contract had not been changed from a bailment to a conditional sale, but that, viewing it in the light of the subsequent acts of the parties, it had always been a conditional sale, saying:

"In our opinion, the contract has not been changed, but only been interpreted by the subsequent conduct of the parties. In reality it has always been a contract of conditional sale, although it may be true that the bankrupt himself would not have been permitted to prove its true character."

[1] The referee and the court below both agree that, upon its face, the writing constitutes a good bailment. Indeed, under the authorities this cannot be controverted. It bears all the indicia of a bailment and does not contain any of the disabling elements, whereby contracts intended as bailments are sometimes construed by the courts to be conditional sales. *Liquid Carbonic Co. v. Quick et al.*, 25 Am. Bankr. Rep. 396, 182 Fed. 603, 105 C. C. A. 141; *Dando v. Foulds*, 4 Penny. (Pa.) 342; *Ditman v. Cottrell*, 125 Pa. 606, 17 Atl. 504; *Wheeler & Wilson, etc., v. Heil*, 115 Pa. 487, 8 Atl. 616, 2 Am. St. Rep. 575; *Collins v. Railroad Co.*, 171 Pa. 243, 33 Atl. 331; *Harris v. Shaw*, 17 Pa. Super. Ct. 1; *Jones v. Wands*, 1 Pa. Super. Ct. 269.

An analysis of the statement of facts relied upon by the court warranting in his opinion the interpretation that this paper, upon its face a good bailment, was in reality a conditional sale, were: (a) Payments under the agreement in sums other than therein provided; (b) payments at irregular intervals; (c) failure by the Franklin Company to return the machine to the Smith Company at the expiration of the term provided for; and (d) failure by the Smith Company to pursue its remedy under the contract and retake the machine, until six months after the expiration of the term and after the bankruptcy of the Franklin Company.

[2] It is a cardinal rule in the interpretation of contracts that, if the words or terms thereof are equivocal, the subsequent acts of the parties thereunder are admitted to show how the parties understood their contract, and such acts are a practical construction of it. 1 Beach on Contracts, § 721, p. 875. However, where the contract is free from ambiguity, and its meaning is clear in the eye of the law, such mode of construction is inadmissible. The practical construction of a contract adopted by the parties thereto will not control or override language that is so plain as to admit of no controversy as to its meaning. In such cases the intent of the parties must be determined by the language employed, rather than by their acts. 1 Beach on Contracts, § 722, p. 877.

As was said in *Wright v. Gas Co.*, 2 Pa. Super. Ct. 219:

"The parties to a contract, where there may be some ambiguity, always have a right and can put their own construction upon their own lease, and it is a proper question to submit to the jury whether both parties agree to such a mutual construction, and the jury so finding should adopt such construction as their own."

But, where there is no ambiguity, the fact that a party acted in accordance with a certain construction does not make such construction binding upon him. *Penna. Co. v. Erie, etc., Co.*, 108 Pa. 621.

The learned court furthermore says:

"Assuming that the bankrupt would be bound by the words of this agreement, and could not deny it to be a lease, his trustee is not so bound, and may contend that the contract is really one of conditional sale. In such a contention he may offer any competent and relevant evidence, and it is obvious, I think, that the conduct of the parties may ordinarily throw much light on the true meaning of their agreement. If they treat it as a contract of sale, it makes no difference what name they have given it. A creditor may adopt their own construction, and they cannot successfully object."

The learned judge cites, in support of this, the cases of *Brunswick v. Hoover*, 95 Pa. 508, 40 Am. Rep. 674, *Peck v. Heim*, 127 Pa. 500, 17 Atl. 984, 14 Am. St. Rep. 865, and *Ott v. Sweatman*, 166 Pa. 217, 31 Atl. 102. All of these cases were contests in which execution creditors figured. In each case the contract was held to be a conditional sale and not a bailment. This construction, however, was based upon a written contract, which bore upon its face the indicia of a conditional sale.

[3] While it is true that the mere use of the words "lease" and "rental," in a written agreement relating to personalty, will not convert into a bailment what must otherwise be construed as a conditional sale (*Kelly Road Roller Co., Appellant, v. Spyker*, 215 Pa. 332, 64 Atl. 546; *Morgan-Gardner Elec. Co. v. Brown*, 193 Pa. 351, 44 Atl. 459), yet, even in a contest in which execution creditors are concerned, if the contract by its terms is a bailment, the courts will give it its effect to the exclusion of the execution creditor (*Ditman v. Cottrell*, 125 Pa. 606, 17 Atl. 504). In this case, where, on a sheriff's interpleader, the claimants showed a written agreement between themselves and the execution defendant, where-



by, in consideration of a fixed sum to be paid monthly, they agreed to let to hire to the latter the property levied upon, for a term of years, and, in case of no default, to execute a bill of sale of the property, the agreement as to the creditors of the execution defendant was held by the Supreme Court of Pennsylvania to be a bailment and not a conditional sale.

[4] Under the authorities, to constitute this contract a conditional sale, the title to the machine must have passed to the Franklin Company at the time it received it into its possession. Said Mr. Justice Gorden, in the case of *Dando v. Foulds*, supra:

"It is to be observed that, to bring the case within the statute of Elizabeth, the contract must vest presently a title of some kind in the buyer, and the mere right to acquire title at some future time, or upon the happening of some future contingency, will not have that effect. *Rose v. Story*, 1 Pa. 190, 44 Am. Dec. 121. In other words, the title to the goods must pass to the vendee at the time he receives the possession, otherwise there is no sale, but only a bailment."

[5] Did the Franklin Company acquire any kind of title under the contract, at the time it received the machine into its possession? Answering the question upon an inspection of the instrument, under the Pennsylvania authorities, we say it did not. It cannot be seriously argued that, if the controversy at bar had arisen during the first month of the term, the trustee in bankruptcy could have wrested the possession of the machine from the Smith Company under the contract. At that time any subsequent acts could not have been proven, because there were none. It then would have been held that the contract is a bailment.

Therefore this court holds that, since the contract is plain and unambiguous, it is not permissible to resort to the subsequent actions of the parties thereunder, in order to its interpretation, and that, even though it was permissible so to do, the actions relied upon are insufficient to overcome or overrule the plain terms of the writing.

Again, the indulgences as to manner and time of payment of rental and retention of chattel by the Franklin Company after the expiration of the seven months' term cannot operate to change the construction which otherwise would be put upon the instrument. Conceding that there was a parol agreement modifying the contract as to the time when the installments should be paid, that will not avoid the remaining covenants in the contract, and it still remains a bailment upon its plain terms. Said Mr. Justice Porter in *Whitehill v. Schwartz*, 27 Pa. Super. Ct. 529:

"Even if the parol agreement, modifying the written contract as to the time when the installments of rent should be paid, was made, all the other covenants of the lease were still binding on the parties. The relations of the parties to the property and to each other remained unchanged, and a default in payment of an installment of rental, at the time it became due under the new contract, would involve all the consequences stipulated for in the written agreement."

Grant that there was a subsequent parol agreement modifying the definite term of the contract into an indefinite one. That circumstance, coupled with the modification of the terms of payment of the rental,

would not be sufficient to warrant the construction that the agreement in writing was a conditional sale.

The desire of many judges to do away altogether with the mischief frequently occasioned by the misuse of contracts of bailment has often led to the error here committed. And while it must be admitted that this device is resorted to by designing persons to cover doubtful transactions, often resulting in injustice to innocent parties, it must be remembered that much of the business of men is dependent upon it; and in many ways it is enabling the poor to hire property needful to them.

Notwithstanding such consideration, the contract, being a bailment in its inception, so remained at the time of the bankruptcy, and the trustee of the Franklin Company is not entitled to retain possession of the machine.

The decree is reversed, with costs

BRADFORD, District Judge. I am constrained to join in the judgment of reversal solely for the reason that, the decisions of the Supreme Court of Pennsylvania having established a rule of property in force in that state on the subject of conditional sales and bailments of personal property, the federal courts are under obligation to enforce it there without regard to its soundness or unsoundness.

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POST PUB. CO. v. PECK.

(Circuit Court of Appeals, First Circuit. August 9, 1912.)

No. 950.

1. TRIAL (§ 251\*)—INSTRUCTIONS—ISSUES.

In an action for libel based on a newspaper article, containing pictures, referring to plaintiff and a book written by him, where the answer did not attempt to justify in a common-law sense by alleging the truth of the words spoken, but the defense was that the article was published in good faith and was fair and reasonable comment and criticism, and the action was tried on the issue raised by the answer, the court properly submitted the case as one in the nature of an action on the case for injuries, involving as the vital issue the question of reasonable or unreasonable press comment, rather than one of strict libel.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.\*]

2. TRIAL (§ 251\*)—INSTRUCTIONS—CONFORMITY TO ISSUES.

In such case instructions as to the necessity of proof of special damages as a basis of the right to recover general damages, if such instructions were conceded to be necessary in actions of strict libel, were inapplicable to the issues tried, and were properly refused, and the instructions given in accordance with the general rules of damages in tort cases were admissible and sufficiently favorable to the defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. APPEAL AND ERROR (§ 1050\*)—REVIEW—ADMISSION OF EVIDENCE.

A judgment will not be reversed because of the admission of incompetent or irrelevant evidence unless it fairly appears to have been prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1050.\*]

4. LIBEL AND SLANDER (§ 107\*)—MENTAL SUFFERING—EVIDENCE.

In an action for libel in which mental anguish is a proper element of damages, evidence that plaintiff had a wife and sister was admissible.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 299-303, 305; Dec. Dig. 107.\*]

5. APPEAL AND ERROR (§ 971\*)—WITNESSES (§ 267\*)—REVIEW—CROSS-EXAMINATION OF WITNESSES.

Limitation upon cross-examination on the ground that it is not germane to the examination in chief, on the ground that it is too extended even if it relates to matter brought out on examination in chief, or on the ground that it is remote in respect to subject-matter or time, is within the discretion of the trial judge and not reviewable on writ of error, except in cases of extreme and extraordinary exercise of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3852-3857; Dec. Dig. § 971;\* Witnesses, Cent. Dig. §§ 923-930; Dec. Dig. § 267.\*]

6. LIBEL AND SLANDER (§ 107\*)—DAMAGES—EVIDENCE.

On the question of damages in an action for libel, evidence of plaintiff's standing in his profession and his capacity to earn money therein is admissible.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 299-303, 305; Dec. Dig. § 107.\*]

In Error to the Circuit Court of the United States for the District of Massachusetts.

Action at law by Harry Thurston Peck against the Post Publishing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

James Thomas Pugh, of Boston, Mass. (Elder, Whitman & Barnum, on the brief), for plaintiff in error.

Clarence A. Barnes, of Boston, Mass. (Charles D. Francis, on the brief), for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. This is an action of tort for alleged libel based upon a publication in the Boston Sunday Post of July 24, 1910, which has reference to a book written by Prof. Harry Thurston Peck, and published by Dodd, Mead & Co.

The alleged harmful matter consists of words, pictures, and drawings.

[1] The defense in this case, as finally defined, was not what is called justification, in the strict sense of the ordinary libel suit, but one based upon a denial of malice and of the innuendoes and an assertion that the publication complained of was merely a matter of news published in good faith with reference to legitimate

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

public interests, and that what was done only involved reasonable comment and criticism and as such was privileged.

The plaintiff in his declaration proceeded upon the idea that the printed words and the things done were libelous, and that what the Post said about Mr. Peck and his publication, together with what was brought in about the woman Quinn, her breach of promise case, and what she said about the book in question and its author, and what was done by the Post's staff of authors and artists, taken altogether, operated to bring the book, Mr. Peck, and his other literary works into disgrace and ridicule, and under such circumstances as to entitle him to recover damages.

According to the record, the plaintiff, at the time of the alleged wrongful publication, had for a long time sustained important relations with Columbia University, was a professor in the classics, had written and published several books and many magazine articles, was at the time of the alleged libel engaged upon a "History of Classical Philology" for the Macmillan Company of New York and London, upon a number of articles and reviews for magazines, under contract to become the literary editor of Smith's Magazine, under contract with the American Philological Association to write a series of articles on pure literature in Europe and America, and under contract with the trustees of Columbia University to lecture as Anthon professor of Latin; and it is alleged that by reason of the wrongful publication he suffered financial loss, injury to personal and professional reputation, and was subjected to mental anguish.

It is quite true the plaintiff in his declaration, in speaking of the publication as a whole, characterizes it as a malicious libel, and alleges that the defendant in publishing and circulating the statements and pictures in question intended to convey and did convey the idea that the outline of a head, which included obscene pictures, was the outline of the plaintiff's head, and that the plaintiff was a licentious person, and a moral pervert with a degenerate mind.

But the answer does not put the defense upon the common-law ground of justification through alleging the truth, but upon the ground of the right of justifiable, legitimate, fair, and reasonable comment.

And it thus follows that, while the declaration was one of libel, the whole situation was practically changed by the answer, which presented substantially different issues and substantially different questions from those existing in the ordinary common-law libel suit, and it is apparent that the presiding judge in the last analysis wisely submitted the case to the jury on the lines of common sense instructions, not only practically and legally applicable to the substantial issues involved, but upon such general and comprehensive lines as, under the particular circumstances, were necessary for the proper determination of the real questions at issue, and, the case being exceptional in the sense that the actual question under the answer and upon the trial was in substance one of fair criticism and reasonable comment rather than one of strict libel, it

seems not out of place to set out pretty fully the way in which the case was finally submitted to the jury, to the end that, further on, the importance or lack of importance, the applicability or inapplicability, of the various points raised in the course of the trial may be better understood and appreciated.

The learned judge, after reminding the jury that it was the province of the court to state the law, and that the questions of fact involved would be passed upon by them, proceeded to explain the questions of fact which they were to determine under the peculiar circumstances of the case before them, and among other things said:

"It is my duty to submit to you the questions of fact upon which you are to pass, to point them out to you, and to give you such instructions regarding the law as may be necessary to enable you to arrive at a verdict. This I will try to do, using as few and as simple words as possible. It will, in view of the length of the trial, however, be inevitably necessary for me to occupy some little time. \* \* \*

"This, gentlemen, as you know, is what is called a suit for libel, in which the plaintiff complains of damage done by the defendant to his reputation. He complains of injury to reputation, personal or professional reputation. I need not dwell upon the fact, so well realized by every one of you, that to every man his reputation is of value. Anything wrongfully done, which tends to injure his reputation, is a wrong which the law will redress. Anything wrongfully done, which tends to make people shun or avoid or have a less good opinion of the plaintiff, or to hold him in contempt or in ridicule, of course it is obvious is an injury to reputation of that general character which the law will redress.

"The plaintiff complains in this case that he has been injured in his reputation, personally and professionally, by a publication made in the Boston Post which has been shown to you, and which has been read to you, the Boston Post of Sunday, July 24, 1910. There is no dispute in this case that the article of which the plaintiff complains was published by the Post, published in the Sunday issue of July 24, 1910. There is uncontradicted evidence as to the number of copies of that Sunday paper circulated. It is undisputed that the article of which the plaintiff complains referred to a book called *The New Baedeker*, to which frequent references have been made before you. There is no dispute that the plaintiff had, previously to the publication of the Post's article, written and published the book which I have mentioned; and there is no dispute that I have heard that the plaintiff is a literary man by profession, and a teacher, an educator, as it has been called, a professor, a part of whose daily business it is to write books or to write articles.

"Now, the object of this action on the part of the plaintiff is to get compensation in money for injuries which he says this article did to his professional and personal reputation. The damages claimed in his writ are stated to be \$100,000; but that, gentlemen, as I may say to you again, is no index of any consequence regarding the amount of damages, if you give any damages, which you should give in this case. The plaintiff in a suit is allowed to insert, when he comes to stating the amount of damages which he claims, any sum which he pleases.

"Now, in order to recover in this case, the plaintiff must satisfy you, by fair preponderance of the evidence, that this publication by the Post did in fact cause an injury to his reputation in some of the ways that I shall endeavor to indicate to you. Of course, injuries to his reputation caused by something else do not entitle him to recover in this action against the Post for publishing this article. The plaintiff must satisfy you by a fair preponderance of the evidence that the publication of this article was the cause of an injury to him in his reputation and in his business, before he can expect you to find a verdict in his favor for that, and award him any damages. Now, if you should be satisfied that this publication was the cause of injuries to his reputation, the plaintiff then has the burden of satisfying you what

is a fair compensation in money for the injuries which you find he sustained. That, and only that, has he any right to recover in this case.

"You will find in this article published by the Post, and complained of by the plaintiff here, statements of two kinds. A good deal of what is said in that article, perhaps the most of it, consists of statements about the book supposed to be under criticism; but some of the things in it, as we have heard, are references, not to the book, but directly to the plaintiff himself; and these are complained of, and they need consideration by themselves. In some respects they stand on a different ground from the ground on which the statements made in criticising the book merely rest. Now, I will consider these first. As to them, I instruct you that the defendant, in reviewing books written by the plaintiff, has a right to make only fair, truthful, and reasonable criticism of the book reviewed. It is bound to confine itself to such criticism of the book, and it has no right to make an attack on the plaintiff personally, or on him in his profession as an author. I mean that it has no right to make a wrongful attack on the plaintiff personally, or on him in his profession as an author. If any statements are made directly by a reviewer not based on the text of the book or warranted by it, then those statements are to be tested by the ordinary rules of law applying to libel, and you have to consider as to those statements whether they are libelous statements.

"Let me recall to you briefly what the statements that I am talking to you about are. They are these:

"This article in the Post begins with a passage in italics, put in quotation marks, and followed by the words 'Professor Harry Thurston Peck.' That passage in italics purports to be a quotation from something that the plaintiff has written. There is evidence here, and uncontradicted evidence, that the plaintiff never wrote anything of that kind. If a newspaper publishes as a quotation from the plaintiff something which the plaintiff never wrote, that of course is a statement that he did write it; and, if the nature of the quotation be such as to make that a statement injurious to the plaintiff's reputation, it is a statement for which you may have the right to award damages. I will refer to that statement merely for the present, as I shall speak of it again in its order.

"The next statement I am talking about is that made in this publication that the plaintiff is an 'ink maniac.' The next one that I shall refer to is the statement that 'he has an almost paranoiacal desire to write of women when he takes a pen in hand.' The last feature of the article of this kind upon which I shall comment will consist of the so-called portraits and illustrations, and the headlines over the article which the Post published.

"Now, any statements, as I have told you, about the plaintiff which have a tendency to expose him to ridicule, contempt, or disgrace, are things of which he has a right to complain as an injury to his reputation; and the question for you regarding these statements which I have just mentioned is: Were these statements, or were any of them, statements having such a tendency? Do you think, as fair and reasonable men, that the statements to which I have been referring are such as to tend to injure the plaintiff in his reputation? Now, take them one by one and consider that question. Your result upon each of the statements to which I have referred will enter into your verdict. And it is for you to say, regarding each and all of those statements, whether you think they were of such a character as to tend to injure the plaintiff in his reputation.

"Begin with the alleged misquotation. Perhaps it will be worth while, as some days have elapsed, if I read this over:

"'Against the 20th century woman every man should set his face like flint. She is striving for economic independence, and her advanced theories have always borne fruit in the marked distaste for marrying that is growing among men. The cause for this distaste does not lie in man's heartlessness, nor yet in his profligacy, but in the fanaticism and unwisdom of the modern woman.'

"Now, you are to take that in this way, gentlemen: The plaintiff says, 'I never wrote those words'; and the Post has not proved that he did. They are, then, untruly attributed to the plaintiff. What harm has been done to

the plaintiff by having the writing of those words wrongfully or erroneously attributed to him? Has that caused any injury to his reputation? Are you prepared to say that you are satisfied that the tendency of attributing those words to him when he did not write them is such as to damage his reputation?

"The next statement to which I have referred is the statement that the plaintiff was an 'ink maniac,' and the later statement that he has 'an almost paranoiacal desire to write about women when he takes a pen in hand.' Now, you will observe that in that article those two statements are not made on the Post's own authority. The reviewer in the Post does not undertake to say on his own authority that those things are true. He quotes those statements from a certain Miss Quinn, who is referred to elsewhere in the article; but that, gentlemen, makes no difference for the purposes of this case. You may take those statements just as if they had been made on the authority of the Post itself. The defendant is as much responsible in law for publishing that some one else says the plaintiff is an ink maniac and has an almost paranoiacal desire to write about women, as if it had originated those statements; and it does not escape responsibility for them by putting them into the mouth of a third party, and the fact even that a third party made them does not justify the defendant in publishing them. But, holding the Post responsible for those statements just as if it had made them on its authority, how far are you prepared to say that those statements were such as tended to injure the plaintiff in his reputation? Naturally, you will study a little the meaning of the words used before you can judge of that question. You will naturally inquire: What do such words as those mean?

"Now, in interpreting the meaning of words, their ordinary construction and sense must be used, and taken to be their sense, as far as possible. Take these words 'ink maniac.' Standing by themselves I do not believe they need the slightest explanation to any of you. You are all perfectly familiar with the meaning of 'ink' and the meaning of 'maniac.' I may perhaps question, gentlemen, whether you can say with as much confidence that you know what the words together, 'an ink maniac,' mean. Now, I am afraid, moreover, that I have no explanation that I can afford you. I shall have to leave it to you unassisted, in your own good common sense, to say what 'ink maniac' means, and whether calling a man an ink maniac is something that tends to injure him in his reputation.

"The words, to come to the other statement, 'has an almost paranoiacal desire to write about women when he takes his pen in hand'—in that statement I suppose it is safe to say that we all understand that the word 'paranoiacal' indicates mental unsoundness, or insanity of some kind, and more or less permanent in character. That, perhaps, is a word which is not familiar to many persons. My understanding regarding that word, gentlemen, is that strictly speaking it is a technical word, used by what are called alienists, people who have made a study of diseases of the mind. It does not appear from the connection in which the word is used here that the man who used it had any very accurate, close, definite idea of what it did mean. It looks as if he used it because it was a big-sounding word which he thought would have a good effect in that place, without any very definite notion of what he was really talking about. I think we have all noticed that the use of words of that sort is often resorted to by writers in newspapers. But I do think, gentlemen, that we can say that the word 'paranoiacal' does indicate mental unsoundness of some kind, never mind what, and of a more or less permanent character. I submit that to you. You are to make the best you can of that charge. You are to say, gentlemen, whether you think it had a tendency to injure the plaintiff in his reputation.

"Now, there are no other explicit statements, made in so many words in this publication, which I shall refer to. I shall instruct you that there are no other statements in the article which you need consider by themselves as having been made directly of the plaintiff. With one exception the rest of the article seems to me criticism. Of that I will speak presently. There are in the article two statements that this Miss Quinn whom I have mentioned brought a breach of promise suit against the plaintiff. Those statements I shall instruct you you need not consider in this case. The fact that such a

suit has been brought is admitted. The statement therefore was true. The fact that the statement that such a suit had been brought had been widely published elsewhere months before this publication in the Post has also been admitted; and I see no evidence in the case which would warrant an award of damages for the mere fact that the Post republished in this article the circumstance that such a suit as that had been brought. I shall therefore instruct you regarding those two statements that the breach of promise suit had been brought, that you need not consider them for the purpose of awarding damages.

"But, as to all the other statements to which I have made reference, if you are satisfied that these do refer directly to the plaintiff, and do have a tendency to expose him to ridicule, contempt, and disgrace, and to bring him into disrepute, and if you find that his reputation was in fact thus injured by them, then you will be justified in awarding him damages for them, provided he has also proved to your satisfaction that the injuries were such as call for pecuniary recompense, and what the proper amount of money compensation is. Unless he has satisfied you on all those points, as to them your verdict will have to be for the defendant.

"Now, I refer to the so-called portraits, illustrations, and headlines that introduce this article. I think we may say that it is not obvious, taking these by themselves, that they tend to expose the plaintiff to ridicule, contempt, and disgrace. It is true that there is a newspaper portrait—what is called a portrait—of the plaintiff there. It seems to be neither better nor worse than most newspaper portraits, so far as I have observed. That will be a matter for your judgment, gentlemen; I submit it to you. There is a portrait, another so-called portrait, however, of Esther Quinn; and then there is a rude outline of a head, it is not indicated whose, and certain so-called illustrations within the limits of the outline. You must take all that in connection with the printed article; and I say that, if you take those things by themselves, it is not obvious just what they mean, nor just how nor whether they have any tendency to injure the plaintiff. But the plaintiff has undertaken to tell you what those mean, and he must prove to your satisfaction that they have the sense and meaning which he puts upon them. Unless you are satisfied that they do have the sense and meaning which he puts upon them, your verdict should be for the defendant as to them. If he satisfies you also that they have that sense and meaning, and satisfies you also that they had a tendency to injure him, and did injure him, and as to the amount of damages they caused him, then you may find a verdict in respect of them for the plaintiff. The plaintiff says that the defendant, in publishing and circulating such statements and pictures, intended thereby to convey, and did convey, the idea and meaning that the outline of the human head and obscene pictures therein were the outline and condition of the plaintiff's head and mind, and that the plaintiff was a licentious person, a moral pervert, had a degenerate mind, and had an almost paranoiacal desire, that is, an almost insane desire, to write about women.

"Now, gentlemen, the first question for you then is: Do you think those pictures, so-called, mean fairly that? If they do not, you have nothing to do with them. The first question for you is to say what they mean; whether they do fairly convey the idea and meaning which the plaintiff claims that they convey. Now, if you find that they do convey the idea and meaning which he attributes to them, and if you further find that he has proved such injury from them to his reputation as deserves compensation in money, you will be justified in a verdict for him to that amount; and if not, not. In considering that question I suppose you will undoubtedly be considerably influenced by this allegation that the pictures, what they call pictures, are obscene. That is a question for your good judgment as reasonable men. I can say nothing which will assist you in regard to that. I might express my opinion, but you would not be bound by it. The question is one peculiarly for you, about which I ought to express no opinion at all. It is one of those things peculiarly for the jury to settle. Now, give those pictures fair consideration. Give what the plaintiff claims in regard to them fair consideration and see what your opinion is as reasonable men. Do you see anything obscene in what stands there at the head of the article? Do you think



"Now, except as I have thus far indicated, gentlemen, you may treat the rest of this publication in the Post as a criticism of the plaintiff's book, a part of which has been read to you, which has been frequently quoted to you during the trial, and which you will have with you in your room when you deliberate on this case. So, regarding the publication, as a criticism of a book published by the plaintiff, the burden is on the plaintiff to satisfy you by a fair preponderance of the evidence either that the defendant published this criticism out of actual ill will toward the plaintiff, out of an actual desire and purpose to injure him, or else that the article exceeds the limit of fair criticism and comment allowed in criticising books. One of those things the plaintiff must satisfy you of by a fair preponderance of the evidence. Otherwise, regarding the article as a criticism, your verdict will have to be for the defendant, on the ground that, as criticism, the article has done him no legal wrong.

"Now, if the defendant published this article out of actual ill will toward the plaintiff, out of a deliberate wish to do him a mischief in his reputation, then what is said about his book in the publication, if you think it is of such a nature as to tend to expose him to ridicule, contempt, and disgrace, the criticism then, whatever it was, becomes something for which he may recover—for any injury actually done to his reputation by it, even if the criticism would have been allowable if there had been no such actual ill will involved in it. Now, what will you say? Was this publication, on the evidence which you have heard, due to any actual ill will toward the plaintiff on the Post's part? You may consider the article itself as a whole, and the arguments which have been addressed to you about it. You may consider the evidence of the Post's employes, Troy and Meloon, who got up the article together. Now, as you have heard, they deny that they had any ill will toward the plaintiff, or any intention to injure him; but they have made, as you have heard, certain admissions as to what they tried to do, meant and planned to do, in laying out the article, and deciding what should be discussed in it, from which the plaintiff has argued to you that, notwithstanding they deny it, they must have been actuated by real, deliberate hostility, by a wish to injure the plaintiff. Now, what is indicated to you by that, on the whole? You may consider all those things which I have referred to in this item; and, gentlemen, you may properly consider also whether or not, as the defendant claims, the review has omitted many references to women found in the book, and toned down certain portions of the book. If you find that that was the fact, you may consider that in deciding whether there was any actual ill will toward the plaintiff. And on that question you may further consider the fact, if you find it to be a fact, that the statements in the review were made, not on the authority of the reviewer, but on the authority of somebody else named in the review.

"If then, without any actual ill will toward Prof. Peck, or any desire to injure him, you find that this publication went further in what it said than fair criticism and commentary on his book, and if, where it went beyond fair comment, you find that it tended to injure him in his reputation by exposing him to ridicule, disgrace, and shame, and if you find proved an actual injury to his reputation of that kind from that cause such as deserves compensation in money, then a verdict for the plaintiff would be justified for the injury done by the criticism in this publication; and, if not, not.

"To determine the question there arising you will have to understand something about the limits of fair criticism and comment upon a book which has been published. How far may anybody who undertakes to review another's book in the public prints go in finding fault? Now, gentlemen, it is my duty to say to you there that the limits of fair comment are by no means narrow. If a man publishes a book, he may be said to invite and to expect criticism. He has no right to complain of condemnation of his book, or ridicule of his book, when honest, if there is anything whatever in his book which in any way justifies the condemnation or ridicule. Anybody is free, under our laws, to publish his honest opinion about the book, abusing it, making fun of it, as he thinks it deserves, providing he does not go beyond what is reasonable in view of the actual contents of the book itself.

"You have by this time had a chance to form a tolerably good impression

of the nature of the book. As I have said, you will have the book with you; and, if you desire to make further investigation, you will have plenty of opportunity to do so; but a good deal of it has been read to you, and some of it quoted to you over and over again. You are to remember that the book is not to be judged by a single isolated expression taken out of what goes before and comes after it. That would not be a fair treatment of any writing. You must judge the book, and any topic treated in it, by its fair meaning taken as a whole. And I might say the same thing applies to this publication in the Post. It will not do to pick out any one passage written in criticism of that book, and judge it by itself, entirely separated, isolated, from what goes before and after. You must take the criticism as a whole, just as you must take the book as a whole. A newspaper has a right to publish fair and reasonable comment upon a book, and such publication is not actionable in the absence of actual malice or ill will. The criticism may be severe; it may hold the author up to ridicule if the writing justifies it. If the book contains passages of an offensive or obnoxious character, it may be described with the severity which such passages deserve. In determining what severity or ridicule is justified, the whole book is to be considered, not single passages taken by themselves, separated from the book. If the book contains numerous passages referring to women, the plaintiff cannot complain if that fact is pointed out, and if such comment is made as their frequency and character justify; and you, gentlemen, must say how far the frequency and character of such passages, if you find any in the book, justify what the reviewer said about that. It is only when the writer goes beyond the limits of fair comment that the law of libel applies to it at all. To comment or criticism a very wide latitude is allowed on the grounds of public policy. Free and unrestricted criticism of what is published in the way of books is regarded as a thing for the public advantage. It is good for the public to have the honest opinions of persons who have examined books, and have honest opinions to express about them. Comment, to be fair, must be honest and also relevant. That is, it must really be about something in the book. It must not, under pretense of being about something found in the book, deal with something else entirely outside of the book. Comment is not unfair merely because the critic has failed to see the merits of the book, or because what he writes is in bad taste. If the reputation, or if the pecuniary interest, of the author of a book criticised has suffered in consequence of fair comment, and the criticism has not gone beyond that—suffered in consequence of fair comment merely, not actuated by malice—the person injured can recover no damages.

"Applying these features, gentlemen, you will have to consider those features of the plaintiff's book which counsel on both sides have called to your attention in argument. So far as you are prepared to say that nothing beyond the real truth about the book has been told, the plaintiff has no ground of recovery. If, in summarizing or describing the contents, you find that the defendant told only the truth, the plaintiff has nothing to complain of. If, in arguing on the contents, the arguments seem to you justified by what is in the book, then to that extent you will have to find that the plaintiff has no ground of complaint. Take an illustration: If the plaintiff says in a book, in his own book—says himself in effect—that he does go to the seashore, that he does look at bathing houses, that he does see women coming from bathing houses, or bathing on the beach, he cannot complain of the reviewer saying that he has said so in his book. If that and nothing more has been said of him, he has no right to complain. But if the reviewer in the Post has taken what the plaintiff says in his book on those matters, and has put a construction upon them which they do not fairly and reasonably bear, has said something on that subject which the book does not justify in your opinion, then the limits of fair criticism have been exceeded; if not, not.

"Now, gentlemen, I think that is all that I can usefully say to you regarding fair criticism. You must compare the book and the article in the light of the suggestions I have made; and, if you are satisfied that the Post's remarks did go in the direction of blame or ridicule, beyond anything reasonably justified by the book, according to what I have told you, then to that

extent—to the extent that you find that those limits were exceeded—you may regard the remarks as giving the plaintiff the right to damages; but not to any greater extent. That the criticism of the Post was not at all skillful or competent, or even intelligent; that it was blundering and ignorant, if you think it was so, is not important, except so far as those facts may lead you to believe that the limits of fair criticism were exceeded by the reviewer.

“Now, gentlemen, I have indicated to you the particular grounds upon which you may perhaps find—it will be for you to say—that the plaintiff has satisfied you, by a fair preponderance of the evidence, that an injury was wrongfully done to his reputation. If you are so satisfied as to those things, or any of them, then you will come to the question of damages. If you are not so satisfied as to any of them or as to such of them with regard to which you are not so satisfied, you will not come to the question of damages at all. But I have to assume now, for the purpose of instructing you about it, that you do come to the question of damages. You are not to understand it as any intimation on my part whatever that you will or that you will not. That is a question wholly for you to settle.

“I suppose, for the purpose of instructing you further regarding the rule of damages, that, as to some of these things, or all of them, you have found that the plaintiff has been wrongfully held up to contempt, ridicule, or disgrace by the Post, and that his reputation has suffered from that cause and from no other. What rule are you to follow in awarding damages for an injury like that? I instruct you there, gentlemen, that you are in that case to determine, from all the evidence and circumstances as proved at the trial, what damages ought to be given to the plaintiff, not exceeding the amount claimed. In fixing the measure of damages the jury may take into consideration the mental suffering produced, if any, by the publication of the article or pictures, or both, if they believe from the evidence that such suffering has been endured by the plaintiff, and the injury, if any, to him in his reputation, and the loss, if any, to the plaintiff by diminution of a demand by publishers for his contributions, literature, to magazines and periodicals, caused by the publication of the article and pictures, if they believe from the evidence that such injury and loss had been suffered by the plaintiff. The loss of contracts with publishers, if any, suffered by the plaintiff, and caused by the publication of the article and pictures, if you believe from the evidence that such loss of contracts has been suffered by the plaintiff, and the probable future loss, if any, by the plaintiff by the diminution of a demand by publishers for his contributions to literature, to magazines and periodicals, which the publication of the article and pictures is reasonably calculated to produce, if you believe from the evidence that such future loss will be suffered by the plaintiff.

“I instruct you, gentlemen, that if the plaintiff is entitled to any damages, he can recover only compensatory damages; that is, only such damages, only such amount in money, as you think is a fair and reasonable indemnity for the actual injury that he has sustained. He cannot recover what are called vindictive or punitive damages. No such damages are recoverable in this case. There are cases in which a jury may award damages going beyond actual indemnity, going beyond actual injury, for the sake of punishing the defendant, and marking their sense of the wrong which he has committed. This is not a case of that kind. In this case you will be limited in any award of damages you may make to actual compensation, for an actual injury suffered. The plaintiff, if he recover any damages at all, can recover only such damages as are proved to be due to the article published by the defendant. The wrong done by the defendant must be the efficient cause of the damages sustained in order to hold it responsible therefor. The defendant is not liable for injury to the plaintiff's reputation caused by prior publications of other parties, or by prior acts of other persons. The burden is on the plaintiff to prove the damages directly caused to him by the publication in the Post; and, if the jury are not satisfied on the evidence that the damage was caused by or was due to that publication, they should find for the defendant.

“The jury may consider that the defendant promptly offered to correct, or publish anything which the plaintiff desired, and that the plaintiff scorned the offer, if they find that those were the facts. You have heard, gentlemen,

that after the publication of this article the plaintiff and the defendant had certain correspondence. You have seen the letters. Do the letters indicate to your minds that in good faith the defendant offered the plaintiff to publish anything he desired, and that the plaintiff scorned such an offer? That is for you to decide. If you so find, you may consider it on the question of damages. The plaintiff is not to be allowed here any damages in reparation which you find that he might equally have had without suit.

"Now, gentlemen, the damages, you will remember, are to be only for injuries caused by this publication, not for injuries from other causes. There is evidence here that some of the damage complained of was due to other causes. You have heard that evidence; you have heard it argued about; and the question is for you.

"The question of damages, in case you reach it, will be one particularly calling for the exercise of your good judgment and your fair discretion. If you should think that what the Post published may have done the plaintiff an injury in his reputation, but not so much of an injury as to inflict upon him any substantial damage in money, that could be indicated in your verdict by an award of nominal damages, \$1, or some such sum. Such a verdict would indicate only that you thought the Post had published something which it ought not to have published, but that no real substantial harm had been done to the plaintiff's reputation. You might, of course, find that you thought no harm had been done at all, that his reputation had not been injured in the least; and in that case you would find for the defendant. If you find that an injury has been done, but no substantial damage suffered by it, you can bring in a verdict for nominal damages. Beyond that, in proportion as you find that an injury has been done the plaintiff's reputation, and that from that injury he has suffered a serious damage, to that extent your award should be increased; and, in making your award, you should endeavor to award him what you can, as reasonable men, say is fair and reasonable compensation for any actual injury to his reputation that he has suffered. But in no case should he be awarded more than just, fair, and reasonable compensation for an actual injury done. You are here to do justice, and nothing more, between these parties, fairly and impartially, without showing one of them any more favor than you do the other. Should you make any award of damages, your award should not be indiscreet or unreasonable. It should not be in the exercise of generosity. It should be just what you reasonable men say is fair and reasonable compensation. You are to view this testimony about damages, as you are to view the testimony on all the other points in the case, fairly and impartially, from all sides, and come to the conclusion indicated by the condition in your minds after you have done that.

"Counsel may now indicate to me anything they may wish to indicate. \* \* \*

"Mr. Pugh: Exceptions to what was taken out of the requests at the conference upon the rulings are saved?

"The Court: Yes.

"The Court: One thing more, gentlemen, on this question of damages. The plaintiff desires that I recall to your mind the evidence about the demand the plaintiff had for literary contributions to magazines and periodicals before the publication of this article, and the evidence regarding what demands he had after it. That, as I recall, was fully argued to you by counsel last week. The mere fact that the demand fell off, if it be a fact, does not necessarily prove that the falling off was by reason of this publication in the Post; but, if you can say that it was due to the publication in the Post, then to such extent as you find that it was due to the publication in the Post, it will be proper for you to take it into account on the question of damages.

"At the conclusion of the charge, defendant's counsel stated to the court:

"It is not necessary, your honor, to go over the matters which we discussed at the conference on our requests?"

"To which the court replied:

"Your exceptions are saved on all those matters."

A careful examination of the declaration as amended, and the answers, and the very comprehensive and careful charge of the presid-

ing judge, make it clear that, while the case upon the declaration was one of libel, it was treated under the defendant's pleadings as one in which the issue of libel was not in practical, or substantial controversy, and as one which, upon the practical issues raised by the answer became something in substance more in the nature of an action on the case for injuries sustained than one of strict libel, and it is apparent that the learned judge did not undertake to direct the course of the trial strictly upon the lines of a common law trial for libel, and when the cause was finally submitted to the jury there was no explanation of the circumstances under which, in the old common-law libel sense, general damages were dependent upon the proof of special damages.

In short, upon the plaintiff's declaration, this was a case of libel; but upon the defendant's answer and the issues actually tried, it became in substance one of reasonable or unreasonable press comment. The plaintiff is not complaining that the cause was tried upon that issue, and the defendant cannot be heard to complain that the rules of damages are less favorable to him under the issue of reasonable or unreasonable comment than under the strict issue of libel or no libel, because he tendered that issue as the one upon which the trial was in substance had, and the one under which the substantial facts in controversy were determined.

This case, in a sense, may be said to be *sui generis*, because the damaging matter consists chiefly of ingenious, suggestive, and sensational drawings and pictures connecting themselves with printed statements and lines, which were well calculated, through the force of subtle innuendoes, to bring both the book, the author, and his other writings into disrepute under circumstances which would naturally cause mental disturbance and anguish.

The alleged harmful and damaging character of the publication complained of in this case consists in the combination—a combination in which it was designed to avoid the consequences of the strict common-law libel, but at the same time impair the weight of Prof. Peck's authorship and to bring the author into contempt and under the weight of ridicule. The complexity of the harmful publication involving as it did the newer arts, that is to say, something different from alleged libel in cold print, presented a situation where it became necessary for the defendant to depart from the strict technical lines governing trials of the ordinary libel suit. There is a wide difference between the character of the issue of good faith and fair and reasonable comment, and that of a strict issue of libel or no libel, and as a consequence of that particular defense, which became the essential and substantial issue, the character of the trial was changed, and it became necessary for the court to conform the conduct of the cause to such a situation and to put the case upon broader lines than those which obtain under strict libel issues and to adapt the trial to such a common sense course as would permit the case in hand to be presented to the jury under such rulings and instructions as would enable them to deal justly and comprehensively with the situation before them, and under the adoption of such a course the publication, the

book, the pictures, the lines, and the testimony of the witnesses were before the jury upon the question of fact raised by the issues and involved in the right of fair comment.

Neither upon the pleadings nor upon the trial was there any attempt to justify, in the common-law sense of the older libel suit trials, where the truth of the words was proven. Indeed, from the very nature of the words, the lines, and the suggestive pictures, it was a thing impossible to prove the truth or untruth of the combination. From the very nature of things, it was impossible to frame an issue to the end that an intelligent and definite ultimate fact of truth or untruth could be ascertained in a jury trial. It resulted therefore that, as the publication was not susceptible of the test of truth or untruth, the defense, after denying malice, was chiefly, if not altogether, based upon the right to review and make fair comment upon publications, a right based upon the freedom of the press and upon public policy, and it was upon that general line that the case was submitted to the jury.

It is perfectly true that upon the issues raised by the defendant the case became one of fair or unfair comment, and how could there be a better form of trial in a case of this nature, upon the issues raised by the defendant, than one which accords to the publisher the absolute and inalienable right of free and fair comment, and whether the publication be called a libel or some other name which may be invented, through which it may be defined with legal certainty—a trial which raises for the jury a definite question of fact to be determined, namely, the plain and simple question whether the inalienable right has been fairly and reasonably exercised.

A case like this, upon the issues, becomes exceptional and therefore involves no departure from the rules of substance in respect to strict libel, yet upon the pleadings it is made one which requires some departure from the course of trial ordinarily obtaining in strict libel cases, because the substantial issue of fair comment raised by the defendant with respect to the alleged offending matter consisting of a combination of words, and various kinds of suggestive pictures and lines, with subtle and suggestive settings, relieves the case from the peculiar and exceptional rule in respect to damages which obtained under the technical issues of libel or no libel in ancient times.

This case raises the broad issue of fair comment as the sole, essential, and substantial one. Under such an issue, if the jury under proper instructions finds the comment or criticism to be fair, the result operates as a justification as did proof of the truth of words under the old libel system; and if found to be unfair, the right of comment has been wrongfully exercised, and the wrongdoer should respond in damages for the injury he has done. This would be the redress afforded in ordinary tort cases, and whether the wrongful matter alleged is strictly libelous, or whether it is unfair comment, it is founded in tort, and from the nature of the alleged wrong and the character of the issue raised by the defendant, it results that the trial in respect to it must conform more to the forms of a trial in an action on the case, than to the order of trial in a strict libel suit.

There is not now, nor was there ever, any right to pollute the natural waters running through communities; but there is now and ever has been the right of reasonable and beneficial use. The issues in the two instances are naturally and necessarily different, and trials in respect to the two situations naturally proceed upon different lines. In the first instance, the question would be whether it involved the wrongful act, and if it did, whether it could be justified. In the other, the question would be whether an existing right was reasonably exercised. There is not now, nor was there ever, any right of libel; but there is now and for a long time has been the absolute and inalienable right of reasonable and beneficial press comment upon public and quasi public questions, and literary productions, and the question of the reasonableness of comment and criticism being a simple one, why, upon an issue like the one here, should the situation not be emancipated from distracting issues, rather than hampered and confused by peculiar limitations and contingencies like those in respect to special damages which may have had a rightful function in the old action for libel, but no rightful or useful adaptation to a publication like the one in question, where the substantial issue in respect to it is simply an issue of reasonableness or unreasonableness.

[2] The answer denies that the publication was malicious or libelous; denies the innuendoes, and expressly puts the real defense on the ground of reasonable comment and criticism; and during the trial when certain evidence of the plaintiff's writings was offered by the defendant, and the question was raised as to whether they were offered for the purpose of showing the truth of the alleged libelous statement, counsel answered:

"I do not offer it for that purpose. I offer it to show that the article is a fair comment on the plaintiff's publication."

The defendant, under the rule which has sometimes been held to obtain in libel suits, in its brief puts great stress upon the idea that the instructions in this case did not make the proof of special damages the basis of the right to recover general damages, and upon the idea that the instructions were not given in accordance with the definite and limited meaning, which, under the old common-law sense, holds with respect to special damages in actions of libel, and says, among other things, "The learned judge was clearly confused and in error in his conception of special damages," and "not one solitary matter in the whole article was left to the jury on the ground of special damages."

Our conclusion is that, upon the issue raised by the defendant, such a rule of special damages is not admissible in a case like this, and notwithstanding the fact that the instructions did deal with some phases of the article as involving questions of libel, and others as involving the question of fair comment, it still remains from the nature of the publication and upon the real issues raised by the pleadings, the evidence, and the arguments, that the case in substance was one of fair or unfair comment, and as the instructions were full and complete with respect to such an issue, and as the rule of damages given was

the one which should obtain in a case like this, we see no reversible error in what was said about libel. Moreover, there was no exception directed against the instructions in respect to the two phases of the article, the exceptions being to the point that the general damages were not made subject to proper proof of special damages, and that the definition in respect to special damages was not such as obtains in libel suits.

In order to aid the jury upon the substantial lines of fair comment, the learned judge, under broad and cautious instructions, made some allusions to the words "ink maniac" and their meaning, or what the jury might accept as their meaning, and as was done by Judge Coxe in *McClure v. Philipp*, 170 Fed. 910, 96 C. C. A. 86, in respect to the words "private graft," gave a cautious explanation of the meaning of the more technical word "paranoiacal," which had reference to the phrase in the article complained of, "He has an almost paranoiacal desire to write of women when he takes a pen in hand."

It will be seen by the instructions which have been set forth at large that the trial judge fully recognized and emphasized the right of the defendant without ill will to make a free, fair, truthful, and reasonable criticism of the book under review, even subjecting it to condemnation and ridicule, but explained that that right was not so broad a right as to justify unfair comment or criticism under ill will, or a wrongful attack upon the author personally or professionally, and if the publication or the way the criticism was set forth with illustrations was wrongful and harmful, then the law would afford redress, and the defendant would be answerable in damages. The two phases of the case, that is to say, the supposed harm to the book, and the supposed harm to the plaintiff personally and his business, were stated to the jury carefully and comprehensively. There were no exceptions to the charge save a general exception as to what was taken out of the requests at the conference upon the rulings, and this exception we must view as one altogether too indefinite to entitle it to examination. Still it may well enough be observed, with such examination as we are able to make from what appears in the record, that we discover nothing which works injustice to the defendant, and this is so because we accept the instructions as comprehensively and sufficiently stating the rules governing the right of fair comment, as well as the question of damages in a case like this.

Having given the jury instructions sufficiently favorable to the defendant upon the question of the right of fair criticism, the judge made the right of recovery or no recovery depend upon whether the jury should find that the criticism was fair or unfair, and after cautioning them that they were not to consider the question of damages except upon the particular grounds he had indicated, the judge proceeded to exclude from consideration all questions as to punitive damages, and stated that they must only consider compensatory damages and such as directly flow from the



wrongful act and such as have direct reference to the actual injuries sustained.

There was some reference during the course of the trial to a publication elsewhere at about the same time; but the jury were carefully instructed that they were to consider only such injuries as resulted to the plaintiff through the direct influence of the Boston Post publication in question.

The nature and scope of the instructions upon the question of damages, which cover in substance many of the defendant's requests, and the lack of specific exceptions to the instructions given upon that subject, leave nothing open for consideration in respect to that phase of the case except so far as questions may have been raised through requests previous to the charge.

There were several exceptions having reference to a definition of special damages, which were taken in chambers at some period before the submission of the case to the jury, which it was then expected the presiding judge would give to the jury; but we think the necessity of an examination into the character of such definition was wholly superseded by the course of the trial and the way in which the case was finally submitted. According to the record, in connection with a hearing on demurrer when the subject was under discussion as to whether there could be general damages without proof of special damages, the learned judge made an observation which involved his idea of what special damages were, and during a consultation in respect to requests in the course of the jury trial, but not in the presence of the jury, the court remarked that it adhered to the ruling made when the demurrer was under discussion. But as the case was finally submitted, general damages were not made dependent upon the proof of special damages, and as we think the nature and scope of the instructions on that subject were correct, the incident of the exception in respect to special damages at a former stage of the trial became wholly fictitious and immaterial, or, as said in *McClure v. Philipp*, 170 Fed. 910-914, 96 C. C. A. 86, "innocuous"; and this is so because an expression of a presiding judge during the course of a trial and during a consultation between the judge and the attorneys aside from the jury, which was not stated to the jury, could have had no influence upon the result. It was simply an incident of the trial not in the presence of the jury, and as the final instructions with respect to damages were in accordance with the rules which under the issues should govern in a case like this, there is no occasion to consider whether the definition of special damages which has sometimes been held to obtain in strictly libel cases was right or wrong.

It is true that, at the conclusion of the charge, defendant's counsel stated to the court, "It is not necessary to go over the matters which we discussed at the conference on our request," and that the court replied, "Your exceptions are saved on all those matters." That was precisely what should have been done in order

that the defendant should have whatever he was entitled to under the circumstances; but the learned judge intended, of course, that they were to have only their rightful status, and stand for what they were worth in view of the instructions finally formulated and submitted to the jury, and it was quite within the province and duty of the court to allow the exceptions to stand, to the end that the appellate court might determine their effect if any upon the ultimate ground upon which damages were finally ascertained.

It is quite true that in strict common-law actions of libel many authorities make general damages contingent upon a particular kind of special damages, yet there are many authorities, like *Ma-honey v. Charles A. Belford*, 132 Mass. 393, *Chesley v. Thompson*, 137 Mass. 136, *Lombard v. Lennox*, 155 Mass. 70, 28 N. E. 1125, 31 Am. St. Rep. 528, *Bishop v. Journal Newspaper Co.*, 168 Mass. 327, 47 N. E. 119, *Spencer v. McMasters*, 16 Ill. 405, *Swift v. Dickerman*, 31 Conn. 285, and *Fry v. Bennett*, 4 Duer, 247, which apparently do not recognize the contingency, but, not deciding and, wholly regardless of the question as to how far that principle would be applied under an issue of libel or no libel in respect to strictly libelous matter contained in printed words, leaving its status as it is in that class of cases and quite independent of it, we view the character of the publication, and the substance of the issues in this case, such as to make the supposed rule in respect to special damages under strict libel issues entirely inapplicable, and such as to render the general rules governing damages in tort cases admissible, to the end that results may be reached, and that justice may be done upon simple and practical lines. Holding this view, we think the question of damages was properly submitted to the jury, because so far as we can see the instructions were in accord with the general rules of damages in tort cases and sufficiently favorable to the defendant.

It is only in a very limited sense that the publication was strictly libelous, and that was involved in the question whether certain words within quotation marks were written by Mr. Peck; and this issue upon the trial was one of secondary importance. The important inquiry, therefore, did not in any substantial sense relate to the question as to what language means, or as to what damage would flow from words, and furthermore the question of language so far as it was involved was so interwoven, intermixed, and merged with the art phases, consisting of lines, pictures, and figures, as to render the harm done by the one phase and the other inseparable; and, as a result of such a situation, general damages should not be made contingent upon the proof of special damages, because the substantial question, into which the question of less importance was merged, and the issues upon the pleadings and evidence, taken altogether, presented a case of fair or unfair comment in every substantial sense rather than one of strict libel.

We see no reason, as expressed by Chitty (*Chitty's Blackstone*, vol. 3, \*126, note 12) many years ago, why general damages should be contingent upon proof of special damages, and it is the purpose

of this opinion to point out that, in a case like this, the artificial and groundless rule has no rightful status. The case in substance does not, as we have said, present the question of the meaning of language, nor does it present the question as to the truth or untruth of the pictorial features of the publication; and, while there may be quasi libelous phases, they are, through innuendo, so interwoven, intermixed, and merged with the free and modern art phases, consisting of lines and pictures and figures, as to make the question of truth or untruth indeterminable either by jury or court; and, as a consequence, in order to have a plain, simple, and adequate remedy, the question necessarily must be whether the right of free comment has been reasonably exercised under all the circumstances, and, if not, the redress should be such damages as flow from the wrongful act, and such as are recoverable under the usual rules in the ordinary actions of tort.

The only reason given by Blackstone for requiring proof of special damages as a foundation for general damages is that it should be made to appear that the picture "was understood to be leveled at the plaintiff or that it was attended with any actionable consequences." Blackstone, *supra*,

And as the rule is now firmly established and thoroughly settled that damages in all tort cases, whether special or general, to be recoverable must be connected with, and have resulted directly from, the harm complained of, there is no longer any reason for the existence of the peculiar rule. As the reason for the old rule of contingency has ceased to exist, it has become one of mere fiction, and, if allowed to interpose itself in a case like this against such damages as are shown to flow from the wrongful act, it would embarrass and hinder rather than promote and further justice. If a man suffers mental anguish by reason of a wrongful attack upon his character, why, on principle, should his recovery for such injury depend upon whether he has lost the sale of a book which had been subscribed for?

During the trial the defendant offered 12 magazine articles of which the plaintiff was the author, and which were published before the Boston Post criticism. Objection was taken, and upon inquiry as to whether they were offered to show the truth of the alleged libelous publication counsel for the defendant said they were not, but that they were offered under the authority of a Massachusetts case and a Massachusetts statute for the purpose of showing acts of the plaintiff which created a reasonable supposition that the matters charged in the alleged libel were true, and also for the purpose of rebutting actual malice. They were excluded as not admissible under the pleadings, and we think properly upon that ground, as well as upon the ground that they were not within the knowledge of the Boston Post at the time the alleged libelous production was given to the public, and therefore could have had no possible effect either in respect to the defendant's actual malice or in respect to his reasonable supposition as to the truth of the alleged libelous matter.

[3] The plaintiff called a witness, who for many years had been connected with editorial work in connection with literary magazines, and who was acquainted with the purchase of manuscripts by magazines, including plaintiff's literature, and who was asked if the effect of the publication would be damaging, and, if the effect was damaging, how long it would last. This was objected to not upon the ground that the witness was not qualified, but upon the ground that the subject-matter was not of a character to become the subject of expert testimony. The plaintiff cites a long line of authorities, some of which tend strongly to sustain the evidence upon the ground that the test of the admissibility of expert testimony is not whether the subject-matter is common or uncommon, or whether many persons or few persons have some knowledge, but whether the witness offered as an expert has any peculiar knowledge or experience not common to the world. But without regard to the strict question whether the evidence was admissible or inadmissible, and assuming for the purpose of disposing of the exception that it was inadmissible, we should feel bound to hold that it was not so far prejudicial as to justify an interference with the result of the trial. It would be perfectly plain to the ordinary man, whether lawyer or layman, that such a publication in connection with its pictorial phases would be seriously damaging to the plaintiff and his literary work.

In *Williamson v. United States*, 207 U. S. 425, 451, 28 Sup. Ct. 163, 172 (52 L. Ed. 278), while the court was not dealing with the question of the admissibility of expert evidence, but with the broader question of the present latitude of the rules of evidence and the disinclination to disturb the results of trials, because something inadmissible, though not seriously prejudicial or harmful, gets before the jury, it pointed out that:

"As has been frequently said, great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required, and therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances the more correct their judgment is likely to be. The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth. The modern tendency, both of legislation and of the decision of courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are especially unwilling to reverse cases because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused."

[4] We have to consider another exception which has reference to the proof that the plaintiff had a wife and sister. We see no objection to the proof of such a fact, as the case was tried and submitted upon the idea that the plaintiff was entitled to recover for mental anguish. Such a fact was a legitimate one to place before the jury under proper cautions, because it was proper for the jury to consider whether a man's mental anguish would be en-

hanced by such environment. It was not for the purpose of including the anguish of the wife and sister, but for the purpose of showing that the anguish of the plaintiff was the more severe, and, under the limitations put upon it, it could have had no other effect. *Barnes v. Campbell*, 60 N. H. 27.

Other exceptions related to the limitation of cross-examination of witnesses.

[5] Limitations upon cross-examination, upon the ground that the matter in hand is not germane to the examination in chief, upon the ground that cross-examination is too extended even if it relates to matter brought out upon examination in chief, or upon the ground that the cross-examination is remote in respect to subject-matter, or in respect to time, are ordinarily treated as within the discretion of the presiding judge, and not reviewable upon writ of error except in cases of extreme and extraordinary exercise of discretion, and we fail to discover any wrongful exercise of discretion in respect to the matters complained of.

[6] We do not agree with the position of the defendant that it was not open to the plaintiff in his affirmative case to show his standing in, and capacity to earn through, his profession, because, under the theory which governed the trial, a theory which is thought to be the right one, the plaintiff's reasonable damages would in a large measure directly and peculiarly depend upon these elements. 2 *Greenleaf on Evidence*, § 275; *Press Pub. Co. v. McDonald*, 63 Fed. 238, 11 C. C. A. 155, 26 L. R. A. 53; *N. Y. Evening Journal Pub. Co. v. Simon*, 147 Fed. 224, 77 C. C. A. 366; s. c., 203 U. S. 589, 27 Sup. Ct. 776, 51 L. Ed. 330; *McClure v. Philipp*, 170 Fed. 910, 96 C. C. A. 86; *Chesley v. Thompson*, 137 Mass. 136.

There are other minor exceptions as to admission and rejection of evidence, and as to requests for instructions; but they were made so far immaterial through the lines upon which the case was finally given to the jury as to render discussion here quite unnecessary.

The judgment of the Circuit Court is affirmed, and the defendant in error recovers his costs in this court.

### M'KINNEY v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. July 22, 1912.)

No. 3,515.

#### 1. INDICTMENT AND INFORMATION (§ 140\*)—MOTION TO QUASH—SUFFICIENCY AND COMPETENCY OF EVIDENCE BEFORE GRAND JURY.

Unless in extreme instances to prevent clear injustice, or an abuse of judicial process, a defendant against whom an indictment has been returned cannot require the court to review the evidence before the grand jury to determine its sufficiency or whether incompetent evidence was received.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 474, 475; Dec. Dig. § 140.\*]

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. **POST OFFICE (§ 49\*)—PROSECUTION FOR USING MAILS TO DEFRAUD—SUFFICIENCY OF EVIDENCE.**

Evidence held sufficient to sustain a judgment of conviction for using the mails to defraud.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84-86; Dec. Dig. § 49.\*]

Nonmailable matter, see notes to *Timmons v. United States*, 30 C. C. A. 79; *McCarthy v. United States*, 110 C. C. A. 548.]

3. **GRAND JURY (§ 2½\*)—COMPETENCY OF JURORS—DISTRICT FROM WHICH DRAWN.**

It is no objection to the legality of the constitution of a federal grand jury that it was drawn from a district including, but larger in area than, the district as it was constituted at the time the offense was committed.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. § 2; Dec. Dig. § 2½.\*]

4. **GRAND JURY (§ 42\*)—"PRESENTMENT."**

A "presentment" is an accusation made by grand jurors upon personal knowledge or observation of the facts instead of upon the testimony of witnesses.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. § 88; Dec. Dig. § 42.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5531, 5532.]

Sanborn, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Oklahoma.

Criminal prosecution by the United States against Richard P. McKinney. Judgment of conviction, and defendant brings error. Affirmed.

J. E. Whitehead, for plaintiff in error.

William J. Gregg, U. S. Atty., and Frank Lee, Asst. U. S. Atty.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. McKinney, who was convicted of using the mails in aid of a scheme to defraud (section 5480, Rev. St. [U. S. Comp. St. 1901, p. 3696]), seeks a reversal because his motion to quash the indictment was overruled and also because, as he says, the evidence at the trial was insufficient.

[1] His motion to quash, which we will assume was a proper form of remedy, stated that the grand jury found the indictment solely upon hearsay and incompetent evidence. To support the motion he offered to prove:

"That the said indictment was found by the said grand jury upon the evidence of F. M. Trout, post office inspector, and upon an examination of the letters, and other documents afterwards introduced at the trial of the case, and copied in this bill of exceptions and marked as exhibits herein, which letters and documents were before the grand jury as evidence, and that no other witnesses or evidence was introduced at the hearing of said case before the said grand jury, that the said F. M. Trout, post office inspector, did not testify positively to any facts except that he had investigated the case, talked to the witnesses and to the injured party, Mittie Polk, and that the said F. M. Trout only related to the grand jury his

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

conversation to the said witnesses, none of which conversation was in the presence of the defendant or with the defendant."

The offer of proof was denied by the court. It is manifest that the proof tendered was not as broad as the ground of the motion. The authorship of the letters claimed to have been written by the accused and the genuineness and significance of the other documents were not denied. Even the complaint of the testimony of the post office inspector before the grand jury was partly, if not entirely, that it was not positive. So at the most the contention is substantially that part of the evidence received by the grand jury was incompetent, and all of it in its entirety was legally insufficient for an indictment.

Some courts have held rather broadly that it is proper for a trial court to go behind an indictment and inquire into the character of the evidence upon which the grand jury acted. *United States v. Farrington* (D. C.) 5 Fed. 343; *United States v. Kilpatrick* (D. C.) 16 Fed. 765; *Royce v. Oklahoma*, 5 Okl. 61, 47 Pac. 1083. Other courts have taken the contrary view. *United States v. Reed*, 2 Blatchf. 435, Fed. Cas. No. 16,134; *United States v. Brown*, 1 Sawy. 531, Fed. Cas. No. 14,671; *United States v. Terry* (D. C.) 14 Sawy. 49, 39 Fed. 355; *United States v. Jones* (D. C.) 69 Fed. 973; *United States v. Cobban* (C. C.) 127 Fed. 713. We think the latter is the better rule, though doubtless in extreme instances a court may do what is needful to prevent clear injustice or an abuse of judicial process. This qualification, however, is far from a recognition of the right of a defendant to compel a review of the evidence upon which he was indicted. In *United States v. Farrington*, *supra*, relied on by the accused, it was said:

"It is not intended to suggest that whenever incompetent testimony is received by a grand jury its reception is such error or irregularity as to vitiate their finding nor to hold that the evidence upon which an indictment is found shall be such as the court would regard as making out a *prima facie* case against the accused. It is not the province of the court to sit in review of the investigations of a grand jury as upon the review of a trial when error is alleged; but in extreme cases, when the court can see that the finding of a grand jury is based upon such utterly insufficient evidence, or such palpably incompetent evidence, as to indicate that the indictment resulted from prejudice, or was found in willful disregard of the rights of the accused, the court should interfere and quash the indictment."

In *United States v. Reed*, *supra*, Mr. Justice Nelson said:

"No case has been cited, nor have we been able to find any, furnishing an authority for looking into and revising the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof, or whether there was a deficiency in respect to any part of the complaint; and the grounds and reasons which we have briefly alluded to account sufficiently for the absence of any such precedent."

In some states the local practice is affected by statutes and forms no guide to that which obtains in the courts of the United States where the common-law rule prevails.

The constitutional requirement of a presentment or indictment by a grand jury (fifth amendment) does not imply that the proceedings of such a body when lawfully constituted shall be subjected to a re-

view by the trial court at the instance of the accused. Matters affecting the state or integrity of a grand jury as an inquiring and accusing instrumentality, such as the number and qualifications of its members, are proper subjects of investigation; but to go further and hold that its internal proceedings must whenever challenged undergo a judicial scrutiny and test according to the rules of trial evidence is but to place another needless, impeding obstacle in the course of criminal procedure. *Holt v. United States*, 218 U. S. 245, 31 Sup. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 1138. Grand jurors are generally summoned from the nonprofessional walks of life; their investigations and deliberations are not under the direct and immediate guidance of a judicial officer, and they are rarely informed, much less skilled, in the niceties of legal rules. It would be illogical to test their proceedings by unfamiliar standards. Perhaps in actual practice they seek and receive any evidence which tends to show to their injudicial minds the probability of the commission of a crime and the identity of the perpetrator; but confidence must be reposed somewhere, and public policy requires the presumption that they proceed upon sufficient cause in the formulation of a charge. Their selection is governed by law, they act under the sanction of an oath, and their functions are merely preliminary.

[4] If a trial court must review the investigation of the grand jury to determine whether it received incompetent evidence, it would seem naturally to follow that all the evidence received by such a body must be brought before the court and weighed to determine its legal sufficiency. Under the Constitution a criminal prosecution may be upon either a presentment or an indictment. A "presentment" is an accusation made by the grand jurors upon personal knowledge or observation of the facts instead of upon the testimony of witnesses. *Reg. v. Russell*, 41 E. C. L. 139; *State v. Skinner*, 34 Kan. 256, 8 Pac. 420. The summoning of the grand jurors before the trial court and an examination of them as to the source, character, and extent of their knowledge, would certainly be a novel proceeding, but a necessary one if the principle of the contention now made were sustained.

It is suggested that an indictment upon incompetent evidence violates the clause of the fifth amendment, which provides that no one "shall be deprived of life, liberty or property without due process of law." The suggestion involves a misconception of the scope and meaning of the due process clause. In *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. 111, 292, 28 L. Ed. 232, in speaking of the fifth amendment the court said:

"The natural and obvious inference is, that in the sense of the Constitution 'due process of law' was not meant or intended to include, *ex vi termini*, the institution and procedure of a grand jury in any case."

And it applied the same construction to the like clause of the fourteenth amendment limiting the powers of the states. Due process of law within the meaning of the Constitution does not even embrace such an important safeguard as exemption from compulsory self-incrimination. (*Twining v. New Jersey*, 211 U. S. 78, 29 Sup. Ct. 14, 53



L. Ed. 97), much less mere rules of procedure like those pertaining to evidence before grand juries.

There is an unfortunate tendency in criminal jurisprudence to raise minor matters to the dignity of substantial rights. The plain safeguards against governmental and private oppression have become by judicial action so embedded in nonessential additions and technical refinements that their true limitations are not always clear, and it not infrequently happens that criminal trials become mere adroit contests in which substance yields to form and the search for truth is diverted to and ends in collateral inquiries. Many an intelligent person accused of crime has been discharged for reasons so abstruse as to be beyond his comprehension, and the triumph has been not of innocence but of ingenious subtlety. Of course fundamental safeguards should not be frittered away, but the growth of judicial construction should also be with due regard to the just rights of society and the practical conduct of trials.

[2] The evidence at the trial was sufficient to convict. It showed the accused contrived a scheme to defraud a woman whom he had promised to marry by working upon her love and anxiety for his welfare, and, by false representations of his critical illness in letters written by him and sent through the mails, to obtain from her remittances of money; that, having contrived the scheme, he used the mails in effecting it. His letters contained representations of great physical agony and distress, of the necessity of a surgical operation to save his life, of the performance of the operation, and of his continued illness, interspersed with repeated importunities for money and "more money." There was undisputed testimony that for a considerable period while his efforts were being made he was well and was walking about the streets.

[3] There is no merit in the objection made in the motion to quash that the grand jury was illegally constituted because it was drawn from a larger district than that in which the crime was committed. The crime was committed in the Southern judicial district of the Indian Territory before the statehood of Oklahoma. The grand jury was drawn after statehood from the body of the Eastern district of Oklahoma, which, though including the prior territorial district, was of much greater area.

The judgment is affirmed.

SANBORN, Circuit Judge (dissenting). In my opinion the judgment below ought to be reversed because it was fatal error for the trial court to refuse to receive the evidence offered by McKinney that there was no legal evidence, that there was nothing but hearsay before the grand jury in support of the charge in the indictment they found, and because, as it seems to me, there was no substantial evidence before the petit jury of his guilt, no evidence inconsistent with his innocence.

I am unable to bring my mind to assent to the view of the majority that the defendant did not offer to prove that there was no legal evidence before the grand jury in support of the charge in the indict-

ment. That charge was that McKinney, who was engaged to be married to Mrs. Mittie Polk, devised a fraudulent scheme to be effected by opening correspondence through the post office, that pursuant to that scheme he mailed a letter to her on June 24, 1906, wherein he wrote that he was very sick, that he was very near dying the night before, that he was fixing for an operation, that the doctors would begin their work late that night, that he paid them all the money he had, and that he needed \$45, "when in truth and in fact," reads the indictment, "he was not at said time in distress as stated in said letter and was not absolutely compelled to have said money to alleviate distress and to procure necessities as stated by him, and did not intend to return to the said Mittie Polk the said sum of \$45 requested by him in the said letter, and the same was sent with the intention of him, the said Richard P. McKinney, to defraud the said Mittie Polk of the said sum of \$45." McKinney moved to quash the indictment on the ground that it was "found without any legal proof having been offered before the said grand jury tending to establish the commission of said crime," and in support of his motion he offered to prove:

"That the said indictment was found by the said grand jury upon the evidence of F. M. Trout, post office inspector, and upon an examination of the letters, and other documents afterwards introduced at the trial of the case, and copied in this bill of exceptions and marked as exhibits herein, which letters and documents were before the grand jury as evidence, and that no other witnesses or evidence was introduced at the hearing of said case before the said grand jury, that the said F. M. Trout, post office inspector, did not testify positively to any facts except that he had investigated the case, talked to the witnesses and to the injured party, Mittie Polk, and that the said F. M. Trout only related to the grand jury his conversation to the said witnesses, none of which conversation was in the presence of the defendant or with the defendant."

The letters and other documents in the bill of exceptions mentioned by this offer were letters to Mrs. Polk and receipts for letters from her purporting to have been signed by McKinney and envelopes addressed to Mrs. Polk. But these letters, envelopes, and receipts were not evidence that any of them was ever signed or sent by McKinney, and without proof of that fact they were no evidence of anything against him. Moreover, the offer was to prove that no competent evidence of that fact, or of any other fact, was ever presented to the grand jury. The offer was to prove: (1) That no witness but Trout was introduced at the hearing of said case before the grand jury, and (2) that Trout testified positively to no facts, except that he had investigated the case and talked to the witnesses, and that he "only related his conversation to the said witnesses, none of which conversation was in the presence of the defendant, or with the defendant." The charge against the defendant was the use of the mails to defraud Mrs. Polk of \$45. The testimony of the post office inspector, Trout, that he investigated the charge, was not competent evidence that the charge was well founded, and his testimony of his conversations with Mrs. Polk and other witnesses was mere hearsay. This offer of the defendant must be read in the light of the purpose for which it was made, and it must be given a just and fair construction. So read and

so construed it seems to me to be an offer of plenary proof that no competent or legal evidence whatever, nothing but the hearsay testimony of Trout and the unidentified and unproved letters, receipts, and envelopes, were presented to the grand jury in support of the charge in the indictment. Ought this offer to prove that there was no competent or legal evidence submitted to the grand jury to have been received?

This question appears to me to present a grave and pregnant issue, to involve the purity and integrity of procedure before a grand jury, and the very existence of the constitutional guaranties of lawful notice to the accused before his trial of the nature and cause of the accusation against him and of due process of law. It is a serious thing for any man to be indicted for an infamous crime. Whether innocent or guilty he cannot escape the ignominy of the accusation, the dangers of perjury and error at his trial, the torture of suspense and the pains of imprisonment, or the burden of bail. The secrecy of any judicial procedure is a tempting invitation to the malicious, the ambitious, and the reckless to try to use it to benefit themselves and their friends and to punish their enemies. If malicious, ambitious, or over-zealous men, either in or out of office, may with impunity persuade grand juries without any legal evidence, either by hearsay testimony, undue influence, or worse means, to indict whom they will, and there is no way in which the courts may annul such illegal accusations, the grand jury, instead of that protection of "the citizen against unfounded accusation, whether it comes from government or be prompted by partisan passion, or private enmity" (In re Grand Jury, 2 Sawy. 669, Fed. Cas. No. 18,255), which it was primarily designed to provide, may become an engine of oppression and a mockery of justice. These circumstances have prompted a more extended investigation of this subject than would otherwise have been induced.

The fifth article of amendments to the Constitution of the United States declares that:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war, or public danger, \* \* \* nor be deprived of life, liberty or property without due process of law."

And the sixth article provides that:

"In all criminal prosecutions the accused shall enjoy the right \* \* \* to be informed of the nature and cause of the accusation."

In the case at bar the indictment was the only information of the nature and cause of the accusation vouchsafed to the defendant. He has been sentenced to imprisonment in the penitentiary at hard labor for a year and a day and to pay a fine of \$100. If, therefore, his indictment was found without legal evidence, and hence in violation of law, and the judgment against him is affirmed and executed, he will be deprived of his liberty and property without due process of law.

There is nothing inconsistent with this conclusion in the decision in *Hurtado v. California*, 110 U. S. 516, 534, 4 Sup. Ct. 111, 120 (28

L. Ed. 232) nor in the statement from the opinion in that case quoted by the majority that:

"The natural and obvious inferences is that, in the sense of the Constitution, 'due process of law' was not meant or intended to include *ex vi termini*, the institution and procedure of a grand jury in any case."

The court neither held nor intimated in that case that the trial, conviction, and punishment of a defendant for an infamous crime against the United States without any information of the nature and cause of the accusation against him, except an unlawful indictment found without any legal evidence to sustain it, was not a deprivation of his liberty without due process of law. The truth is that the best protection against trial without a lawful accusation yet devised for one apprehended for a crime is a public examination before a magistrate in the presence of the accused who is entitled to the aid of counsel and the right to the cross-examination of the witnesses against him, before any accusation to be tried is made against him, and after such an examination, an accusation in the form of an information founded upon the evidence at the examination. The Constitution and laws of California had substituted this safeguard for an indictment in the prosecution of offenses against that state, and the decision in *Hurtado's Case* was merely that a trial, conviction, and punishment on an information based on the evidence taken in such an examination without an indictment did not deprive him of his liberty without due process of law. But the defendant had no opportunity to cross-examine the witnesses against him at a public examination before a magistrate, nor was any information of the charge against him, except that contained in the unlawful indictment vouchsafed to him before his trial. And in the face of the requirement of the sixth amendment that he should enjoy the right to be informed of the nature and cause of the accusation against him and of the prohibition by the fifth amendment of holding him to answer for the crime against the United States, with which he was charged, without a presentment or indictment, it seems to me that it cannot be that his conviction and punishment without any indictment, or what seems still worse, upon an unlawful indictment, an indictment found without any legal evidence before the grand jury to sustain it, does not deprive him of his liberty without due process of law.

There are some legal propositions so firmly established that they are no longer debatable. One is that while a grand jury in exceptional cases may find an indictment from their own observation it must in such cases be based on that which the jurors personally see or know, or that which some of them see or know and testify to their associates to the exclusion of all rumors, reports, suspicions, and hearsay. *Mr. Justice Field, 2 Sawy. 667, 672, Fed. Cas. No. 18,255; Hale v. Henkel, 201 U. S. 43, 63, 26 Sup. Ct. 370, 50 L. Ed. 652.* Another is that a grand jury may lawfully receive and hear only legal evidence to the exclusion of mere reports, suspicions, and hearsay. Hearsay evidence is no more admissible before a grand jury than before a court. *Mr. Justice Field, 2 Sawy. 667, 672, Fed. Cas. No. 18,255; Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652;*

Judge Morrow, *In re Grand Jury* (D. C.) 62 Fed. 840, 846; *United States v. Kilpatrick* (D. C.) 16 Fed. 765, 771; *Sparrenberger v. State*, 53 Ala. 481, 485, 25 Am. Rep. 643.

There is, it is true, a conflict of authority over the question whether or not, when substantial legal evidence and some illegal evidence have been presented to a grand jury in support of an indictment, a court should examine the evidence before the grand jury and quash the indictment on account of the insufficiency of the competent evidence, or the admission of the incompetent evidence. *United States v. Farrington* (D. C.) 5 Fed. 343, 347; *People v. Sellick*, 4 N. Y. Cr. R. 329; *United States v. Brown*, 1 Sawy. 531, Fed. Cas. No. 14,671. But for the reasons which have been already stated, that question is not in my opinion in this case. The question here is whether or not, upon a motion to quash an indictment on the ground that no substantial legal evidence was presented to the grand jury in support of it, it is the legal duty of the trial court to receive evidence to sustain the charge, and, if this evidence supports it, to quash the indictment. The former question presents an issue of fact, the sufficiency of the legal evidence presented to sustain the finding, the latter, a question of law, for in every judicial and quasijudicial tribunal the question whether or not at the close of a hearing or trial there is any substantial evidence to sustain a charge or a finding of fact is a question of law. *Howe v. Parker*, 190 Fed. 738, 746, 111 C. C. A. 466, and the cases there cited. And upon this latter issue an examination of the authorities and a thoughtful consideration of the reasons controlling it have convinced that there is and ought to be no substantial conflict in the decisions and that the settled and just rule of law upon this subject is: Whenever, on a motion to quash an indictment on the ground that there was no legal evidence before the grand jury to sustain it, the moving party offers to prove his charge, it is the legal duty of the court to go behind the indictment, to receive proof of the evidence before the grand jury, and, if that proof sustains the charge, to quash the indictment. *United States v. Coolidge*, 2 Gall. 364, 25 Fed. Cas. 662, 663, No. 14,858; *People v. Restenblatt*, 1 Abb. Prac. (N. Y.) 268, 271, 272; *Royce v. Territory*, 5 Okl. 61, 47 Pac. 1083; *State v. Cain*, 8 N. C. 352; *State v. Fellows*, 3 N. C. 340; *People v. Clark* (O. & T.) 14 N. Y. Supp. 642; *People v. Brickner* (O. & T.) 15 N. Y. Supp. 528, 529; *People v. Briggs*, 60 How. Prac. (N. Y.) 17, 29; *People v. Sellick*, 4 N. Y. Cr. R. 329; *People v. Price* (Sess.) 2 N. Y. Supp. 414; *People v. Vaughan*, 19 Misc. Rep. 298, 299, 42 N. Y. Supp. 959; *People v. Moore*, 65 How. Prac. (N. Y.) 177; *People v. Haines* (Gen. Sess.) 1 N. Y. Supp. 55; *Boone v. People*, 148 Ill. 440, 36 N. E. 99; *Sparrenberger v. State*, 53 Ala. 481, 485, 25 Am. Rep. 643; *State v. Logan*, 1 Nev. 509; *State v. Grady*, 84 Mo. 220, 222; *State v. Cole*, 145 Mo. 672, 47 S. W. 895; *United States v. Farrington* (D. C.) 5 Fed. 343; *United States v. Kilpatrick* (D. C.) 16 Fed. 765, 774; *United States v. Edgerton* (D. C.) 80 Fed. 374; *United States v. Rosenthal* (C. C.) 121 Fed. 862, 873; *Chadwick v. United States*, 141 Fed. 225, 235, 72 C. C. A. 343.

The grand jury is the organ of the court, subject to its jurisdiction and direction, and it is one of the legal duties of the court to see that its acts and findings accord with and are not in violation of the Constitution and the law. The Constitution and the law are superior to the theoretical secrecy of the proceedings of the grand jury, and courts should never permit the latter to induce, protect, or perpetuate violations of the former, or private or public wrongs.

In *United States v. Coolidge*, supra, Mr. Justice Story received evidence that one of the witnesses testified before the grand jury without being sworn, quashed the indictment, although there was some legal evidence before the grand jury, and said:

"The grand jury is the great inquest between the government and the citizen. It is of the highest importance that this institution should be preserved in its purity and that no citizen be tried until he has been regularly accused by the proper tribunal. Every indictment is subject to the control of the court, and this indictment having been found irregularly and upon the mere statement of a witness without oath, which was not evidence, a *cassetur* must be entered."

This and the other federal decisions cited above not only sustain, but go much farther than, the rule that an indictment must be quashed where there is no legal evidence to sustain it, for they quashed indictments where illegal evidence was introduced although there was also legal evidence before the grand jury in support of the indictments.

In *Sparrenberger v. State*, 53 Ala. 481, 486, 25 Am. Rep. 643, where the claim was that the indictment was found without legal documentary evidence or the testimony of witnesses, the Supreme Court of Alabama said:

"On a motion to quash or to strike from the files, addressed to the court with reasonable diligence after the facts have been discovered, supported by evidence leaving no reasonable doubt on the mind of the court that the indictment was not the finding of 12 of the grand jury, or that it was found without the evidence of witnesses before them, or legal documentary evidence, truth and justice, the preservation of the verity and dignity of its own records, the protection of the citizen and constitutional guaranty demand that the court should expunge the spurious paper. It is not an accusation the citizen should be held to answer; it is without warrant of law."

In *People v. Restenblatt*, 1 Abb. Prac. (N. Y.) 268, a case in which a motion to quash the indictments on the ground that the testimony before the grand jury contained no legal evidence to sustain them was granted, objection was made that the court could not go behind the indictment, examine the evidence before the grand jury, and quash the indictments. But the court overruled the objection, established in the year 1855 the contrary rule which has ever since obtained in the courts of New York and gave some of the reasons for that rule in these words:

"The ground, as it seems to me, for an interference by the court in cases of this nature, is that the grand jury is wholly without authority to indict, upon the well-settled principle that no jurisdiction by any criminal magistracy can obtain over the subject-matter of a criminal offense, except upon sworn legal testimony before a duly constituted authority; as no jurisdiction can be had of the body of a criminal offender, except by reason of his

personal presence before the power having cognizance of the crime. If this be good law, with all the force of truth and the strength of justice, how may a grand jury indict any one of a crime, having, for want of proof, no jurisdiction of the subject-matter of the offense; or, if they do, why may not a court go behind the record and relieve the accused of preceding imprisonment, with the care, expense, and degradation of a public trial? The answer is, not that there is any law to prevent, but that it has never been done, which, with this court, would be sufficient if justice to the citizen did not otherwise require; but when it is demanded by what are in my judgment the legal rights of the accused, it is no answer, and shall not stay this court from a prudent and careful performance of its duty. It is, in my judgment, quite enough that a grand jury is licensed to act in secret upon ex parte testimony in respect to all matters and persons, without permitting them to indict individuals contrary to the rules of law, and where no crime has been proved. As for instance a witness testifies before the court and jury; a spectator hears a bystander say that the evidence is corruptly false; upon this, the spectator goes before the grand jury now in session, and swears that the witness testified to something which he believes to be utterly false, as a citizen standing hard by said it was so; and upon this an indictment is ordered for perjury. Is there no relief in such a case, save a public trial? Cannot the court, these facts appearing, quash the indictment for insufficiency of proof? If not, why not? The only answer is that there is no authoritative precedent. If not, it is time for one; for, if controlled by nothing else, grand juries should be bound by the rules of evidence; for upon this, more than anything else, depends the citizen's safety."

Upon the importance of the preservation and enforcement of the rule which excludes hearsay as evidence this court said: . . .

"Strike down this rule, and the most sacred rights of person and property rest only upon the whimsical and pernicious gossip of the reckless, the irresponsible, and the vicious. The rule that hearsay is incompetent evidence is essential to the preservation of personal liberty and the rights of property. It should be guarded with jealous care. Its enforcement is not discretionary with the courts, and its violation is fatal error." Board of Com'rs v. Keene Five Cents Savings Bank, 108 Fed. 505, 510, 47 C. C. A. 464, 470, and cases there cited.

In *Royce v. Territory*, 5 Okl. 61, 47 Pac. 1083, 1086, in the year 1897, 42 years after the rule upon this subject was established in the state of New York, it became the duty of the Supreme Court of Oklahoma to examine the question in issue in this case and to establish the rule for that territory and state. After a careful examination of the authorities and of the reasons which condition this legal issue, it delivered an exhaustive and instructive opinion in which it reversed a judgment of conviction for the error of the court below in refusing to receive and consider proffered testimony that, although there was much incompetent evidence, there was no competent evidence before the grand jury in support of the indictment. That court stated, with what seems to me to be compelling force and logic, the reason for its decision and for the rule, which all the authorities above cited sustain, that on a motion to quash for the absence of all competent evidence before the grand jury it is the duty of the court to receive proof of the evidence before the grand jury and if the evidence sustains the charge to quash the indictment, in these words:

"The importance of the proposition involved may be appreciated when it is considered that the defendant had no other way to have the question

presented to the attention of the court, or considered by it, as, under our statutes, it could not be presented either upon a motion for a new trial or upon a motion in arrest of judgment." (Nor has the defendant in this case any other way to present his question to the federal courts.) "Hence, if it be not substantial error for a trial court to summarily overrule a motion to set aside and quash an indictment, based upon the grounds stated in this motion, and to arbitrarily refuse to comply with the statutes and permit the defendant to produce evidence showing its invalidity, then the constitutional right of one accused of crime may be taken from him, and he may be held to answer to a capital or otherwise infamous crime without a presentment or indictment of a grand jury. The Constitution, in guaranteeing this right to persons accused of crime, did not mean a mere form of indictment, but meant a valid indictment found and presented in accordance with the ancient and just rules and safeguards of law, provided for the organization, action, and conduct of grand juries."

There is no decision in the authorities cited by the majority in conflict with the rule which has been stated and which governs the case at bar. All those authorities concern the question whether or not an indictment which is sustained by some legal evidence may be quashed on account of the insufficiency of that evidence or the presence of incompetent evidence also.

In *United States v. Reed*, 2 Blatchf. 435, 27 Fed. Cas. 727, 738, 739, No. 16,134, there were two classes of counts in the indictment. Only one class was challenged on the ground that some incompetent evidence was received before the grand jury. But there was also much competent evidence before them to sustain that class of counts and the court denied the motion to quash on the ground that it was not its duty to consider and determine the sufficiency of the competent evidence before the grand jury and that the class of counts not challenged would in any event sustain the indictment.

In *United States v. Brown*, 1 Sawy. 531, 24 Fed. Cas. 1273, No. 14,671, a motion to quash was made on the ground that the grand jury compelled the defendants to testify before them and received their testimony which was claimed to be incompetent. There was, however, no claim or offer to prove that there was not ample competent evidence before the grand jury to sustain the indictment, and the court denied the motion.

In *United States v. Terry* (D. C.) 14 Sawy. 49, 39 Fed. 355, 356, a motion was made to quash certain indictments because, after the grand jury had heard 17 witnesses in support of them and the district attorney had drawn the indictments, they were not read to the grand jury before they found them. There was no claim that there was not substantial evidence to sustain them, and the court denied the motion. In the opinion, however, it sustained the rule that the evidence must be considered and the indictments quashed if there was no substantial evidence to sustain them. It said:

"So, again, the general rule that the admissibility and sufficiency of the evidence on which an indictment has been found cannot be inquired into is unquestionable. Yet if, for example, it should appear from the indorsement on the back of the indictment that only one witness was examined and it should be shown that he was a convicted felon, and therefore incompetent to be a witness in any case, I presume that the indictment



would be quashed. It has also been held that in extreme cases, 'when the court can see that the finding of the grand jury is based on such utterly incompetent evidence as to indicate that the indictment resulted from prejudice, or was found in willful disregard of the rights of the accused,' it will interfere and quash the indictment."

In *United States v. Jones* (D. C.) 69 Fed. 973, 978, a motion to quash an indictment on the ground that some incompetent evidence was introduced before the grand jury was denied. But it was not even asserted that there was not sufficient competent evidence to authorize the finding of an indictment, and the court said that:

"If the grand jury required the accused to appear and compelled him to be sworn and to testify touching the charge against him, the indictment might be set aside. *State v. Froiseth*, 16 Minn. 296 (Gil. 260). If a witness who was incompetent or disqualified from giving evidence under the law, as for instance, if the wife of the accused testified before the grand jury, the indictment might be quashed."

In *United States v. Cobban* (C. C.) 127 Fed. 713, 721, 722, a plea in abatement that incompetent evidence was introduced before the grand jury, and that a special assistant district attorney was guilty of unlawful conduct before them, was overruled. But there was no claim made or proof offered that there was not ample competent evidence before the grand jury to sustain the indictment, and the court went behind the indictment, examined the evidence of the testimony and proceedings before the grand jury, and exonerated the special district attorney. And this completes the review of the authorities cited by the majority.

In a study of the books a few sporadic cases have been found, such as *State v. Boyd*, 2 Hill (S. C.) 288, 27 Am. Dec. 376, decided in 1834; *Smith v. State*, 61 Miss. 754; *State v. Dayton*, 23 N. J. Law, 49, 57, 53 Am. Dec. 270, a case which seems to rest on the proposition repudiated by all the federal and all other state authorities, that the grand jury may lawfully hear and indict upon incompetent evidence alone; and *Kingsbury v. State*, 37 Tex. Cr. R. 259, 39 S. W. 365—in which it has been held that the secrecy of proceedings before the grand jury is more sacred than the constitutional guaranties, that it prevents proof that there was no competent evidence before the grand jury in support of an indictment, and that the guaranties must be disregarded. But these cases are so rare and so far out of accord with the current of modern authority, and the opinions in them are so devoid of reasoning to sustain them, that, as it seems to me, they are negligible and cannot be justly held to raise a conflict over the rule established by the numerous decisions which have been cited. The text-book writers, Rice in volume 3 of his work on Criminal Evidence, at page 410, and Underhill in the second edition of his work on Criminal Evidence, at page 49, one of the latest, if not the latest, work on the subject, which was issued in 1910, so treat this question and declare the established rule to be that an indictment without any competent evidence to support it must be quashed.

The only sound reasons for the secrecy of proceedings before a grand jury are that the grand jurors may not be questioned for

their votes or sayings at their sessions, and that indictments and presentments may not be disclosed before the defendants are arrested, and proof that there was no competent evidence before them impinges upon neither of these reasons, and where the reason of a rule ceases the rule ceases, and ought to cease. Hence the modern and the true rule is that the veil of secrecy may be removed from all the proceedings before the grand jury, except the votes and sayings of the grand jurors whenever such a removal is essential to the enforcement of the constitutional guaranties or to the protection, preservation, or enforcement of public or private rights. *United States v. Coolidge*, 2 Gall. 364, 25 Fed. Cas. 662, 663, No. 14,858; *In re Atwell* (D. C.) 140 Fed. 368, 375; *United States v. Farrington* (D. C.) 5 Fed. 343, 346; *Low's Case*, 4 Greenl. (Me.) 439, 16 Am. Dec. 271; *Burdick v. Hunt*, 43 Ind. 381; *Sykes v. Dunbar*, 2 Wheat. Selwyn, N. P. 1091; *State v. Offutt*, 4 Blackf. (Ind.) 355; *People v. Shattuck*, 6 Abb. N. C. 33, 35; *Commonwealth v. Mead*, 12 Gray (Mass.) 167, 170, 71 Am. Dec. 741; *State v. Cain*, 8 N. C. 352; *State v. Fellows*, 3 N. C. 340; *Way v. Butterworth*, 106 Mass. 75; *People v. Clark* (O. & T.) 14 N. Y. Supp. 642; *People v. Sellick*, 4 N. Y. Cr. R. 329; *People v. Brickner* (O. & T.) 15 N. Y. Supp. 528, 529; *State v. Grady*, 84 Mo. 220, 223; *State v. Logan*, 1 Nev. 509; *Boone v. People*, 148 Ill. 440, 36 N. E. 99; *Royce v. Territory*, 5 Okl. 61, 47 Pac. 1083.

Mr. Rice in the third volume of his work on Criminal Procedure, on page 409, says:

"The jealousy with which the early law guarded the secrets of the grand jury room has largely disappeared. The sacramental character of that august body is very imperfectly recognized at the present day. The theory that the proceedings before this body are beyond the scrutiny or condemnation of court or counsel is a foolish pretense that is very generally abandoned. Malice, corruption, and ignorance frequently combine to impress upon the proceedings of this body the tyrannical and oppressive functions of the Star Chamber and the Council of Ten. And to say or even intimate that, where corrupt practices exist, there is no method open for their proper disclosure, is simply to insist that our criminal law is crippled with a hideous deformity."

It is said that the fifth amendment does not imply that the proceedings of a grand jury shall be subjected to a review by the trial court at the instance of the accused, and that to hold that its internal proceedings must undergo a judicial scrutiny and test according to the rules of evidence, is but to place another impending obstacle in the course of criminal procedure. But the fifth amendment prohibits the deprivation of life, liberty, or property without due process of law. An indictment found by a grand jury without any competent evidence to sustain it is found in violation of, and hence without due process of, law. The trial court has the power to direct and supervise the action of the grand jury and to see that no man is placed upon trial until an accusation according to law, as required by the fifth and sixth amendments, is found against him. The judge is required to support the Constitution. There is no way in which these amendments can be supported in a case like this except by hearing the evidence before the grand

jury and quashing the indictment. And therefore it seems to me that these amendments to the Constitution not only imply, but require him, when a motion is made to quash an indictment on the ground that there was no competent evidence before the grand jury to sustain it, to review the proceedings before the grand jury, and if the ground of the motion is sustained by the evidence to quash the indictment. Nor does this rule of law seem to me to interpose any needless or impeding obstacle in the course of criminal procedure. It but supports the guaranties of the fifth and sixth amendments in the only way they can be supported in a case of this character, in the same way that Justice Story and Judge Davis in *United States v. Coolidge*, in 1815, and the other judges whose decisions have been cited, have since maintained them. It is not the rule, but the constitutional guaranties, that impose the only obstacles to the course of criminal procedure there are here, and the argument against this obstacle seems to me equally potent against every provision of the Constitution protective of the rights of citizens.

It is said that a presentment is an accusation made by grand jurors upon their personal knowledge or observation, and it would be a novel but necessary proceeding to summon grand jurors to testify to the extent and character of their knowledge if the principle of the rule under consideration continues to prevail. But it is well settled that grand jurors may not present on rumors, hearsay, reports, or suspicions, or otherwise than upon their personal knowledge or observation, or that of some of them testified to their associates. And if grand jurors should so disregard their oaths and their duty as to find a presentment without any personal knowledge or observation of any of them, on mere rumors or hearsay, it does not seem to me to be doubtful whether the constitutional guaranties or the secrecy of their proceedings should give way. But that question is not here and may not now be authoritatively decided, and its existence seems to me to be no sound reason for a failure to enforce the rule applicable to the case at bar.

Finally, it is said that there was uncontradicted evidence at the trial that McKinney was guilty of the crime with which he was charged in the indictment. A careful reading of the testimony has led my mind to a different conclusion. But suppose McKinney was guilty and was proved to be so before the petit jury. That is no reason why he should be held to answer for his crime without a lawful indictment, or be deprived of his liberty or property without due process of law. Neither guilty persons nor those subsequently proved to be guilty are excepted from the prohibition and guaranty of the fifth amendment. It does not read no person except guilty persons and those subsequently proved to be guilty shall be held to answer unless on a presentment or indictment. It reads, "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment, \* \* \* nor be deprived of life, liberty or property without due

process of law," and it vouchsafes the same protection and the same right to the guilty as to the innocent.

Because in a case like this at bar the only way in which the constitutional guaranties of the fifth and sixth amendments, and the rule of law that the grand jury may not indict without some legal evidence to sustain the charge they make, can be preserved and enforced, is for the court to receive the proof offered in support of the charge that no legal evidence was presented to the grand jury in support of the accusation in the indictment and if the evidence supports the charge to quash it, and the court below refused to receive such evidence, it fell into a fatal error in my opinion, and the judgment below should be reversed.

The charge in the indictment was that McKinney, who was engaged to be married to Mrs. Mittie Polk, devised a fraudulent scheme to be effected by opening correspondence with her through the post office of the United States, to make her believe he was in love with her and intended to marry her, and believing that the relations between them were such as would induce her to send him money if claims were made by him that he was in distress and needed it to relieve his suffering, he, on June 24, 1906, used the mails to send her a letter from Ardmore, Ind. T., on that day, wherein he wrote that he was very sick, that he was very near dying the night before, that he was fixing for an operation, that the doctors would begin their work late that night, that he had paid them all the money he had, and that he needed \$45, "when in truth and in fact he was not at said time in distress as stated in said letter and was not absolutely compelled to have said money to alleviate distress and to procure necessities as stated by him, and did not intend to return to the said Mittie Polk the said sum of \$45 requested by him in the said letter, and the same was sent with the intention of him, the said Richard P. McKinney, to defraud the said Mittie Polk of the said sum of \$45." The averments in quotation are the only allegations in the indictment of the falsity of any representations of McKinney.

There was evidence at the trial that McKinney wrote and sent the letter, that he subsequently wrote and sent other letters consistent with this letter, in which he wrote of the pain and suffering he had endured and was enduring and of his slow recovery. But it seems to me that there was no substantial evidence of the averments in the indictment that on June 24, 1906, he was not in distress, that he was not "absolutely compelled to have the \$45 to alleviate distress and to procure necessities," and that he did not intend to return the \$45. The indictment contained no averment that he was not fixing for an operation, or that the doctors would not begin, or that they did not begin and perform, the operation on the evening of June 24, 1906, and the letter contained no representation or promise that McKinney intended to or would return the \$45. The result was that the only representations made that were alleged by the indictment to be false were that on the evening of June 24, 1906, he was in distress and needed \$45. All the

evidence that is claimed to be in support of these averments was the testimony of witnesses Kessler and Mrs. Raffus. The letter was written from Ardmore in the Indian Territory on June 24, 1906. Kessler testified that he was rooming at the Southern Hotel in South McAlester for about three months prior to August 1, 1906, that he saw McKinney around there in the town of South McAlester about two weeks along in the spring, some time in June or July, that he could not fix the time any nearer than that, that during this time he saw him and talked to him half a dozen times on the street or at the hotel, that "he was, I should judge, apparently well from his looks," but that he could not say of his own knowledge whether or not he had any private ailments or surgical operations; that McKinney did not stay at the Southern Hotel any length of time, and he did not know whether he was rooming there or not.

Mrs. Raffus ran the Southern Hotel at South McAlester during the year 1906. She testified that McKinney never stayed at the Southern Hotel more than one night at a time, that she did not believe she ever spoke more than two words to him, that she knew she did not, that he would just come up and pay his bill and go down the steps, and that was all she had to do, that he was in and out at her place several times, and she did not know whether or not this was in more than one year, that he was there in June and July, 1906, that she was absent from South McAlester from June 19th until in the night of July 4, 1906, that McKinney was not there on June 19th, but that on the morning of July 5th she saw him walking down the hall of the hotel, that she had never seen him before that time, that she saw him but once at that time, that she did not know whether or not he came back that night, that she could not tell how long it was before he returned. To the repeated question of the district attorney whether or not McKinney was sick, her answer was, "No, he wasn't sick at my house," that she knew he was not sick because when she came home on July 4th her husband was there, her son was there, and her housekeeper, and they would have said so, and because she called them up by telephone while she was at Dallas and Ft. Smith, and they said they were all well, that she did not ask or know whether McKinney had been operated upon or had had typhoid fever.

It is an incontrovertible rule of law that it is the duty of the court to instruct the jury to return a verdict for the defendant in a criminal case unless the evidence is incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis than that of his guilt. *Vernon v. United States*, 146 Fed. 121, 125, 76 C. C. A. 547, 551; *United States Fidelity & Guaranty Co. v. Des Moines National Bank*, 145 Fed. 273, 279, 74 C. C. A. 553, 559; *United States v. McKenzie* (D. C.) 35 Fed. 826, 828.

There is nothing in the testimony of these witnesses inconsistent with the truth of the statement of McKinney that he was in distress and in need of money on the evening of June 24, 1906, at

Ardmore. Nay more, there is nothing inconsistent with his statement that he was preparing for an operation, or, for that matter, with the fact that he submitted to an operation and with pain and suffering slowly recovered from it. Take the testimony of Kessler. It is that he saw him in South McAlester for about two weeks in June or July, spoke to him a half dozen times, that he was apparently well, and that he did not know whether he had any private diseases or surgical operations. Kessler might have seen him there apparently well the first two weeks of June or the last two weeks of July, and yet he might have been ill and in need of money at Ardmore on June 24th, and he might have submitted to an operation on that night and slowly recovered. Take the testimony of Mrs. Raffus. She testified that she saw him for the first time in her life on the morning of July 5th going down the hall, that she did not see him again at that time, that she does not know when he returned, that he was never sick at her house so far as she had heard, and that she never spoke two words to him, that he was never at her house more than one night at a time, and she never inquired or knew whether he had been sick or submitted to an operation. There is nothing in all this incompatible with the representations of McKinney that he was sick and in need of money and about to be operated upon at Ardmore on June 24th, when Mrs. Raffus was, as she testifies, at Dallas or at Ft. Smith. Mrs. Raffus was a complete stranger to McKinney on July 5, 1905, and during that summer Kessler was but a chance acquaintance. They were people to whom a young man like McKinney was not likely to tell his secret pains and troubles, and there is nothing in their testimony inconsistent with the truth of his statements to Mrs. Polk. The fact that there was no substantial evidence before the trial jury inconsistent with his innocence is another reason why it seems to me the judgment against him should be reversed.

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MAY et al. v. UNITED STATES.†

(Circuit Court of Appeals, Eighth Circuit. August 19, 1912.)

No. 3,663.

**1. INTERNAL REVENUE (§ 47\*)—OLEOMARGARINE—LICENSE TAX—OFFENSES—INDICTMENT.**

Oleomargarine Act Aug. 2, 1886, c. 840, § 17, 24 Stat. 212 (U. S. Comp. St. 1901, p. 2234), provides that whenever any person engaged in carrying on the business of manufacturing oleomargarine defrauds, or attempts to defraud, the United States of the tax on the oleomargarine produced by him, or any part thereof, he shall forfeit the factory and manufacturing apparatus used by him, and shall be fined and imprisoned. *Held*, that the essential elements of such offense are the engaging in the business of manufacturing oleomargarine, the producing of such substance, and the attempt to defraud the United States, and hence an indictment alleging that defendants on a specified date, being persons engaged in carrying on the business of a manufacturer of colored oleomargarine at a specified place, did knowingly, etc., attempt to defraud the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied November 25, 1912.

United States of a tax imposed on 120 pounds of colored oleomargarine, then and there produced by them, etc., was sufficient without a further allegation that the substance produced had become subject to the tax by having been sold or removed for consumption or sale within section 8.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 144-150; Dec. Dig. § 47.\*]

**2. INTERNAL REVENUE (§ 47\*)—OLEOMARGARINE TAX—ATTEMPT TO DEFRAUD UNITED STATES.**

Since Oleomargarine Act Aug. 2, 1886, c. 840, § 17, 24 Stat. 212 (U. S. Comp. St. 1901, p. 2234), making it an offense to attempt to defraud the United States of the tax imposed on oleomargarine, does not declare it an offense to commit the fraud in any particular way, it is an offense if the government is defrauded by any means or method, and hence an indictment charging that defendants, while manufacturers of colored oleomargarine, did fraudulently, etc., attempt to defraud the United States of the tax on a specified quantity of such substance, was not objectionable for failure to charge the manner in which the attempt to defraud was made.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 144-150; Dec. Dig. § 47.\*]

**3. INDICTMENT AND INFORMATION (§ 109\*)—STATUTORY OFFENSE.**

An indictment for a statutory offense, which distinctly and clearly charges every element of the offense and distinctly advises the defendant of what he is to meet at the trial, is sufficient.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 286-288; Dec. Dig. § 109.\*]

**4. INTERNAL REVENUE (§ 39\*)—OLEOMARGARINE ACT—LICENSE TAX—FAILURE TO PAY—OFFENSES—"MANUFACTURER."**

Oleomargarine Act Aug. 2, 1886, c. 840, § 17, 24 Stat. 212 (U. S. Comp. St. 1901, p. 2234), providing that any person engaged in carrying on the business of manufacturing oleomargarine, who defrauds, or attempts to defraud, the United States of the tax on oleomargarine produced by him, etc., shall be fined and imprisoned, was applicable to one who did not manufacture white oleomargarine and therefore was not a manufacturer within the definition contained in the original act, but who mixed white oleomargarine with artificial coloration so as to make it look like butter and thereby became a "manufacturer" within the definition as extended by Act Cong. May 9, 1902, c. 784, 32 Stat. 194 (U. S. Comp. St. Supp. 1911, p. 969).

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 97-101, 103-106, 142, 143; Dec. Dig. § 39.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4346-4358.]

**5. INTERNAL REVENUE (§ 39\*)—OLEOMARGARINE—DEFFRAUDING UNITED STATES—STATUTES—APPLICATION.**

Oleomargarine Act Aug. 2, 1886, c. 840, § 17, 24 Stat. 212 (U. S. Comp. St. 1901, p. 2234), making it an offense for any person engaged in carrying on the business of manufacturing oleomargarine to defraud, or attempt to defraud, the United States of the tax thereon, etc., is not limited to persons who have received a license to manufacture oleomargarine, but includes all persons who carry on the business of manufacturing oleomargarine, who defraud, or attempt to defraud, the United States of the tax thereon.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 97-101, 103-106, 142, 143; Dec. Dig. § 39.\*]

**6. INTERNAL REVENUE (§ 47\*)—OLEOMARGARINE TAX—DEFFRAUDING UNITED STATES—EVIDENCE.**

In a prosecution for attempting to defraud the United States of the tax on colored oleomargarine, evidence *held* sufficient to sustain a con-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

viction, though there was no proof that any witness saw each defendant in the act of mixing coloring matter with white oleomargarine.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 144-150; Dec. Dig. § 47.\*]

Sanborn, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Missouri.

Fred D. May and others were convicted of carrying on the business of manufacturing oleomargarine without having paid the special tax therefor, and they bring error. Affirmed.

Henry W. Blodgett (Bates, Blodgett, Williams & Davis, on the brief), for plaintiffs in error.

Charles A. Houts, U. S. Atty.

Before SANBORN and HOOK, Circuit Judges, and WILLARD, District Judge.

WILLARD, District Judge. [1] Plaintiffs in error, Fred D. May, Thomas B. May, William M. Johnson, and E. W. Bailey, were convicted under the second count of an indictment which charged a violation of section 4 of the Oleomargarine Act of August 2, 1886, c. 840, 24 Stat. 209 (U. S. Comp. St. 1901, p. 2229). This section punishes one who carries on the business of manufacturing oleomargarine without having paid the special tax therefor. They were also convicted under the third count, which charged a violation of section 17 of the same act. No objection to the sufficiency of the second count is here urged. It is claimed, however, that the third count is insufficient. This point was raised in the court below by a demurrer.

The third count is as follows:

"That Fred D. May, Thomas B. May, William M. Johnson, and E. W. Bailey, whose Christian name is to the grand jurors aforesaid unknown, heretofore, to wit, on or about the 29th day of November, 1910, within the division and district aforesaid, and within the jurisdiction of the court aforesaid, at No. 3536 Morgan street, in the city of St. Louis, state of Missouri, they, the said Fred D. May, Thomas B. May, William M. Johnson, and E. W. Bailey, whose Christian name is to the grand jurors aforesaid unknown, being then and there persons engaged in carrying on the business of a manufacturer of colored oleomargarine at said No. 3536 Morgan street, in the city of St. Louis, state of Missouri, under the name of the Clayton Creamery, did then and there knowingly, willfully, fraudulently, and feloniously attempt to defraud the United States of the tax imposed by law upon colored oleomargarine of ten (10) cents per pound on each pound of colored oleomargarine so manufactured, to wit: Ten (10) cents per pound on one hundred and twenty (120) pounds of colored oleomargarine then and there produced by them, the said Fred D. May, Thomas B. May, William M. Johnson, and E. W. Bailey, whose Christian name is to the grand jurors aforesaid unknown."

Section 17 is as follows:

"That whenever any person engaged in carrying on the business of manufacturing oleomargarine defrauds, or attempts to defraud, the United States of the tax on the oleomargarine produced by him, or any part thereof, he

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



shall forfeit the factory and manufacturing apparatus used by him, and all oleomargarine and all raw material for the production of oleomargarine found in the factory and on the factory premises, and shall be fined not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years."

The essential elements of the offense defined in section 17 are: (1) That the defendant is engaged in carrying on the business of manufacturing oleomargarine. (2) That he has produced oleomargarine. (3) That he has attempted to defraud the United States. All of these are found in the third count. The claim of the defendants, however, is that before the offense can be committed the oleomargarine produced must have become subject to the tax. They call attention to section 8 of the act, which provides that "upon oleomargarine which shall be manufactured and sold, or removed for consumption or use," there shall be assessed a tax, and they say that the indictment should have alleged that the defendants had attempted either to sell it, or to remove it for consumption, or to remove it for use; and they insist that an allegation of this kind was an essential part of the indictment.

Whatever may be said of this claim when the charge is that the defendant has defrauded the United States, it cannot be sustained when the charge is that the defendant has attempted to defraud the United States. Conclusive evidence might be produced to the effect that a defendant had made plans to construct and operate an illegal factory for the manufacture of oleomargarine, to manufacture it, and to sell it without payment of the tax. It might also be further shown conclusively that, in pursuance of this illegal plan, he had erected a factory and had commenced to manufacture and had actually manufactured oleomargarine with the intent of selling it without paying the tax, but that before he had sold or removed, or attempted to sell or remove, any part of it, his operations were interfered with by the authorities. Can it be said in such a case that he has not attempted to defraud the United States. At least, when a defendant's operations have proceeded so far as to show conclusively that he has produced oleomargarine with the intent to defraud the government out of the tax thereon, there is an attempt to defraud such as is mentioned in section 17, although he has neither sold nor removed nor attempted to sell or remove any of the product.

[2] It is further said with reference to this count that it does not advise the defendant of the manner in which he attempted to commit the fraud, so as to enable him to prepare his defense. It is to be noted that section 17 does not declare it an offense to commit the fraud in any particular way. If it did, then it would be necessary to allege the manner in which the act was done. But as the section stands, it is an offense if the government is defrauded by any means or method. As was said in *United States v. Simmons*, 96 U. S. 360, on page 364, 24 L. Ed. 819:

"The intent to defraud the United States is of the very essence of the offense; and its existence, in connection with the business of distilling being distinctly charged, must be established by satisfactory evidence. Such in-

tent may, however, be manifested by so many acts upon the part of the accused, covering such a long period of time, as to render it difficult, if not wholly impracticable, to aver, with any degree of certainty, all the essential facts from which it may be fairly inferred."

To have alleged in this indictment how the defendants attempted to defraud the United States would have required a statement of much of the evidence presented at the trial. The count, as it appears, advises the defendants of the time when the act was committed, namely, on November 29, 1910. It advises them where it was committed, namely, at 3536 Morgan street, in the city of St. Louis, Mo. It advises them of the name under which it is claimed they were doing business, namely the Clayton Creamery. It advises them of the amount of oleomargarine produced, namely, 120 pounds.

As to the sufficiency of this count the case is, we think, covered by the case of *Armour Packing Company v. United States*, 153 Fed. 1, on page 16, 82 C. C. A. 135, on page 150 (14 L. R. A. [N. S.] 400). This court there said:

"It is conceded that, where a crime is a statutory one, the indictment must set forth with clearness and certainty every essential element of which it is composed. It must portray the facts which the pleader claims constitute the alleged transgression so distinctly as to advise the accused of the charge which he has to meet and to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or an acquittal in defense of another prosecution for the same offense, and so clearly that the court may be able to determine whether or not the facts there stated are sufficient to support a conviction. (Citing cases.) The indictment in this case pleads the names of the carriers that transported the property, the date and place of the delivery of the goods to the initial carrier and of the receipt of the concession by the shipper, a description of the specific articles shipped, the filed and published rate, the less rate at which the goods were transported, and the amount of the concession, the place of shipment, and the point of destination of the property, and the route over which it was transported. Here were averments of facts sufficient to clearly advise the defendant of the offense with which it was charged, to give it ample opportunity to prepare its defense, to enable it to avail itself of a conviction or an acquittal in the case of another prosecution for the same crime, and to qualify the court to determine whether the facts stated constituted an offense. The particular device by which the concession and transportation were obtained was not an essential ingredient of the offense charged, because the latter might well exist, whatever the device, and whether or not there was one, and hence the indictment portrayed every material element of the crime without an averment of this device. *U. S. v. Tozer* (D. C.) 37 Fed. 635, 637. The substance of the crime of receiving a rebate or concession under the Elkins act is the solicitation, acceptance, or receipt thereof, whereby property in interstate or foreign commerce is transported at less than the regular rate. The device whereby the receipt and transportation are obtained is not an essential element of the crime, and it is unnecessary to plead it in the indictment."

[3] It is to be observed that the law there under consideration provided that it should be unlawful for any person to receive any rebate or concession, whereby property should, "by any device whatever," be transported at a less rate than that named in the published tariffs, yet the indictment there under consideration did not allege what the device was by which the rebate had been secured. The judgment of this court in that case was affirmed by

the Supreme Court, and the decision of that court is reported in 209 U. S. 56, on page 83, 28 Sup. Ct. 428, on page 436 (52 L. Ed. 681), under the name of *Armour Packing Company v. United States*. It was there said:

"It is alleged that the indictment is insufficient, in that it fails to set out the kind of device by which traffic was obtained, and of what the concession consisted, and how it was granted. Authorities are cited to the proposition that in statutory offenses every element must be distinctly charged and alleged. This court has frequently had occasion to hold that the accused is entitled to know the nature and cause of the accusation against him, and that a charge must be sufficiently definite to enable him to make his defense and avail himself of the record of conviction or acquittal for his protection against further prosecutions and to inform the court of the facts charged, so that it may decide as to their sufficiency in law to support a conviction, if one be had and the elements of the offense must be set forth in the indictment with reasonable particularity of time, place, and circumstances. And it is true it is not always sufficient to charge statutory offenses in the language of the statutes, and where the offense includes generic terms it is not sufficient that the indictment charge the offense in the same generic terms, but it must state the particulars. *United States v. Hess*, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516; *Evans v. United States*, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830. But an indictment which distinctly and clearly charges each and every element of the offense intended to be charged, and distinctly advises the defendant of what he is to meet at the trial, is sufficient.

"And in *Ledbetter v. United States*, 170 U. S. 606, 612, 18 Sup. Ct. 774, 776 (42 L. Ed. 1162), Mr. Justice Brown, speaking for the court, said: 'Notwithstanding the cases above cited from our reports, the general rule still holds good that upon an indictment for a statutory offense the offense may be described in the words of the statute, and it is for the defendant to show that greater particularity is required by reason of the omission from the statute of some element of the offense.'"

Indictments in some respects similar to this one have been under consideration in the cases of *Hardesty v. United States*, 168 Fed. 25, 93 C. C. A. 417; *Enders v. United States*, 187 Fed. 754, 109 C. C. A. 502. The demurrer to the third count was properly overruled.

[4] The evidence at the trial did not show that the defendants manufactured white oleomargarine; they therefore did not come within the definition of a manufacturer contained in the original act. It was proven that they mixed white oleomargarine with artificial coloration, so that it looked like butter. This brought them within the definition of a manufacturer found in the amendment of May 9, 1902, c. 784, 32 Stat. 194 (U. S. Comp. St. Supp. 1911, p. 969). It is claimed by the defendants, inasmuch as when section 17 was enacted the only manufacturer was a person who made white oleomargarine, that that section cannot apply to these defendants who became manufacturers by an act subsequent thereto. There is nothing in this contention. If it were sustained, it would not be necessary for persons who mixed coloring matter with white oleomargarine to pay a license tax of \$600 a year. Nor would any of the other sections of the original law, which refer to manufacturers, apply to those who became such under the act of 1902. In order to make such sections applicable, it was not necessary to re-enact them. There is no difficulty in applying the forfeiture provision in section 17 to such a condition as is found in this case.

These defendants had a factory and a manufacturing apparatus, such as it was. They had the raw materials for the manufacture of the new product, namely, white oleomargarine and the coloring matter.

[5] It is further claimed by the defendants that section 17 applies only to persons who have received a license to manufacture oleomargarine, and that these defendants, never having taken out such license, cannot be convicted. To so construe the section would be to add thereto the word "licensed," so that it would read "whenever a licensed person," or to add other words indicating that it was limited to persons who had received such a license as has been mentioned.

If it clearly appeared that it was the intention of Congress to so limit that section, possibly authorities might be found which would support such an interlineation. But a moment's reflection will show that such never could have been the intention of the Legislature. If such were the law, a person who intended to violate section 17 would purposely fail to take out a license as a manufacturer, for in such a case he could not be imprisoned in the penitentiary; he could only be punished for a violation of section 4, the penalty for which is a fine. In *Vermont v. United States*, 174 Fed. 792, on page 794, 98 C. C. A. 500, on page 502, this court said:

"The temptation to make the additional profit which would result by evading the payment of the tax of 10 cents a pound imposed by law upon colored oleomargarine naturally appeals more strongly to the dishonest and irresponsible than to the legitimate dealer; and the former would likely be the class Congress was most solicitous to regulate. It must be admitted that it is possible and well within the power of any and all persons to resort to the business of coloring oleomargarine to make it look like butter; and, in view of this possibility, the words 'any person' under consideration were doubtless employed by Congress. They are broad and comprehensive and easily embrace any and all persons whether licensed wholesale or retail dealers or otherwise; and by a familiar rule of construction they should be given full force and effect, to the end that the legislative purpose may be subserved."

[6] The evidence was sufficient to convict all of the defendants.

The government's witnesses testified that Thomas B. May, one of the plaintiffs in error, had obtained about a month prior to and possessed on November 29, 1910, a special tax stamp as a retail dealer in colored oleomargarine for the premises 3536 Morgan street in the city of St. Louis; that the business at these premises was conducted under the name of the Clayton Creamery. They further testify that they watched these premises for a period of a week before breaking in on the 29th day of November, 1910; that, at the time they broke in, they had to break down several doors, and when they finally reached the second story of the premises, they there found three of the plaintiffs in error, to wit, Fred D. May, William M. Johnson, and E. W. Bailey. They found on the premises a gasoline stove, around which were piled a number of tubs of oleomargarine in a soft and oily condition. They found oleomargarine in tubs, stored in an ice box. They found a printing table, such as is usually used in preparing butter or oleomargarine in shaping the same in prints from its original contents in firkins. They found paddles, some

galvanized iron tubs, in which colored oleomargarine was found sticking to the sides. They also found, under a trapdoor in the floor, a lot of oleomargarine streaked with coloring matter, and under this same trapdoor they also found an empty can which bore a label upon which was the inscription, "Butter Color, Heller & Merz Co., Alder-nay Butter Color, New York, N. Y.," and also another empty can of the same character thrown on top of the ice box.

The testimony of these witnesses further shows that plaintiff in error Tom May, the proprietor, had been seen around said premises at various times for a considerable period, and had been there on every day during the week immediately preceding the raid, but was not, and had not been, there on the morning of the raid; that plaintiff in error Fred D. May usually arrived at said premises about 6 or 6:15 in the morning; that he had been around there every day during the week immediately preceding the raid, and had also been around there frequently for a period of about two years immediately preceding said time; that plaintiff in error Johnson was observed there three different times during the week immediately preceding the breaking in; that he arrived about 7:15 in the morning and would leave about 10:30 or 11 the same morning, and that he had been observed around there on other occasions prior to this time; that Bailey was around there every morning during the week immediately preceding the breaking in, and also during a considerable period preceding this time; that he had been observed taking care of the horses and wagons that were kept on the premises.

It required from 20 to 25 minutes to break into the room upstairs. The demand for admission before breaking in was made in so loud a voice that it attracted the attention of the neighbors in the house next door. While the officers were attempting to force an entrance, the defendants who were inside the building neither said nor did anything. During the time that the officers were watching the premises they observed a number of drivers come in the early morning and depart in wagons loaded with goods.

The facts above stated, with other evidence to which attention has not been called, were sufficient to convict all of the defendants both of the offense of engaging in the manufacture of oleomargarine without paying the tax of \$600, and also of the offense punished by section 17.

It seems to be the claim of the defendants that they cannot be convicted unless some witness saw each defendant in the act of mixing coloring matter with white oleomargarine. Such proof was not required. The evidence shows that this unlawful business of coloring oleomargarine was being carried on at this place with intent to sell the product and to defraud the government, and that each one of the defendants knowingly assisted therein. *Vermont v. United States*, 174 Fed. 792, 795, 98 C. C. A. 500.

The judgment of the court below is affirmed.

SANBORN, Circuit Judge (dissenting). All there is of the charge in the indictment, when it is stripped of its immaterial verbiage, is that the defendants being engaged in the business of a manufacturer

of colored oleomargarine attempted at No. 3536 Morgan street, St. Louis, at a date specified, to defraud the United States out of 10 cents a pound on 120 pounds of colored oleomargarine produced by them. This 10 cents a pound could never become due to the United States on this 120 pounds, and hence the United States could never be defrauded of it by the defendants unless without paying that tax they sold this oleomargarine or removed it for use. 24 Stat. 209, § 8, 2 U. S. Comp. Stat. 2231. The manufacture of colored oleomargarine, either by producing it or by mixing artificial coloring matter with white oleomargarine, could never subject them to liability to pay that tax. This manufacturing might lawfully be done by paying the \$600 occupation tax without incurring any liability whatever to pay the poundage tax. Therefore the manufacturing of colored oleomargarine was consistent with innocence of all attempt to defraud the government out of the poundage tax. And no offense is proved or charged by evidence or averment of facts that can be reconciled with the theory of the innocence of the accused unless the charge and the evidence are such as to exclude every reasonable hypothesis but that of guilt. *Vernon v. United States*, 146 Fed. 121, 123, 76 C. C. A. 547, 549; *People v. Bennett*, 49 N. Y. 144; *United States v. Babcock*, 3 Dill. 581, Fed. Cas. No. 14,487; *United States v. Hart* (D. C.) 78 Fed. 868, 873, affirmed in *Hart v. United States*, 84 Fed. 799, 28 C. C. A. 612; *United States v. McKenzie* (D. C.) 35 Fed. 826; *People v. Ward*, 105 Cal. 335, 38 Pac. 945; *Asbach v. Chicago, etc., Ry. Co.*, 74 Iowa, 248, 37 N. W. 182; *Smith v. First National Bank*, 99 Mass. 605, 97 Am. Dec. 59.

Read in the light of the act of Congress and of this rule of law, all the facts set forth in the third count of this indictment are consistent with the innocence of the defendants except the bare averment that at the time and place named they attempted to defraud the United States of a poundage tax of 10 cents a pound on 120 pounds of oleomargarine. An averment in a complaint in a civil action that at a certain time and place the defendant defrauded the plaintiff out of \$12 that was due him on a specified account, without stating the facts which constituted the defrauding so that the court could determine from the complaint whether or not those facts constituted a fraud, would be clearly insufficient. An attempt to defraud may be made in a thousand ways. Three ways in which the attempt charged in this case might have been made are by selling the colored oleomargarine, by removing it for consumption, and by removing it for use without first paying the tax. Acts which constituted the attempt, means by which the attempt was made, were indispensable ingredients of the attempt, and until they were disclosed by the pleading it seems to me that no facts were set forth from which the court could determine whether or not the facts which the pleader by its silence concealed when it presented the indictment, and which it subsequently attempted to prove, were sufficient to support a conviction, none which advised the defendants of the charge they were to meet and gave them a fair opportunity to defend. *Armour Packing Co. v. United States*, 153 Fed. 1, 17, 82 C. C. A. 135, 151, 14 L. R. A. (N. S.) 400. The reason why the decision and opinion in the *Armour*

Packing Company's Case that it was not necessary to plead the device by which the offense of rebating there charged was committed, does not in my opinion sustain the conclusion that it is unnecessary to plead the facts which constituted the attempt to defraud in this case, is, that the device was neither the offense charged nor an essential element of the offense charged in that case, while the attempt to defraud is the offense itself in this case, and hence the facts which constitute it are inseparable elements thereof. In the Armour Case this court said:

"The substance of this offense is not the device, but the solicitation or receipt of the concession and the transportation effected thereby. \* \* \* The device whereby the receipt and transportation are obtained is not an essential element of the crime, and it is unnecessary to plead it in the indictment."

On the other hand, if the device had been the offense, or had been an essential element thereof, it would, in my opinion, have been necessary to plead it in that case. But the offense in that case was the rebating, and the indictment was sustained because, and only because, every essential element, all the facts which constituted that crime, "the names of the carriers that transported the property, the date and place of the delivery of the goods to the initial carrier and of the receipt of the concession by the shipper, a description of the specific articles shipped, the filed and published rate, the less rate at which the goods were transported, and the amount of the concession, the place of shipment, and the point of destination of the property and the route over which it was transported," were clearly and at large set forth in the indictment. The offense in this case is the attempt to defraud, and by the same mark it was indispensable to plead all its essential elements, all the ultimate facts, though undoubtedly not their details, which constituted the offense. By a pleading of those facts, and by such a pleading only, could the indictment be brought within the established rule that "it must portray the facts which the pleader claims constitute the alleged transgression so distinctly as to advise the accused of the charge which he has to meet and to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or an acquittal in defense of another prosecution for the same offense, and so clearly that the court may be able to determine whether or not the facts there stated are sufficient to support a conviction." *Armour Packing Co. v. United States*, 153 Fed. 1, 17, 82 C. C. A. 135, 151, 14 L. R. A. (N. S.) 400. In *Ledbetter v. United States*, 170 U. S. 606, at page 609, 18 Sup. Ct. 774, at page 775 (42 L. Ed. 1162), the Supreme Court said:

"We have no disposition to qualify what has already been frequently decided by this court, that where the crime is statutory it must be charged with precision and certainty, and every ingredient of which it is composed must be clearly and accurately set forth, and that even in the cases of misdemeanors the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged. *United States v. Cook*, 17 Wall. 168, 174, 21 L. Ed. 538; *United States v. Cruikshank*, 92 U. S. 542, 562, 23 L. Ed. 588; *United States v. Carll*, 105 U. S. 611, 26 L. Ed. 1135; *United States v. Simmons*, 96 U. S.

360. 24 L. Ed. 819; *United States v. Hess*, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516; *Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419; *Evans v. United States*, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830."

The following declarations of the law upon this subject are extracted from the opinions of the Supreme Court in the cases which are cited and reaffirmed in the *Ledbetter Case*.

"No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication, and the charge must be made directly and not inferentially, or by way of recital. \* \* \* The doctrine invoked by the Solicitor General that it is sufficient in an indictment upon a statute to set forth the offense in the words of the statute does not meet the difficulty here. Undoubtedly the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense coming under the general description with which he is charged." *United States v. Hess*, 124 U. S. 483, 487, 8 Sup. Ct. 571, 573, 31 L. Ed. 516.

"A rule of criminal pleading, which at one time obtained in some of the circuits, and perhaps received a qualified sanction from this court in *United States v. Mills*, 7 Pet. 138, 8 L. Ed. 636, that an indictment for a statutory misdemeanor is sufficient if the offense be charged in the words of the statute, must, under more recent decisions, be limited to cases where the words of the statute themselves, as was said by this court in *United States v. Carll*, 105 U. S. 611, 612, 26 L. Ed. 1135, 'fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.' The crime must be charged with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged." *United States v. Cook*, 17 Wall. 168, 174, 21 L. Ed. 538; *United States v. Cruikshank*, 92 U. S. 542, 558, 23 L. Ed. 588.

"It is an elementary principle of criminal pleading that, where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species—it must descend to particulars.' 1 Arch. Cr. Pr. & Pl. 291. The object of the indictment is: First, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place and circumstances." *United States v. Cruikshank*, 92 U. S. 542, 558, 23 L. Ed. 588.

Because "attempt to defraud" is a generic term, because such an attempt is a conclusion of law made up of acts and intent, and because the facts which are claimed to constitute it must be set forth in the indictment with such reasonable particularity as will enable the court to decide whether they are sufficient in law to support a conviction, as will enable the defendants to prepare their defense and as will protect them from a second prosecution therefor, and the third count in this indictment in my opinion utterly fails to set forth those facts, or the essential elements which constitute the attempt to defraud, I am unable to concur in the view of the majority that this count was not demurrable. It does not seem to me to set forth facts constituting the generic crime alleged.

Nor have I been able to find in the record in this case any substantial evidence that either of the defendants attempted to defraud the



United States out of the \$12 poundage tax on the 120 pounds of oleomargarine. There is evidence tending to show that they were manufacturing colored oleomargarine by mixing colored matter with white oleomargarine. But they could lawfully do that without defrauding or attempting to defraud the government out of the poundage tax. Even an intent at some future time to defraud is neither the fraud itself nor the attempt to defraud. The fraud could not be perpetrated in this case without either selling the 120 pounds, or removing it for consumption, or removing it for use, without paying the tax, and there is no evidence that either of these defendants attempted to do either of these things. The conclusion that they made such an attempt is a mere deduction from the proof that they were manufacturing colored oleomargarine—a deduction that it seems to me could not have been lawfully drawn by the jury for the purpose of convicting these defendants of a crime, because none of the acts proved against them was inconsistent with their innocence of an attempt to defraud the government of this poundage tax. And circumstantial evidence is insufficient to warrant a conviction in a criminal case unless it cannot be reconciled with the theory of innocence and it is such as to exclude every reasonable hypothesis but that of guilt of the offense charged. *Vernon v. United States*, 146 Fed. 121, 123, 76 C. C. A. 547, 549.

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MAY et al. v. UNITED STATES.†

(Circuit Court of Appeals, Eighth Circuit. August 19, 1912.)

No. 3,756.

1. INTERNAL REVENUE (§ 47\*)—DEFAUDING UNITED STATES—OLEOMARGARINE TAX—EVIDENCE.

Evidence *held* to sustain a conviction that one engaged in the business of manufacturing colored oleomargarine attempted to defraud the United States of the tax thereon in violation of Oleomargarine Act Aug. 2, 1886, c. 840, § 17, 24 Stat. 212 (U. S. Comp. St. 1901, p. 2234).

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 144-150; Dec. Dig. § 47.\*]

2. GRAND JURY (§ 7\*)—FEDERAL COURTS—ORDER.

A federal judge, having been designated by the senior circuit judge to act in the Western district of Missouri, thereby had authority by Rev. St. § 591 (U. S. Comp. St. 1901, p. 480), to discharge all judicial duties of the judge of that district, so that an order for the drawing of a grand jury entitled "In the United States District Court for the Western District of Missouri," and signed by such judge, when filed in the clerk's office of that court, was a sufficient order of the court within section 810 (U. S. Comp. St. 1901, p. 627), providing that no grand jury shall be summoned to attend any Circuit or District Court unless one of the judges of such Circuit Court or a judge of such District orders that a venire issue therefor.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 2, 16, 21; Dec. Dig. § 7.\*]

3. GRAND JURY (§ 8\*)—SELECTION—METHOD.

A grand jury being desired in a federal District Court, and the jury commissioner being absent, the court appointed R. as jury commissioner

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes.

† Rehearing denied December 28, 1912.

in his place. R. and the clerk drew from the box the names of the jurors which were placed in the venire. There was nothing to show that the names in the box were not put there by the clerk and the original jury commissioner at some prior time, nor did it appear that the clerk ever put any names in the box without the corresponding action of the regular jury commissioner. *Held*, that the jury was properly drawn, and that it was not necessary that additional names should be placed in the box by R.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 16-20; Dec. Dig. § 8.\*]

4. GRAND JURY (§ 9\*)—VENIRE—NAMES OF JURORS.

A grand jury venire was not illegal because the names of the jurors were attached thereto instead of being inserted in the body thereof.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 21-26; Dec. Dig. § 9.\*]

5. GRAND JURY (§ 9\*)—SUMMONING—MODE.

Act Cong. May 14, 1890, c. 202, § 3, 26 Stat. 106 (U. S. Comp. St. 1901, p. 386), provides that jurors shall be summoned for the Circuit and District Courts of Missouri as provided by law for the summoning of jurors in the districts, and whenever the Circuit and District Courts in either of the districts or divisions shall be held at the same time and place, jurors shall not be summoned for each, but for both of the courts, and they shall act accordingly as grand and petit jurors in both courts. *Held*, that such provision only means that when both courts are in session two sets of jurors shall not be drawn, one for each, and hence, where it did not appear that any grand jurors had been drawn for the Circuit Court, a conviction in the District Court could not be set aside because the grand jurors finding the indictment were summoned for that court, and not for both the Circuit and District Courts.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 21-26; Dec. Dig. § 9.\*]

6. CRIMINAL LAW (§ 1144\*)—APPEAL—PRESUMPTIONS—SUMMONING GRAND JURY.

Under Rev. St. § 802 (U. S. Comp. St. 1901, p. 625), providing that jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur unnecessary expense, or to unduly burden the citizens of any part of the district with such service, jurors must be returned from the whole district until the court orders otherwise, and, if no order is made, it will be presumed that the court has determined that drawing them from the whole district will be most favorable to an impartial trial, etc.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2781, 2901, 3016-3037; Dec. Dig. § 1144.\*]

7. INDICTMENT AND INFORMATION (§ 25\*)—GRAND JURORS—RESIDENCE.

An indictment need not state that the grand jurors who found it are residents of the division of the district in which they served.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 92, 108-114; Dec. Dig. § 25.\*]

8. INDICTMENT AND INFORMATION (§ 125\*)—OLEOMARGARINE TAX—DEFAUDING UNITED STATES—INDICTMENT—DUPLICITY.

Oleomargarine Act Aug. 2, 1886, c. 840, § 17, 24 Stat. 212 (U. S. Comp. St. 1901, p. 2234), provides that whenever any person engaged in manufacturing oleomargarine defrauds, or attempts to defraud, the United States of the tax on oleomargarine produced by him, he shall forfeit his factory, etc. *Held*, that an indictment charging that on a specified date, and on each and every day thereafter during specified months, defendants were engaged in carrying on the business of manufacturing

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

oleomargarine, and did then and there unlawfully and feloniously defraud, and attempt to defraud, the United States of the tax on oleomargarine produced by them, etc., was not objectionable for duplicity in that it charged two felonies, one of defrauding, and the other of attempting to defraud the United States of the tax imposed on manufactured oleomargarine.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. § 125.\*]

9. INDICTMENT AND INFORMATION (§ 121\*)—BILL OF PARTICULARS.

While a bill of particulars cannot make an indictment valid which fails to state an essential element of the offense, in case objection is made in the proper time and manner, yet when an indictment alleges the facts constituting the essential elements of the offense with such certainty that it cannot be pronounced bad on motion to quash or demurrer, and yet is couched in such language that the accused may be surprised at the trial, he may obtain a bill of particulars in advance of the trial.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 316-320; Dec. Dig. § 121.\*]

10. INTERNAL REVENUE (§ 47\*)—OLEOMARGARINE—POUND TAX—DEFRAUDING UNITED STATES—EVIDENCE—INTERNAL REVENUE REGULATIONS.

In a prosecution for defrauding the United States out of the pound tax on oleomargarine, as distinguished from the license tax, in violation of Oleomargarine Act Aug. 2, 1886, c. 840, § 17, 24 Stat. 212 (U. S. Comp. St. 1901, p. 2234), an internal revenue regulation, which it was claimed gave a person engaged in the oleomargarine business the whole of the calendar month in which to make payment, was applicable, if at all, only to the yearly license required of a manufacturer, wholesale or retail dealer in oleomargarine.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 144-150; Dec. Dig. § 47.\*]

11. CRIMINAL LAW (§ 829\*)—TRIAL—REQUEST TO CHARGE.

A request to charge substantially covered by an instruction given may be properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

12. SEARCHES AND SEIZURES (§ 7\*)—PRIVATE PAPERS.

Where internal revenue officers armed with a search warrant raided defendants' place of business to obtain evidence of an alleged violation of Oleomargarine Act Aug. 2, 1886, c. 840, § 17, 24 Stat. 212 (U. S. Comp. St. 1901, p. 2234), and seized various articles which they found on the premises, together with letters, papers, and two promissory notes signed by defendant M., tending to connect him with the business carried on in the place searched, such act did not constitute a violation of M.'s right to be free from unlawful searches and seizures.

[Ed. Note.—For other cases, see Searches and Seizures, Cent. Dig. § 5; Dec. Dig. § 7.\*]

13. WITNESSES (§ 300\*)—PRIVILEGE.

That internal revenue officers, in raiding defendants' place of business for alleged violation of Oleomargarine Act Aug. 2, 1886, c. 840, § 17, 24 Stat. 212 (U. S. Comp. St. 1901, p. 2234), seized certain articles, letters, papers, and two promissory notes signed by defendant M., which notes were later introduced in evidence against him, did not constitute a violation of his constitutional right against being compelled to give evidence against himself.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1042, 1042½; Dec. Dig. § 300.\*]

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

## 14. INTERNAL REVENUE (§ 47\*)—INDICTMENT—COUNTS—CONVICTION.

Where two counts of an indictment each charged a violation of Oleomargarine Act Aug. 2, 1886, c. 840, § 17, 24 Stat. 212 (U. S. Comp. St. 1901, p. 2234), the same evidence and the same acts being relied on to convict defendants on both counts, and the judge charged that the two counts really constituted but one offense, a conviction on the second count could not be sustained.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 144-150; Dec. Dig. § 47.\*]

Sanborn, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Western District of Missouri.

Joseph G. May and others were convicted of defrauding or attempting to defraud the United States of the tax on colored oleomargarine, and they bring error. Affirmed.

Shepard Barclay (Roland Hughes, P. H. Cullen, and Thomas T. Fauntleroy, on the brief), for plaintiffs in error.

Leslie J. Lyons, U. S. Atty. (Hugh C. Smith and Thad. B. Landon, Asst. U. S. Attys., on the brief), for the United States.

Before SANBORN and HOOK, Circuit Judges, and WILLARD, District Judge.

WILLARD, District Judge. [1] The plaintiffs in error, Thompson, Taylor, and Joseph G. May, were convicted in the court below of a violation of section 17 of the Oleomargarine Act (Act Aug. 2, 1886, c. 840, 24 Stat. 212 [U. S. Comp. St. 1901, p. 2234]). The case made by the evidence was like this: Several persons under the name of the Clayton Creamery were, during the summer and fall of 1910, engaged in business at 809 West Twelfth street, Kansas City, Mo. One of their number had a license to do business as a retail dealer in oleomargarine. They employed persons to travel over certain routes soliciting purchases of oleomargarine. Drivers were also employed to travel over these routes delivering the goods sold by the solicitors. They commenced with one delivery wagon in April, and by October the business had grown to such an extent that five delivery wagons were required. Each one of the persons engaged in that work delivered between 700 and 1,200 pounds a week. The oleomargarine thus delivered was, according to the testimony of the delivery men and the purchasers, colored so that it looked like butter. They never paid the tax of 10 cents a pound upon this product. That they intended to evade the payment of the tax is apparent from the price which they paid for white oleomargarine and the price at which they sold the colored article, which was 25 cents a pound. For the former they paid between 13½ cents and 18 cents a pound; when colored so as to look like butter it was subject to an additional tax of 9¾ cents. They paid their solicitors at the rate of about \$1.35 a day and 2 cents a pound. They paid the delivery men as high as \$15 a week, and 2 cents a pound on all in excess of 750 pounds a week. That the white oleomargarine was manufactured into colored oleomargarine upon their premises is indicated by the fact that they

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

bought large quantities of the white product and very small quantities of the colored product. Between June 21, 1910, and October 29, 1910, they bought of Swift & Co. 57,840 pounds of the white oleomargarine. They bought white oleomargarine also from Morris & Co. and from W. J. Moxley. The place where the business was carried on had been for some time prior to October 29, 1910, watched by the government revenue officials. On that day these officials accompanied by city policemen entered the place, and in the front room of the building they found Stowers, who is not one of the plaintiffs in error, sitting at a desk. They demanded admission to the rear part of the building, which was refused, and the door was broken open with an iron bar and a jimmy. On the inside of this door were two stirrups, so that two 2x4's could be dropped in them. In the room thus entered was found a large ice box about 6 feet square, running almost to the ceiling, with walls 6 inches thick. There were arrangements for locking the door of this ice box on the inside, but no arrangements for locking it on the outside. The defendant Taylor was found in this ice box mixing coloring matter and white oleomargarine. The defendant Thompson was standing near by washing his hands and arms. Six tubs of yellow oleomargarine were found in the ice box and pure white oleomargarine thrown upon the floor. A glass smeared with coloring matter and a can of coloring matter were found in the building, also boxes partially filled with yellow oleomargarine in prints, one-pound packages, also an oil and a gas stove for heating water, and 30 tubs of white oleomargarine. The window on the west side of the building was boarded up tight, and the south windows had curtains extending over the lower part probably half-way up.

The defendant Joseph G. May was not found in the building at that time, but the evidence is ample to show that he was engaged with Thompson and Taylor in the enterprise. Swift & Co. sold oleomargarine to him during the time covered by the indictment. Morris & Co. sold him oleomargarine on October 18, 1910. He employed Wilson as a driver; he figured up the accounts of Mrs. Rairdon, a solicitor, and paid her, and he signed a contract with Gardiner as a driver.

The evidence in the case, an outline of which has been given above, was entirely sufficient to convict all of the defendants of a violation of section 17. The questions to be now considered are whether the conviction upon this evidence must be set aside by reason of errors occurring in the proceedings which led up to the sentence.

[2] Counsel for defendants commenced their attack upon these proceedings by objecting to the sufficiency of the order of the judge directing a grand jury to be summoned. Section 810 of the Revised Statutes (U. S. Comp. St. 1901, p. 627) provides that:

"No grand jury shall be summoned to attend any Circuit or District Court unless one of the judges of such Circuit Court, or a judge of such district, in his own discretion, or upon a notification by the district attorney that such a jury will be needed, orders a venire issue therefor."

The order for this grand jury was made by Judge McPherson, judge of the District Court for the Southern District of Iowa. It

appears from the record that he had been designated by the senior circuit judge to act in the Western district of Missouri during the time covered by these proceedings.

While so acting he had, by virtue of section 591 of the Revised Statutes (U. S. Comp. St. 1901, p. 480), authority to discharge all the judicial duties of the judge of that district, and therefore he had authority to order a venire for a grand jury. Something is said in the brief of the defendants to the effect that this order was a personal order of Judge McPherson. Just what is meant by that is not clear. It was a written order entitled "In the United States District Court for the Western District of Missouri." It was signed, "Smith McPherson, Judge," and was filed in the clerk's office of that court.

This was sufficient as an order of the court.

[3] The next attack is upon the manner in which the grand jury was drawn. The jury commissioner, Welsh, was absent, and the court appointed Rust as a jury commissioner in his place. Rust and the clerk drew from the box in the manner provided by the law the names of the jurors which were placed in the venire. It is said, however, by the defendants, that Rust had nothing to do with selecting the jury. By this is meant probably that he had nothing to do with putting the names of any jurors in the box; but the fact that the names of 21 jurors were drawn out of the box is enough to show that there were sufficient names in the box to satisfy the order of the court. There is no evidence in the case to show that the names in the box were not put in there by the clerk and Welsh, the jury commissioner, at some previous time. There is nothing whatever to indicate that the clerk ever put any names in the box without the corresponding action of Welsh. Under the circumstances, it was not at all necessary that additional names should be placed therein by Rust.

[4] It is further said that the venire was illegal because it did not contain the names of the jurors. The venire directed the marshal to summon "the persons named in the list hereto attached." It seems from the proceedings at the trial that this objection was based upon the fact that the names were not inserted in the body of the venire, but were inserted in a list attached thereto. There is no merit in this claim.

[5] The Act of May 14, 1890, c. 202, § 3, 26 Stat. 106 (U. S. Comp. St. 1901, p. 386), provides as follows:

"Jurors shall be summoned for the courts hereby created (Circuit and District Courts in Missouri) as now provided by law for the summoning of jurors in the said districts, and whenever the Circuit and District Courts in either of said districts or divisions shall be held at the same time and place, jurors shall not be summoned for each of said courts, but for both of said courts, and they shall act accordingly as grand and petit jurors for both of said courts."

The defendants say that the conviction must be set aside, because these grand jurors were summoned for the District Court, and not for the Circuit and District Courts. The law above cited means that when both courts are in session two sets of jurors shall not be drawn, one for the Circuit and one for the District

Court. In the present case there is nothing to show that two sets were drawn. If it had appeared that grand jurors had already been drawn for the Circuit Court, and while discharging their duties therein these grand jurors had been drawn in the District Court, a different question would have been presented. This contention cannot be sustained.

[6] Section 802 of the Revised Statutes (U. S. Comp. St. 1901, p. 625) provides as follows:

"(Jurors, how to be apportioned in the district.) Jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burden the citizens of any part of the district with such service."

Until the court otherwise orders, jurors must be returned from the whole district. If no order is made, the presumption is that the court has determined that drawing them from the whole district will be most favorable to an impartial trial, and will not unduly burden the citizens of any part of it, although some unnecessary expense may thereby be incurred. No order directing jurors to be drawn from a part of the district had ever been made.

[7] It is further claimed that the indictment does not state that the grand jurors are residents in the division of the district in which they served. The indictment commences as follows:

"United States of America, Western Division, Western District of Missouri  
—ss.:

"In the District Court of the United States for the Western Division of the  
Western District of Missouri.

"The grand jurors of the United States of America, duly chosen, selected, impaneled, sworn and charged to inquire of and concerning crimes and offenses in the Western division of the Western district of Missouri, on their oaths present."

If they were duly selected they must have been selected from the Western division of the Western district. It was no more necessary to state in the indictment that the grand jurors were residents of that division than it was to state that they were of legal age, or that they were citizens, or that their names had been placed in the box by the clerk and commissioner and then been drawn alternately from the box by those officials.

[8] After making these objections to the indictment, all of which were overruled, the defendants demurred to the first count. That count is as follows:

"On or about the 1st day of July, 1910, and on each and every day thereafter during the months of July, August, September, and up to and including the 29th day of October, A. D. 1910, at Kansas City, Jackson county, Mo., in said division and district, and within the jurisdiction of this court, Joseph G. May, William C. Stowers, Herbert Taylor, Fred May, and W. L. Thompson, whose Christian name is to the grand jurors unknown, were engaged in and carrying on the business of manufacturing oleomargarine at said Kansas City, Mo., and did then and there unlawfully and feloniously defraud, and attempt to defraud, the United States of America of the tax provided by

law, and required to be paid on the oleomargarine produced by them, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States."

This count is based upon section 17 of the Act of August 2, 1886, 24 Stat. 209, which is as follows:

"That whenever any person engaged in carrying on the business of manufacturing oleomargarine defrauds, or attempts to defraud, the United States of the tax on the oleomargarine produced by him, or any part thereof, he shall forfeit the factory and manufacturing apparatus used by him, and all oleomargarine and all raw material for the production of oleomargarine found in the factory and on the factory premises, and shall be fined not less than five hundred dollars nor more than five thousand dollars and be imprisoned not less than six months nor more than three years."

It is said that this count is bad for duplicity, as two felonies are charged, one, the act of defrauding, and, the other, the attempt to defraud, both under section 17. This contention is answered by the case of *Crain v. United States*, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097.

An indictment charging a violation of this same section has been sustained by this court in the case of *Fred D. May et al. v. United States*, 199 Fed. 42, just decided. That indictment differs from this one, in that the former states the street number of the factory, where the business was carried on, the name under which the defendants were doing business, and the number of pounds of oleomargarine produced without payment of the tax of which the defendants attempted to defraud the United States. No allegations of a similar character appear in this indictment, but no one of these facts there stated was an essential element of the offense. The Supreme Court said in the case of *Ledbetter v. United States*, 170 U. S. 606, at page 611, 18 Sup. Ct. 774, at page 776 (42 L. Ed. 1162):

"The cases wherein it is held that an indictment in the exact language of the statute is not sufficient are those wherein the statute does not contain all the elements of the offense, as in *United States v. Carll*, 105 U. S. 611, 26 L. Ed. 1135, where a statute against passing counterfeit money failed to aver the scienter; but where the statute sets forth every ingredient of the offense, an indictment in its very words is sufficient, though that offense be more fully defined in some other section."

The decision in the case of *Fred D. May* is authority for saying that this count contained every element of the offense. The most that can be claimed by the defendants is that it was not so full as it might have been in giving the details of the offense. Is this such a defect in the indictment as requires a reversal of this judgment? In the case of *Clement v. U. S.*, 149 Fed. 305, at page 313, 79 C. C. A. 243, at page 251, this court said:

"We must, so far as possible, consistently with insuring an accused person a fair and impartial trial, guaranteed to him by the Constitution and laws, disregard form, imperfection of statement, and unimportant defects, which do not reasonably tend to the prejudice of the accused. This we are commanded to do by positive law (section 1025, Rev. St. [U. S. Comp. St. 1901, p. 720]) as well as by repeated admonitions of the Supreme Court."



In the case of *Brown v. United States*, 143 Fed. 60, at page 62, 74 C. C. A. 214, at page 217, this court said:

"But it is to be borne in mind that what is required is reasonable, not absolute or impracticable, particularity of statement; else the rules of criminal pleading will be deflected from their true purpose, which is to secure the conviction of the guilty, as well as to shield the innocent. *Evans v. United States*, 153 U. S. 584, 590, 14 Sup. Ct. 934, 38 L. Ed. 830; *Cochran v. United States*, 157 U. S. 286, 290, 15 Sup. Ct. 628, 39 L. Ed. 704; *Durland v. United States*, 161 U. S. 306, 314, 315, 16 Sup. Ct. 508, 40 L. Ed. 709. It is also to be borne in mind that a defect in matter of substance is fatal, while a defect in matter of form only—and this includes the manner of stating a fact—which does not tend to the prejudice of the accused, is immaterial. Rev. St. § 1025 (U. S. Comp. St. 1901, p. 720)."

[9] A bill of particulars cannot make an indictment valid which fails to state an essential element of the offense, when objection is made at the proper time and in the proper manner. But in *Morris v. United States*, 161 Fed. 672, at page 681, 88 C. C. A. 532, at page 541, the court said:

"So it might well be said by a defendant, charged in general terms with carrying on the business of a manufacturer, that it does not reasonably advise him in advance as to which of said statutes it was the purpose of the prosecutor to invoke. This question could not be raised in advance by demurrer, as the indictment on its face would be good under section 4 of the original statute. The clear course for the defendant in such situation to pursue, for his proper protection against unpreparedness and surprise, is by timely motion to compel the prosecutor to furnish him with a bill of particulars. This was aptly and comprehensively expressed by Judge Van Devanter in *Rinker v. United States*, 151 Fed. 759, 81 C. C. A. 383, as follows:

"When an indictment sets forth the facts constituting the essential elements of the offense with such certainty that it cannot be pronounced ill upon motion to quash or demurrer, and yet is couched in such language that the accused is liable to be surprised by the production of evidence for which he is unprepared, he should in advance of the trial apply for a bill of the particulars; otherwise, it may properly be assumed as against him that he is fully informed of the process of the case which he must meet upon the trial."

Such was the course pursued by the defendants in this case. They demanded a bill of particulars under the first count, and this was furnished by the district attorney under the order of the court. The facts set out in the bill of particulars stated all of the details which were omitted in the indictment. There can be no doubt but that the defendants went to trial fully advised of the nature and cause of the accusation against them, and were in no way prejudiced by the want of particularity in the statement in the indictment of the details of the offense. In *Connors v. United States*, 158 U. S. 408, on page 411, 15 Sup. Ct. 951, on page 952 (39 L. Ed. 1033), the court said:

"Nor, if made by demurrer or by motion and overruled, would it avail on error unless it appeared that the substantial rights of the accused were prejudiced by the refusal of the court to require a more restricted or specific statement of the particular mode in which the offense charged was committed. Rev. Stat. § 1025. There is no ground whatever to suppose that the accused was taken by surprise in the progress of the trial, or that he was in doubt as to what was the precise offense with which he was charged."

In *Armour Packing Co. v. United States*, 209 U. S. 56, on page 84, 28 Sup. Ct. 428, on page 436 (52 L. Ed. 681), the court said:

"In the present case no objection was made to the indictment until after verdict by motion in arrest of judgment.

"Had it been made by demurrer or motion and overruled it would not avail the defendant; in error proceedings, unless it appeared that the substantial rights of the accused were prejudiced by the refusal to require a more specific statement of the particular mode in which the offense charged was committed. See Rev. Stat. U. S. § 125; *Connors v. United States*, 158 U. S. 408, 411 [15 Sup. Ct. 951, 39 L. Ed. 1033]."

[10] The court refused to submit to the jury a regulation of the Internal Revenue Department, which, as the defendants claimed, gives a person engaged in the oleomargarine business the whole of the calendar month in which to make payment. When most favorably construed for the defendants, all that can be claimed for this regulation is that it gives to a manufacturer or a wholesale or retail dealer who commences his business on any day of the month the whole of that month within which to pay the yearly license, although we do not say that this would be the right construction. The tax of 10 cents a pound upon colored oleomargarine is paid by stamps. There is nothing in this regulation to indicate that the seller of colored oleomargarine has until the end of the month in which to pay this stamp tax on oleomargarine which he has already removed or sold. This count in the indictment is based upon section 17, which does not relate to such license taxes. The regulation therefore had nothing to do with the case.

[11] The defendants' eighth request was in effect given by the court when it said to the jury that section 17 provided that oleomargarine so produced by coloration, when removed for consumption or sale, would be subject to the tax of 10 cents a pound.

We find nothing in the charge to support the claim of the defendants that the judge gave the jury to understand that, if they found that any wrongful and criminal acts were being done when the arrests were made, they might infer therefrom that like acts had been done before.

[12, 13] When the officers went to the place of business of the defendants on October 29, 1910, they had a search warrant. They seized various articles which they found upon the premises, and also some letters and other papers. Two promissory notes signed by the defendant May thus found were introduced in evidence to show his connection with the business. It is claimed by him that his constitutional right to be free from unlawful searches and seizures was violated, and that he was compelled in this way to give evidence against himself. There is nothing in this claim. *Adams v. New York*, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575; *Ripper v. U. S.*, 178 Fed. 24, 101 C. C. A. 152. The conviction upon the first count must be sustained.

[14] The defendants were tried and convicted upon another count. This charges a violation of the same section 17, and the same evidence and the same acts were relied upon to convict the defendants on this count as in the first count. This seems to have

been the view taken by the judge below, for he said at the end of his charge:

"I will simply say this to the jury, that the matter is so presented to the court that the two counts really constitute but one offense. That is to say, that whatever may be the form of the verdict of the jury the court will impose but one sentence if the verdict be guilty. But that need not affect your deliberation as to whether you believe there is guilt or innocence on each of the counts."

Under these circumstances, the conviction under the second count cannot be sustained.

The judgment of the court below is affirmed upon the first count of the indictment, and reversed upon the second.

SANBORN, Circuit Judge (dissenting). The only charge in the first count of the indictment in this case is that at times and at a place named the defendants were manufacturing oleomargarine and did "defraud, and attempt to defraud, the United States of America of the tax provided by law and required to be paid on the oleomargarine produced by them." It contains no averment of any of the facts which constitute the fraud, or the attempt to defraud.

A bill of particulars does not remedy the defect of an indictment, as the majority remark, which fails to set forth the essential elements, the material facts that are claimed to constitute the alleged offense. *United States v. Tubbs* (D. C.) 94 Fed. 356, 360; *Floren v. United States*, 186 Fed. 961, 964, 108 C. C. A. 577.

"It is an elementary principle of criminal pleading that, where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species—it must descend to particulars.' 1 Arch. Cr. Pr. & Pl. 291. The object of the indictment is: First, to furnish the accused with such a description of the charge against him as will enable him to make his defense and avail himself of his conviction or acquittal for protection against further prosecution for the same cause; and, second, to inform the court of the facts alleged so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place and circumstances." *United States v. Cruikshank*, 92 U. S. 542, 558 (23 L. Ed. 588).

And because fraud and attempt to defraud are generic terms, because a fraud, and likewise an attempt to defraud, is a conclusion of law made up of acts and intent, and because the facts which are claimed to constitute either of them, and not a mere conclusion of law, must be set forth in the indictment which charges the offense with such reasonable particularity as will enable the court to decide whether or not they are sufficient in law to support a conviction, as will enable the defendants to know what is charged against them and to prepare their defense, and as will protect them from another prosecution for the same offense, and the first count of this indictment utterly fails, in my opinion, to set forth the facts, the essential elements which constitute either the alleged fraud,

or the alleged attempt to defraud, it seems to me that this count of the indictment was demurrable and voidable in the face of a motion in arrest of judgment. The reasons for this conclusion are stated more at length in the dissenting opinion in *Fred D. May et al. v. United States*, which presented a similar question, and I refrain from repeating them here. I think the judgment below should be reversed.

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JONES et al. v. MISSOURI-EDISON ELECTRIC CO. et al.

(Circuit Court of Appeals, Eighth Circuit. July 22, 1912.)

No. 3,624.

CORPORATIONS (§ 584\*)—CONSOLIDATION—BREACH OF TRUST BY MAJORITY STOCKHOLDERS—RIGHTS OF MINORITY TO EQUITABLE RELIEF.

The distribution of the stock of an electric company, formed by the consolidation of two companies, between the stockholders of the constituent companies, *held* so unjust and unequal as to amount to a breach of trust and a fraud on the minority stockholders of one of the companies by the majority stockholders, who were also sole stockholders of the other and favored company, and to entitle such minority stockholders to relief in equity.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2343-2347; Dec. Dig. § 584.\*]

Rights of minority stockholders as to management of corporate affairs, see note to *Wheeler v. Abilene Nat. Bank Bldg. Co.*, 89 C. C. A. 482.]

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Suit in equity by Morgan Jones and others against the Missouri-Edison Electric Company and others. Decree for defendants, and complainants appeal. Reversed.

Eleeneious Smith, D. T. Bomar, and Ford W. Thompson (Robert & Robert and W. B. Thompson, on the brief), for appellants.

R. E. Rombauer and Henry S. Priest (Edgar R. Rombauer, on the brief), for appellees.

Before SANBORN and HOOK, Circuit Judges, and WM. H. MUNGER, District Judge.

WM. H. MUNGER, District Judge. This action was brought by appellants, as stockholders of the Missouri-Edison Electric Company, to have set aside and declared illegal a consolidation of the Missouri-Edison Electric Company, hereinafter designated "Edison Company," with the Union Electric Light & Power Company, hereinafter designated as "Union Company No. 1," into the Union Electric Light & Power Company, hereinafter designated "Union Company No. 2." A bill was filed, alleging that the consolidation was illegal and fraudulent for the reasons: (1) That it was unauthorized by the statutes of Missouri; (2) that the consolidation was prohibited by the anti-trust laws of that state; (3) that the facts under which the consolidation was made show a

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

breach of trust and fraudulent action on the part of the majority stockholders. The bill prayed that the consolidation be declared illegal and void, and that the property of the Edison Company be restored to it, for an accounting of earnings, or that the value of appellants' stock be ascertained, that the amount when so ascertained be declared a lien upon all the property and assets of the Missouri-Edison Company and said Union Company No. 2, and payment of the amount be decreed to them. A demurrer was filed to the bill, which was sustained. On appeal to this court that judgment was reversed. *Jones v. Missouri-Edison Electric Co.*, 144 Fed. 765, 75 C. C. A. 631.

A full statement of all of the facts alleged in the bill is given in that case, and it is only necessary for the purposes of this case to state that Union Company No. 1 was formed by a consolidation of the Imperial Electric Light, Heat & Power Company, which will be hereinafter designated as "Imperial Company," and the Citizens' Electric Light & Power Company, hereinafter designated as "Citizens' Company." The consolidation between the Imperial Company and the Citizens' Company took place in May, 1902. The assets of the Citizens' Company consisted of certain franchises, underground conduits, and a tract of land purchased for a power site, which will be hereinafter designated as the "Ashley street plant." The Citizens' Company was owned by a syndicate of 20 gentlemen. The North American Company was a stockholding company, owning the stock of numerous electric light and power plants over the country, and owned all of the stock of the Imperial Company. Soon after the consolidation of the Imperial Company and Citizens' Company into Union Company No. 1, the North American Company and the Citizens' Syndicate conceived the idea of procuring a majority of the stock of the Missouri-Edison Company and consolidating that company with Union Company No. 1. Such consolidation was effected by action of the majority of the stockholders of the two companies in September, 1903. Appellants protested and objected to such consolidation. Being overruled, this action was brought.

After the case was remanded by this court, issues were joined and the cause referred to a master, who took the evidence and made specific findings, with the general finding that the consolidation was fairly entered into and the stockholders of the Missouri-Edison Company were given a fair proportion of the stock of Union Company No. 2 for their stock in the Missouri-Edison Company. Exceptions to the report of the master were overruled, his report confirmed, and the bill dismissed, from which this appeal has been taken.

In determining whether appellants are entitled under the facts to relief, we lay aside a consideration of the question as to whether the consolidation was in violation of the anti-trust laws of the state of Missouri, or in violation of the laws of that state relative to the consolidation of two or more corporations. When the case was

before this court on demurrer to the bill (144 Fed. 765, 75 C. C. A. 631), in the opinion then rendered it was said:

"The fraud or breach of trust of one who occupies a fiduciary relation while in the exercise of a lawful power is as fatal in equity to the resultant act or contract as the absence of the power. The relation of a stockholder to his corporation, to its officers and to his co-stockholders is a relation of trust and confidence. \* \* \* A combination of the holders of a majority or of three-fifths of the stock of a corporation to elect directors, to dictate their acts and the acts of the corporation for the purpose of carrying out a predetermined plan, places the holders of such stock in the shoes of the corporation, and constitutes them actual, if not technical, trustees for the holders of the minority of the stock. \* \* \* Such a majority of the holders of stock owe to the minority the duty to exercise good faith, care, and diligence to make the property of the corporation in their charge produce the largest possible amount, to protect the interests of the holders of the minority of the stock, and to secure and deliver to them their just proportion of the income and of the proceeds of the property. Any sale of the corporate property to themselves, any disposition by them of the corporation or of its property to deprive the minority holders of their just share of it, or to get gain for themselves at the expense of the holders of the minority of the stock, becomes a breach of duty and of trust, which invokes plenary relief from a court of chancery."

The applicability of the foregoing rule of law to the case in hand will be seen by a consideration of certain facts disclosed by the evidence.

The Imperial Company was actively engaged in the business of manufacturing and vending electricity in 1901, when it was purchased by the North American Company, subject to an indebtedness of \$1,552,000, for the sum of \$700,000. The Citizens' Company was not an active concern. Its assets consisted of certain underground conduits, which cost \$200,000 a contract right to string wires upon the poles of the Kinloch Telephone Company, and the Ashley street property, purchased at the sum of \$100,000, and a contract with the General Electric Company, which granted to it the exclusive right to use the patented electric apparatus within the city of St. Louis manufactured by that company. Its capital stock of \$750,000 was issued as paid-up stock, based upon said contract with the General Electric Company. For the purpose of constructing the conduit system, the Syndicate entered into a contract with one of its members, who described himself as trustee, whereby it agreed to pay him for constructing the conduit system and acquiring the pole rights \$1,250,000 par value of stock and \$525,000 par value of bonds, and the stock of the Citizens' Company was increased to \$2,000,000. This contract was really one by the Citizens' Syndicate with itself. An issue of \$2,000,000 bonds was authorized, and for the purpose of constructing the Ashley street plant the Syndicate agreed to purchase \$1,100,000 par value bonds of the company at 90 cents on the dollar. These bonds were never issued, but the agreement of the Citizens' Syndicate was used as collateral, upon which money was procured; the amount not being disclosed by the evidence.

Such was the situation when, in May, 1902, the consolidation took place between the Imperial Company, owned by the North

American Company, and the Citizens' Company, owned by the Citizens' Syndicate, which consolidation was on the basis of the Imperial Company being turned in subject to its indebtedness of \$1,552,000 as equal in value to the property of the Citizens' Company. This new consolidated company, Union Company No. 1, organized with a capital of \$2,000,000 preferred stock; \$8,000,000 of common stock, and authorized an issue of \$10,000,000 of bonds, secured by a mortgage or deed of trust of date September 1, 1902. To the Citizens' Syndicate was issued \$1,000,000 par value of the preferred and \$350,000 of the common stock of the consolidated company, and to the North American Company a like amount in lieu of the stock held by the Citizens' Syndicate in the Citizens' Company and the stock held by the North American Company in the Imperial Company, and it was agreed that the North American Company would subscribe for and take \$2,000,000 of the authorized issue of bonds, and the Citizens' Syndicate would subscribe for and take \$2,000,000, such bonds to be taken at 97 cents on the dollar, the \$1,100,000 of bonds which the Citizens' Syndicate had subscribed for and agreed to take to be deducted from the \$2,000,000. In this manner the indebtedness of the Citizens' Company, resulting from the promise of the Syndicate to subscribe for the \$1,100,000 of its bonds, was paid by Union Company No. 1; \$2,000,000 of the common stock was issued to the Citizens' Syndicate as a bonus for their subscription to the \$2,000,000 of bonds, and \$2,000,000 of common stock was issued to the North American Company as a bonus for its subscription to the \$2,000,000 of the bonds; and \$3,300,000 of the common stock remained in the hands of trustees of the new company as treasury stock.

Immediately after this consolidation steps were taken by the North American Company and the Citizens' Syndicate to obtain a majority of the stock of the Missouri-Edison Company. This was desirable, as the Missouri-Edison Company was in active operation in the manufacture and sale of electricity, and was the only substantial competitor in the city, and by acquirement of it active competition would be throttled. The North American Company and the Syndicate thereupon agreed that they would acquire a majority of the stock of the Missouri-Edison Company and consolidate it with Union Company No. 1. They proceeded to do so, and early in the year 1903 acquired a majority of the stock and agreed upon terms of consolidation. Being unable to negotiate the \$10,000,000 of authorized issue of bonds of Union Company No. 1, except the \$4,000,000 subscribed for by the North American Company and the Citizens' Syndicate, unless the mortgage also included the property of the Missouri-Edison Company, and then being the owners of a majority of the stock of that company, they, on June 19, 1903, gave a supplemental mortgage covering the property of the Missouri-Edison Company, to secure the \$10,000,000 issue of bonds. That mortgage recited the contemplated consolidation of Union Company No. 1 with the Missouri-Edison Company. The mortgage of September 1, 1902, provided that, out of

the issue of \$10,000,000 of bonds, \$1,552,000 was to be used in the payment of the indebtedness of the Imperial Company, and \$2,-448,000 of the bonds were to be used to pay for such betterments, construction work, and purchases as Union Company No. 1 should make. It was not until after the giving of the supplemental mortgage before mentioned that Union Company No. 1 was enabled to negotiate its \$10,000,000 of bond issue, except the \$4,000,000 above stated. Thus it will be seen that the property of the Missouri-Edison Company was pledged as security June 19, 1903, to secure the funds which paid off the indebtedness of the Imperial Company, which had been assumed by Union Company No. 1, and to secure the funds with which the Ashley plant was completed. The Ashley plant was not completed and a going concern until some time during the year 1904.

Immediately after the giving of the supplemental mortgage, notice was given of a meeting of the stockholders of Missouri-Edison Company, to be held September 9, 1903, for the purpose of perfecting the consolidation. Appellants applied to the officers of the company for information as to the terms of the contemplated consolidation, the information was refused them, and they did not know the proposed terms until the meeting at which the consolidation took place. The consolidation of Union Company No. 1 and the Missouri-Edison Company resulted in the formation of Union Company No. 2, with a capital stock of \$10,000,000 divided into 100,000 shares of \$100 each, and the distribution of its stock by the agreement of consolidation was: For the stock of the Edison Company, one share of Union Company No. 2 and \$5 for every two shares of Edison preferred stock and one share of Union Company No. 2 stock and \$5 for every four shares of Edison common stock. For the stock of Union Company No. 1, one share of Union Company No. 2 for each share of the preferred and one share of Union Company No. 2 for every two shares of the common stock of Union Company No. 1. The remaining \$2,500,000 stock of Union Company No. 2 was, by the terms of the agreement of consolidation, to be held by the North American Company and the Mississippi Valley Trust Company as trustees for Union Company No. 2; in other words, as treasury stock. By this consolidation agreement the holders of Edison stock collectively received \$1,500,000 in stock of Union Company No. 2 and \$75,000 in cash, and the holders of stock of Union Company No. 1 received \$4,350,000 of the stock of Union Company No. 2.

The general basis of the consolidation of Union Company No. 1 and Edison Company was understood by the members of the Citizens' Syndicate and the North American Company prior to May 15, 1903. On June 19, 1903, the former directors of the Edison Company resigned and their places were filled by directors selected by the North American Company and the Citizens' Syndicate.

The master found, upon the question as to whether or not the defendants, in the consolidation between Union Company No. 1



and Edison Company, were actuated by fraudulent intent and purpose, as follows:

"The finding on this issue is controlled almost entirely by the finding as to the relative value of the two properties. If those values are as alleged in the bill, then, in view of the fact that the basis of the consolidation, though known as early as June, was suppressed until September 9, 1903, there would be sufficient ground for a finding of fraudulent intent. On the other hand, if the relative values coincide exactly or approximately with the basis of the consolidation, there is no room for such a finding."

The master found that the property of Union Company No. 1, aside from the Ashley plant, and the property of the Edison Company were equal in value, and this, we think, fully borne out by the testimony, as it appears that, for the year ending August 31, 1903, the earnings of the Edison Company were \$794,842.91, the cost of operation \$393,394.42, or 49½ per cent. of the gross earnings; that the income of Union Company No. 1 was \$562,265.29, operating expenses \$278,359, or 49½ per cent. of the gross receipts. These figures, the master found, represented the relative efficiency of the two properties. Union Company No. 1 and the Edison Company were, as we have seen, going concerns, and hence each had a potential value. The value of the Ashley street plant was practically all prospective. As a single unit it had no franchise, no good will, no customers. It had been contemplated to erect the Ashley street plant with a capacity of 12,000 kilowatts. Some work had been done upon the Ashley street plant, but the inability of Union Company No. 1 to negotiate its bonds, before giving the supplemental mortgage in June upon the Edison property, rendered it impossible for it to complete the construction of the plant until after the Edison property was pledged for that purpose. The plan for the Ashley street plant was changed and enlarged to one of 36,000 kilowatts.

The master, in his findings, we think, fell into an error in treating the Ashley street plant as having a large potential value, based upon the possibilities which would result upon its completion and operation, and giving all of this benefit to Union Company No. 1. He entirely ignores the fact that the construction of the Ashley street plant, with all its future possibilities, was only made possible by pledging the property of the Edison Company, and hence the Edison Company was entitled to an equal share of a large part of the value of the Ashley street plant. Had the same amount of money, derived from a mortgage of the properties of both the Union Company and the Edison Company, been applied to enlarging or constructing a new plant for the Edison Company, it is very evident that the parties would not have thought for a moment of crediting the entire value, actual and potential, of such structure, wholly to the Edison Company. To credit Union Company No. 1 with a value based upon the future possibilities of the Ashley street plant was both fallacious and inequitable.

The value of the tangible property of the Edison Company was fixed by an appraisalment; that of Union Company No. 1 was simply assumed. The master found difficulty in making, from the evi-

dence, an accurate valuation of the properties. By a careful reading of the testimony, we appreciate the difficulty in that respect. But the defendants, upon acquiring the Edison property in the consolidation, opened books as of January 1, 1904, less than four months after the consolidation, and fixed the respective values of the properties. This valuation, made by the defendants upon their books, was a representation by them of the respective values of the property, and they cannot complain of its binding effect, in the absence of more definite and specific evidence of values. The values so stated by defendants were as follows: The tangible assets of the Edison Company, \$2,905,142.97; the intangible assets, franchises, and good will, \$3,005,168.20; or a total of \$5,910,311.17. The tangible assets of Union Company No. 1, including the Ashley street plant, \$3,436,442.04; the intangible assets, franchises, and good will \$4,495,935.02. Of these intangible assets of Union Company No. 1, \$2,075,000 was credited to the Ashley street plant, thus fixing the relative value of the two plants, with all the estimated assets, both tangible and intangible, of the Ashley street plant credited to Union Company No. 1, as 57 per cent. to Union Company No. 1 and 43 per cent. to the Edison Company. At the date of the consolidation the bonded indebtedness of the Missouri-Edison Company was \$4,000,000, and that of Union Company No. 1 \$4,000,000; the latter being the \$4,000,000 bonds taken by the North American Company and the Citizens' Syndicate. The distribution, as actually made, was, as the master finds, substantially at the ratio of three to one. We cannot resist the conclusion that, in the distribution of the stock of Union Company No. 2 among the stockholders of Union Company No. 1 and the Edison Company, such distribution was so grossly unjust, and, considering the fact that the holders of the majority of the stock of the Edison Company were the sole stockholders of Union Company No. 1, that they fixed and determined the basis of distribution, and were the beneficiaries of the inequality, that their action in that regard was a breach of their trust and a fraud upon the minority stockholders of the Edison Company. These views require that the decree be reversed.

The decree is accordingly reversed, and the case is remanded to the court below, with instructions to ascertain the value of the property of Union Company No. 2 immediately after its consolidation, to assign 43 per cent. of that value to the Edison Company, to find the value of the stock of the appellants on that basis, and to enter a decree to rehabilitate the Edison Company, or that the appellants have a lien upon the property of Union Company No. 2 for the value of their stock and interest thereon from the date of the consolidation, and the costs of this suit, and that that lien be foreclosed, or for such other permissible relief in equity as to the court below shall seem meet and effective to satisfy the claim of the appellants, unless within a short day, named by the court, the defendants shall pay to the appellants the said value of their stock, and interest thereon from the date of the consolidation, and the costs of this suit.

## E. H. ROLLINS &amp; SONS v. BOARD OF COM'RS OF GRAND COUNTY.

(Circuit Court of Appeals, Eighth Circuit. August 2, 1912.)

No. 3,459.

## 1. LIMITATION OF ACTIONS (§ 48\*)—COUNTY WARRANTS—ACCRUAL OF RIGHT.

Limitation does not begin to run against a suit to enforce payment of county warrants, which, under the statute, are payable in the order of their registration, subject to a provision that such warrants shall be receivable for taxes, until there is sufficient money in the treasury applicable thereto to pay such warrant.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 259-265, 351; Dec. Dig. § 48.\*]

## 2. COUNTIES (§ 170\*)—WARRANTS—SUIT TO ENFORCE PAYMENT—PAYMENT.

A statutory provision which is in force at the time county warrants are issued, that they shall be paid in the order of their presentation and registration, creates a contract for precedence with a warrant holder which cannot be impaired by subsequent legislation providing that only a certain part of the tax collected each year for current expenses shall be applied to the payment of outstanding warrants; and a warrant holder may maintain a suit in equity to enjoin the county from refusing to apply the taxes in accordance with the contract.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 256-259; Dec. Dig. § 170.\*]

## 3. WORDS AND PHRASES—"BUT."

The word "but" is defined as "except"; "on the contrary"; "yet" or "still," as a word of limitation (citing *Words and Phrases*, vol. 1, p. 926).

Appeal from the Circuit Court of the United States for the District of Colorado.

Suit in equity by E. H. Rollins & Sons, a corporation, against the Board of Commissioners of Grand County, Colo. Decree for defendant, and complainant appeals. Reversed.

Horace N. Hawkins and Stephen W. Ryan, for appellant.

Jesse R. Allphin (Benjamin C. Hilliard, on the brief), for appellee.

Before ADAMS and SMITH, Circuit Judges, and REED, District Judge.

SMITH, Circuit Judge. The complainant, a citizen of Maine, filed its bill against the defendant, a municipal corporation in the state of Colorado, alleging that it was the owner and holder of 62 county warrants of Grand county, issued at various dates from October 3, 1882, to January 8, 1890, amounting, without interest, to \$2,007.13; that each of said warrants was presented for payment to the county treasurer of said county, not paid for want of funds, and duly registered. The bill further charges that none of said warrants have ever been paid, and alleges that at the time of the issuance thereof, and each of them, the respondent was required to levy upon the taxable property of the county a sum not in excess of 10 mills of the total value thereof with which to produce a fund to redeem the said warrants; that said tax was regularly

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

levied down to 1890, but that for the years 1891 to 1894, inclusive, but 3 mills was applied to the redemption of the outstanding warrants of the class and character of the complainant's, and that commencing with the year 1895, and ever since that time, the defendants levied a tax of 5 mills on each and every dollar of valuation; that the county has received county warrants, without reference to the date of their registration, in payment of taxes; that the amount collected since the year 1891 by the 3 and 5 mill levies has been scarcely sufficient to pay the interest upon the warrant debt of the respondent; that the complainant is not entitled to execution against the respondent, and a mere judgment would therefore be unavailing, and complainant prays:

(a) That a judgment may be rendered herein for the face of your orator's warrants and the accrued interest thereon up to and including the date of the rendition of said judgment.

(b) That a master in chancery be appointed to take an account of the warrants outstanding of the respondent county, together with the date of the registration of the same, to the end that it may be determined what amount of warrants have been received in payment of taxes, or otherwise, without regard to the order of their registration, thereby impairing the obligation of the warrants of your orator.

(c) That said master may report to your honors at what time and when your orator's warrants would have been paid in due course but for the unlawful diversion of said funds by the redemption of warrants received in payment for taxes.

(d) That the said master report to your honors what fund would have been produced by the proper levy of taxes to pay the warrants of your orator and others similarly situated since the year 1890, if such proper levies had been made, and that, in that connection, he inform your honors by his report what levy would be necessary to produce a fund upon the present valuation which would be equivalent to the fund which would have been produced upon the former valuation, had such levies been duly and in due time made and collected.

(e) That a writ of injunction be issued against the respondent to restrain it from the further diversion of funds until the judgment herein to be rendered shall have been fully paid in accordance with the date of the registration of the warrants upon which said judgment is to be founded.

(f) That a writ of injunction having the force and effect of a writ of mandamus may be issued out of this honorable court, commanding the respondent to make such proper levies upon the present assessed valuation of Grand county as will restore your orator and all others similarly situated to the position that they would have been in, as nearly as may be, but for the wrongs and grievances herein complained of.

(g) That, from time to time, such other and further orders, general and specific, may be made by your honors as will effectuate the object and purposes for which this suit is brought, and that

your orator may have such writs, processes, and other aids of the court as may, from time to time, be found necessary to accomplish that purpose.

(h) For the costs of this suit.

(i) And for all such other, further, and general relief as to a court of equity may seem meet in the premises.

To this bill the respondent filed a demurrer, as follows:

"IV. That it appears by said bill of complaint, and from the allegations therein, that the right of action, if any, set up in said bill did not accrue, if it accrued at all, to said complainant within three years before the bringing of this suit, and that complainant's right to bring and maintain said action was, long prior to the bringing of said suit, barred by the provisions of section 4066 of the Revised Statutes of 1908 of the state of Colorado; the same being section 2168 of the Revised Statutes of 1883, and section 1676 of the General Laws of 1877, of the state of Colorado.

"V. That it appears by the said bill, and from the allegations therein, that the right of action, if any, set up in said bill did not accrue, if it accrued at all, to the said complainant within six years before the bringing of this suit, and complainant's right to bring and maintain said action was, long prior to the bringing of said suit, barred by the provision of section 4061 of the 1908 Revised Statutes of the state of Colorado; the same being section 2163 of the Revised Statutes of 1883, and section 1671 of the General Laws of 1877, of the state of Colorado.

"VI. That it appears by said bill of complaint and the allegations therein that the complainant and its assignors had full knowledge of the matters and facts complained of and set up in said bill, to wit, that the proper officers of said Grand county, Colorado, had committed the wrongs and injuries complained of, and had failed and refused, and were intending to continue such failure and refusal, to do the matters and things now sought to be enjoined upon them by complainant for more than 18 years, and that it does appear from the facts stated in said bill of complaint that complainant and its assignors did not diligently avail themselves of all, or any, of their legal remedies provided by law in such case; and it does appear from the facts stated in said bill of complaint that complainant and its assignors by their laches, had lost their right to such remedies long prior to the institution of this suit, and that the facts stated in said bill of complaint are not sufficient, in equity, to relieve said complainant and its assignors from their laches, and that, according to the rules and practices of courts of equity, it would now be inequitable and against good conscience to grant the complainant the relief prayed for in said bill of complaint, or any relief whatever.

"VII. The respondent further demurs specially to those parts and portions of said bill complaining of the failure to collect taxes in cash, and the diversion and misapplication of the funds and moneys of said respondent county, during each and all the years from 1882 to 1890, inclusive, for that it appears from the allegations in said bill that during each and all of said years said complainant and its assignors had a plain, adequate, and complete remedy at law by writ of mandamus to compel the treasurer and other proper officers of said Grand county to collect the taxes during each and all of said years in cash, and to apply the same to the payment of the indebtedness of said respondent county in the manner required by law, as alleged in the bill; and that said complainant and its assignors, with full knowledge of the diversion and misapplication of said funds and moneys, did not at any time during all such years 1882 to 1890, inclusive, or at any time, diligently, or at all, avail themselves of said legal remedy by writ of mandamus, or otherwise, to compel said treasurer and other officers of said respondent county to discharge their legal duties in the premises; and that, according to the rules and practices of courts of equity, it would now be inequitable and against good conscience to grant complainant the relief prayed for in the bill of complaint—that is, to levy and collect additional taxes for the years 1882 to 1890, inclusive—or, to grant complainant any relief whatever on account of said diversion and misapplication of said funds and moneys during said years.

"VIII. Respondent demurs specially to those parts and portions of said bill of complaint complaining of the failure and neglect of the proper officers of said respondent county to levy and collect certain taxes for the year 1891, and hitherto, as alleged in said bill of complaint, for that it appears from the allegations in said bill that during each and all of said years said complainant and its assignors had a plain, adequate, and complete remedy at law by writ of mandamus to compel and require said officers to levy and collect said taxes during each and all of said years, and to apply the same to the payment of the indebtedness of said Grand county, all as required by law, as alleged in said bill of complaint, and that with full knowledge of the fact that said officers in said year (1891) had failed and refused to levy said taxes, and then and there intended to continue such failure and refusal, and did so continue to fail to make said levies during each and all of said years subsequent to the year 1891; and that said complainant and its assignors did not at any time during the said year 1891, nor during any of said years subsequent thereto, or at any time, avail themselves of said legal remedy by writ of mandamus, or otherwise, compel said officers of said respondent county to discharge their duties in the premises, and to make said levies; and that, according to the rules and practices of courts of equity, it would now be inequitable and against good conscience to grant the relief prayed for in the bill, requiring said additional levy of taxes for said year 1891 and hitherto, or to grant complainant any relief whatever.

"IX. Respondent further demurs to said bill of complaint, for that it appears in the allegations, matters, and facts stated in said bill that said complainant has had, during all the years from the year 1882 and hitherto, a plain, adequate, and complete remedy at law by writ of mandamus to compel and require the proper officers of said Grand county to levy and collect all lawful taxes and apply the same, when collected, to the payment of the indebtedness of said Grand county, all as is required by the laws and statutes of the state of Colorado.

"X. Respondent demurs specially to those parts and portions of said bill charging and complaining that respondent has, since the year 1890, applied to the payment of said prior outstanding and unpaid warrants only the revenue derived from the special 3-mill levy for the years 1891, 1892, 1893, and 1894, and only the revenue derived from said special 5-mill levy for the year 1895, and subsequent years, for that it does not appear that the respondent, through its proper officers, did not, for each and all of said years, to wit, for the year 1891 and hitherto, in addition to said special levies, collect annually 10 mills or more for each and every dollar of taxable property of said respondent county for ordinary county revenue, as provided and authorized by the statutes of the state of Colorado referred to in said bill of complaint, and it clearly appearing from the allegations, matters, and facts set forth in said bill of complaint that all such revenues levied and collected for ordinary county revenue for each and all of said years might have been applied to the payment of said prior outstanding and unpaid warrants owned by complainant and its assignors, and all others similarly situated, and that the application of such revenue to the payment of said warrants could have been compelled and coerced by a writ of mandamus against the proper officers of said respondent county; and the allegations of said bill wholly fail to show that complainant and its assignors, or any other person similarly situated, during any of said years, or at any time, sought by writ of mandamus, or otherwise, to compel or coerce said officers of said respondent county to apply said revenue to the payment of said warrants.

"XI. The respondent further demurs to said bill, for that it appears from the allegations, matters, and facts stated in said bill of complaint that prior to the year 1891 said respondent county had become indebted in a very large amount, evidenced by its then outstanding and unpaid county orders or warrants, and that in said year 1891 [Laws 1891, p. 112, § 4] the Legislature of the state of Colorado duly enacted a statute requiring the respondent county to levy a special tax of 3 mills on each and every dollar of the taxable property of said county, to be exclusively applied to the payment of said prior outstanding and unpaid warrants, and that thereafter, in the year 1893 [Laws 1893, p. 100], said Legislature of the state of Colorado amended said

prior statute by further enactment that there should be thereafter levied each year 5 mills on each and every dollar of the taxable property of said respondent county, to be exclusively applied to the payment of said prior outstanding and unpaid warrants, and that the respondent has faithfully complied with each and all of said statutes, and has made said levies during each and all of said years, and applied the moneys derived therefrom to the payment of said warrants in the order of their registration, all as alleged in the bill of complaint. It also clearly appears from said bill that said complainant and its assignors, and all others similarly situated, ever since the year 1891, acquiesced in said method and manner of payment of said warrants, as authorized and directed by the Legislature of the state of Colorado by said statutes of 1891 and 1893, and that complainant and its assignors, and all others similarly situated, have, since the year 1891, received and accepted payment of said warrants, in the order of their registration, from the moneys and funds derived from the taxes collected by respondent under and by virtue of said levies of 3 and 5 mills annually, all as alleged in said bill of complaint since the year 1891, and that the complainant and all others similarly situated are estopped from now claiming that the Legislature of the state of Colorado was without power or authority to enact said statutes of 1891 and 1893 providing for the payment of said warrants by said special levies of taxes, as directed by said statutes, and as alleged in the bill of complaint.

"XII. And respondent further demurs to said bill of complaint, for that it clearly appears from the allegations of said bill that, had said complainant and its assignors used due diligence by availing themselves of their legal remedies, said warrants would long since have been paid, and that said complainant and its assignors have, by their laches, long since lost all legal or equitable right to coerce and command the respondent county to make additional levies of taxes on the present assessed valuation of the respondent county, for the purpose of supplying or producing a fund equivalent to the fund which would have been produced upon former valuation for prior years, had proper levies on such former valuations of said prior years been duly made and collected as prayed for in the bill of complaint.

"XIII. Respondent further demurs to said bill of complaint, for that said bill of complaint does not state any matters entitling complainant to the relief prayed for therein; nor are the facts therein stated sufficient to entitle the complainant to any relief in equity against the respondent."

The demurrer was sustained, and, the complainant electing to stand on its bill, the same was dismissed, and it appeals.

In the view taken in this case, it will only be necessary to consider at length one question, and that arises under paragraph (e) of the complainant's prayer:

"That a writ of injunction be issued against the respondent to restrain it from the further diversion of funds until the judgment herein to be rendered shall have been fully paid in accordance with the date of the registration of the warrants upon which such judgment is to be founded."

When these warrants were issued, the laws of Colorado contained the following:

"Colorado General Laws of 1877.

"Act relating to county government.

"Sec. 533 [p. 244]. County orders, properly attested, shall be entitled to a preference as to payment according to the order of time in which they may be presented to the county treasurer; but where two or more orders are presented at the same time, precedence shall be given to the order of the oldest date, but every county treasurer shall receive in payment of county taxes, county orders issued in said county, which may be presented in payment for such county taxes."

"Sec. 540 [p. 246]. Every fund in the hands of the county treasurer for disbursement shall be paid out in the order in which the orders drawn thereon, and payable out of the same, shall be presented for payment."

"Sec. 2245 [p. 742]. There shall be levied and assessed upon taxable, real and personal property within this state in each year the following taxes: For ordinary county revenue, including the support of the poor, not more than ten mills on the dollar."

[1] No claim is made that complainant's warrants are themselves barred by the statute of limitations, though the claim is made that much of the relief sought is so barred. As, under the law, the warrants were payable in the order of their registration, subject to the provision as to the receipt of warrants for taxes, and under the allegations there has been no time when the money in the treasury was sufficient to pay them and prior orders, the statute of limitations has not yet commenced to run against them.

[2] In 1885 the Legislature of Colorado made county taxes payable in cash. As it will hereafter appear, the Supreme Court of that state declared this enactment unconstitutional, in so far as it denied the privilege of using warrants issued prior to its enactment for that purpose.

In 1891 the Legislature passed the following law:

"Colorado Session Laws of 1891 (pp. 111, 112).

"An act to require the affairs of the counties of this state to be conducted from the revenues derived from taxation, and to prevent the expenses of any county from exceeding its revenues.

"Section 1. The fiscal year of each county in the state of Colorado shall commence on the first day of January in each year. The board of county commissioners of each county in this state shall, within the last quarter of each fiscal year, and at the same time that the annual levy of taxes is made, pass a resolution to be termed the annual appropriation resolution for the next fiscal year, in which said board shall appropriate such sum, or sums, of money as may be deemed necessary to defray all necessary expenses and liabilities of such county for the next fiscal year, and in such resolution shall specify the objects and purposes for which such appropriations are made, and the amount appropriated for each object or purpose. No further appropriation shall be made at any other time within such fiscal year, nor shall the total amount appropriated exceed the probable amount of revenue that will be collected during the fiscal year."

"Sec. 4. The board of county commissioners of each county in the state of Colorado shall levy and assess upon the taxable real and personal property within their county, in each year, the following taxes: For ordinary county revenue such rate as will be sufficient to defray the ordinary county expenses; for the purpose of paying outstanding warrants and other floating indebtedness, not more than three mills on the dollar.

"Sec. 5. It shall be the duty of the county treasurer to apportion and keep all taxes collected by him in the several funds for which the taxes were levied, as above provided, and it shall not be lawful to use the moneys belonging to any fund, for the purpose of paying warrants drawn, or which properly should have been drawn upon some other fund. \* \* \*

"(Approved April 1, 1891.)"

And in 1893 the Legislature enacted the following:

"Colorado Session Laws of 1893.

"Section 1 [p. 100]. It shall be the duty of the board of county commissioners of any county of this state which has, or shall have, any unliquidated and unpaid county warrants or orders, drawn on any fund, for the payments of which there are no funds in the county treasury of such county, and to



pay which the incoming taxes already levied are insufficient, at the same time other county taxes are annually levied for the current year, in addition to the other taxes provided by law, to levy a sufficient tax, not exceeding five mills on the dollar of assessed property, as shown by the assessment roll of such county of the current year, for the purpose of creating a 'Special Fund' for the liquidation, payment and redemption of all such unliquidated and unpaid warrants or orders. A like levy shall be so made at such time, annually, until all of such unliquidated and unpaid warrants or orders shall be fully liquidated, paid and redeemed, principal and interest, as provided in this act.

"Sec. 2 [p. 101]. After the levy of such special tax all such warrants or orders of such county issued prior to such levy, unliquidated and unpaid, for the payment of which no funds are at hand in the county treasury, and no effective provision made for their payment out of other taxes already levied, shall be paid exclusively from the fund hereby created and appropriated, which shall be known and carried on the books of the county treasurer as 'The Redemption Fund for . . . . Fund Warrants,' naming the fund on which the warrants liquidated and redeemed were originally drawn, and such 'Redemption Fund' shall be used exclusively for such liquidation and redemption, and for no other purpose whatever."

The county, under all these laws, has authority to levy up to 10 mills on the dollar for ordinary county revenue. There is therefore no necessity to consider what would be the situation if it did not have the power to levy 10 mills for that purpose. The question at once arises, as when the plaintiff's warrants were issued the county was expressly empowered to levy, not to exceed 10 mills, for ordinary expenses, and it issued these warrants under the law which provided that they should be paid in the order of registration, could the Legislature simply provide that only 3 or 5 mills should be applied on the old warrants, and not 10, as provided by the law under which they were issued?

In *Stryker v. Board of Commissioners of Grand County*, 77 Fed. 567, 578, 23 C. C. A. 286, 296, it was said:

"It may be conceded that because the petitioner's warrants, now merged in a judgment, were issued and registered prior to the repeal of said section, such repeal could not operate to deprive him of the remedy for their collection which was provided thereby, unless the repealing act provided an equally efficacious remedy."

The Supreme Court of Colorado, in *People v. Hall*, 8 Colo. 485, 9 Pac. 34, expressly held that, where the general law of the state in force at the time of the issuance of a warrant provided it should be receivable for taxes, a subsequent repeal of such law was in conflict with section 10 of article 1 of the federal Constitution:

"No state \* \* \* shall pass any \* \* \* law impairing the obligation of contracts"—

and a similar provision of the state Constitution of Colorado. This was followed in *People v. Austin*, 11 Colo. 134, 17 Pac. 485.

It will be borne in mind that section 533 of the Colorado General Laws of 1877 provided that:

"County orders, properly attested, shall be entitled to a preference as to payment according to the order of time in which they may be presented to the county treasurer \* \* \* but every county treasurer shall receive in payment of county taxes, county orders issued in said county, which may be presented in payment for such county taxes."

[3] The word "but" is defined in volume 1, Words and Phrases, page 926, as "except"; "on the contrary"; "yet" or "still," as a word of limitation.

How absurd it would be to assume the statute in general was not a part of the warrants issued while it was in force, but a mere exception, or words of limitation became incorporated in every such warrant.

While the statutes under consideration are Colorado laws, they did not originate there. As early as March 27, 1850 (St. 1850, c. 42), the California Legislature passed a law providing for the payment of warrants in the order of registration. In Iowa the provision that county warrants should be received for county taxes appears in section 489 of the Code of 1851; and the provision for stamping warrants, not paid for want of funds, appears in section 153 of the Code of 1851. In that state the provision for payment by counties in the order of registration was not enacted until April 7, 1886, in chapter 84 of the Acts of the Twenty-First General Assembly; and this provision was extended to cities by section 2 of chapter 3 of the Acts of the Twenty-Second General Assembly, passed in 1888. The same General Assembly passed a law providing for an annual appropriation ordinance, intended to put cities on a cash basis. At that time the city of Council Bluffs had outstanding many thousands of dollars of city warrants, the overlap of former years; and to pay the expenses of the city from the taxes of that year would of necessity indefinitely defer the payment of this outstanding indebtedness. Council Bluffs was organized as a city of the first class in March, 1882, and at the solicitation of the city there was added to this statute a provision that it should not apply to cities of the first class organized since 1881. In 1897, in a general revision of the statutes of the state, this exception of Council Bluffs was omitted from this statute. Subdivision 16, § 668, Code of 1897. The city clerk brought suit to compel the payment of his warrant when there were outstanding some \$140,000 of warrants issued since 1888, but prior to the adoption of the Revision. The Supreme Court said, in *Phillips v. Reed*, 109 Iowa, 188, 80 N. W. 347, that:

"The effect of the requirement that warrants shall be paid in the order of their presentation is to create a contract for precedence with the warrant holders, which could not be impaired by subsequent legislation."

It cites as sustaining this *People v. May* (Hall) 8 Colo. 485, 9 Pac. 34; *People v. Austin*, 11 Colo. 134, 17 Pac. 485; *Taylor v. Brooks*, 5 Cal. 332; *Western Savings Fund Society v. Philadelphia*, 31 Pa. 175, 72 Am. Dec. 730.

In Washington the city ordinance of Tacoma provided for payment of warrants in the order of their number and date, and subsequently it was sought, without reducing taxation, to divert the proceeds thereof to other funds than the general fund on which a warrant was drawn, and it was held to impair the obligation of the contract with the warrant holder. *Eidemiller v. City of Tacoma*, 14 Wash. 376, 44 Pac. 877. See, also, authorities cited in

36 Am. Dig., Municipal Corporations, 1890; 14 Decennial Dig., Municipal Corporations, 904 (2); 28 Cyc. 1572.

"It is within the power of the Legislature to prescribe the order of payment of warrants, e. g., that they be paid in the order of issuance or the order of presentation and registration; and a statutory provision which is in force at the time when warrants are issued, that they shall be paid in a prescribed manner—e. g., the order of presentation and registration—creates a contract for precedence with the warrant holder which cannot be impaired by subsequent legislation." Dillon on Municipal Corporations (5th Ed.) § 859.

It is settled by authority that where the law, at the time of the issuance of a warrant, provides for its payment in the order of its presentation this becomes a part of the contract, and cannot be altered or changed, at least without an equally safe, certain, and speedy provision for payment. Such a proposition would not seem to require authorities to sustain it. Usually warrants purport to be for immediate payment, but where the county or city is in an embarrassed condition such payment cannot be made; and when the Legislature provides they shall be paid in the order of the presentation and registration this is equivalent to inserting in each warrant, "Payable at any time when the cash in the fund is sufficient to pay this and all previously presented and registered warrants," and in law fixes the date of payment. When, therefore, the Legislature sees fit, definitely or indefinitely, to change the date of maturity, it impairs the obligation of the contract, and that it cannot do consistently with the provision of the Constitution of the United States. If ever since 1891, a period of more than 20 years, the respondent has refused to apply 10 mills annually to the payment of the warrants, but has paid 3 or 5 mills, it is clearly the right of the complainant to have it enjoined from such conduct in the future; and such injunction would be equitable relief to which it would be entitled in this action.

Much of the rest of the relief sought cannot be granted. The law provided for the receipt of warrants in payment of taxes at the time these warrants were issued, and did not provide that, when thus used, they must be used in the order of their registration. The Supreme Court of Colorado has declared that it is unconstitutional to deprive outstanding warrants of this privilege existing at the time of their issuance. No relief can therefore be granted to the complainant on account of such receipt.

There is no allegation in the bill that 10 mills have not been annually levied, collected, and disbursed for ordinary county expenses. There is therefore nothing to sustain the plea for an accounting upon that subject; nor are there any allegations in the bill to warrant an injunction in the nature of a writ of mandamus as prayed. *Stryker v. Board of Commissioners*, 77 Fed. 567, 23 C. C. A. 286.

For the reasons indicated, the decree is reversed, and the case is remanded, with directions for further proceedings in accordance with the views expressed in this opinion.

## ELLIS v. RAFFERTY.

(Circuit Court of Appeals, Third Circuit. September 25, 1912.)

No. 1,615.

**BANKRUPTCY (§ 318\*)—CLAIMS—PURCHASE OF BANKRUPT'S PROPERTY—TAXES AND WATER RENTS—LEASES.**

A bankrupt had a long lease of the business premises occupied by it, which provided that the landlord might terminate it in case of the tenant's bankruptcy, and also required that the tenant pay city and county taxes and water rents as "additional rent." Certain prospective purchasers, in order to induce a receiver to sell the bankrupt's good will and stock in trade, entered into a combination to purchase the same, and falsely informed the receiver that the landlord had granted a new lease. The bid for the property provided that, in case of sale, the estate should be released from the payment of the "rent" on and after the date the sale was consummated. The bid having been accepted, the actual purchaser took possession, and later was compelled to accept a new lease from the landlord on terms less favorable than the old one, and, in order to obtain the same, was required to pay the accrued taxes and water rents which accrued after the sale; the landlord agreeing that he would claim reimbursement therefor for the purchaser's benefit from the bankrupt's estate. *Held* that, under the purchaser's bid, the estate was not liable to reimburse him for the taxes and water rents so paid, and that the landlord was therefore not entitled to the allowance of such claim.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 481, 482; Dec. Dig. § 318.\*]

Appeal from the District Court of the United States for the Western District of Pennsylvania.

Claim of Gilbert T. Rafferty for taxes and water rents, presented in the interest of M. L. Roth, purchaser of the bankrupt's property, to which A. C. Ellis, trustee of the Boyd Clothing & Suit Company, filed objections. From a decree overruling the referee's finding disallowing the claim, and allowing the same, the trustee appeals. Reversed and remanded, with instructions.

Charles H. Sachs, of Pittsburgh, Pa., for appellant.

Joseph Stadtfeld, of Pittsburgh, Pa., for appellee.

Before GRAY, Circuit Judge, and McPHERSON and RELLSTAB, District Judges.

RELLSTAB, District Judge. The appellant is the trustee of the estate of the Boyd Clothing & Suit Company (corporation), and the appellee is the landlord of the premises which were occupied by the bankrupt. The question raised by the record is whether the appellee is entitled to recover from the estate the sum of \$2,646.31, a part of the taxes assessed against said premises for the year 1911, and the sum of \$158.32, water rent affecting the same premises.

It is conceded that such claim is presented solely in the interest of Mr. M. L. Roth, the purchaser of the bankrupt's property, who paid such taxes and water rents as a condition to obtaining the lease for the premises. The referee disallowed the claim on the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ground that it had been paid by Roth pursuant to the agreement between him and the receiver as part consideration for the sale of the bankrupt's property. The District Court reversed the referee's findings, and allowed the claim on the ground that by the terms of the lease such taxes and water rents became due and owing by the bankrupt, and that the advances made by Roth in procuring the new lease were not as payment of such claim. It is also conceded that except for the transactions involving the sale of the bankrupt's property, and the making of a new lease between the purchaser thereof and the appellee, the latter's claim would have been a charge upon the estate.

At the time the petition in bankruptcy was filed—May 29, 1911—the bankrupt was in possession of the premises by virtue of a lease dated August 25, 1910, having an unexpired term of nearly 10 years, but forfeitable at the option of the landlord upon inter alia the filing of such a petition. In addition to the definite yearly rent reserved, payable monthly, this lease required the bankrupt to pay, inter alia, the water rent and the city and county taxes assessed against the leased premises, which charges, with others imposed upon the tenant, the lease referred to as "additional rent." The city taxes were to be paid on or before March 31st, and the county taxes on or before August 1st, in each year. No specific date was named for the payment of the water rent; the requirement in that behalf, as in regard to gas and electricity, being in the following language:

"This additional rent to be due and payable when from time to time such respective debts, claims and assessments shall become payable."

At the time of the filing of such petition the bankrupt had not paid the water rent claimed; but whether it was the entire rent for the current year, and when it was payable, does not appear. The taxes, under the city's regulations, were payable in two installments, one in March and the other in September. The bankrupt had paid the March installment, and, if that covered all the taxes payable in March according to the terms of the lease, the bankrupt had not defaulted in the payment of taxes.

The appellant, as receiver of the bankrupt's estate, was in possession of the leased premises and the bankrupt's property contained therein from May 31, 1911, until the 7th day of July following, when he sold the bankrupt's stock, fixtures, and good will to M. L. Roth for \$18,500. No bill of sale or other writing evidencing the transfer of title was given by the receiver, the title being transferred by a physical delivery made on the leased premises to which the receiver and purchaser had repaired on July 7, 1911, immediately following the court's confirmation of the receiver's acceptance of a private written bid, of which the following is a copy:

"A. C. Ellis Esq.,

July 7th, 1911.

"Receiver, 301 Renshaw Bldg., Pittsburgh, Pa.

"Dear Sir: We herewith submit an offer of eighteen thousand five hundred dollars (\$18,500) for the entire stock of merchandise, fixtures and good will

of the Boyd Clothing and Suit Company, at No. 221 Fifth Avenue, Pittsburgh, Pa., including all goods in storage, conditioned upon the same being accepted on or before July 7, 1911, the estate to be released from the payment of rent on and after the date of the confirmation of the sale to the undersigned.

"Respectfully yours,

Horn Bros."

The receiver did not know that Roth was to be the purchaser until after his acceptance of Horn Bros.' bid was confirmed. Previous to any negotiations for sale, Roth aided the members of the bankrupt corporation in an endeavor to effect a composition with its creditors. This failing, he and Horn Bros. became prospective purchasers. However, instead of acting independently and competing with each other, they entered into an agreement whereby only Horn Bros. were to bid, and who, in the event of securing an acceptance of their bid, were to turn it over to Roth for the consideration of \$1,000. In pursuance of such agreement, the attorney of Horn Bros. began negotiations with the receiver, and submitted several bids in their name. W. R. Boyd, the secretary of the bankrupt, was a party to this arrangement between Roth and Horn Bros. and the subsequent negotiations with the receiver for the purchase of such property. Boyd's identification with, and interest in, such combine, is well shown in the following excerpt from his testimony:

"Q. You were familiar with the purchase of the stock by Mr. Roth? A. I was.

"Q. How did you get your knowledge about it? A. I was there during the negotiations between them.

"Q. Between whom? A. Between Alpern, Horn Bros., Roth, my brother, and myself.

"Q. State what took place? A. Well, we were trying to buy the stock of goods belonging to the Boyd Clothing & Suit Company, and Mr. Roth offered to put up the money to buy it. We employed Alpern as attorney to make the negotiations with Mr. Ellis. We also agreed to pay Horn Bros. a certain fee, provided the sale was made—(interrupted). (Objected to as incompetent and irrelevant, as having no effect on the landlord's claim.) We made three different bids with Mr. Ellis for the goods, and he finally accepted \$18,500, and Mr. Roth gave his check for it."

Boyd's interest did not end with the sale, but continued until after Roth had obtained a new lease for the premises from the landlord. Horn Bros., it will be noted, made no offer to the receiver for the unexpired term of the lease, and the latter made no attempt to sell it. That such unexpired term was a valuable asset is established by the new lease subsequently entered into between Roth and the landlord, as it provided for a shorter term with increased rent, and that such asset might have inured to the benefit of the estate is properly inferable from the testimony of J. W. Stoner, attorney of the landlord, who, in response to the referee's questioning about the making of a new lease, testified as follows:

"Q. Did Mr. Roth make his application to continue the Boyd lease, or did you head that off, and state you would not do it? A. The application first made by Mr. Roth, together, however, with Boyd, was to continue the old Boyd lease.

"Q. And objection was made to that by you on behalf of Mr. Rafferty? A. Yes; but I may say, if your honor please, that we would have continued under the lease.

"Q. There were lengthy negotiations between Mr. Rafferty and Mr. Roth looking to the continuation of the old lease? A. Yes; between his agents."

During the negotiations for the sale of the property, the attorney for the bidder told the receiver that a lease had been signed for the premises; and the latter's failure to ascertain from the landlord whether he would forego his right to terminate the lease and permit a sale of the unexpired term would be inexplicable, save for such statement. This statement, it was subsequently learned, was not true so far as the landlord's signing was concerned, but it sufficiently accounts for the absence of any negotiations by the receiver to turn such unexpired term into an asset of the estate. That Roth, Boyd, and Horn Bros., as well as their attorney, fully expected to take over the premises under the old lease or under a new one upon favorable terms, is probable, else why their bargaining for the "good will" and the offer to release the estate from the payment of future rents? This "good will" would be seriously impaired, if not wholly destroyed, if the prospective purchaser could not continue the business on the leased premises, and the clause releasing the estate from the rents accruing after the sale would be a gratuitous burden upon the bidder if the latter did not take the bankrupt's place as tenant. Roth's expectation in this behalf, however, did not materialize, either in respect to continuing under the old lease or under a new one on as favorable terms. He continued in possession of the premises, however, for more than two months, making efforts to secure a new lease, and it was not until October 3, 1911, that he obtained it. This lease, as already observed, was for a much shorter term and at a considerably higher yearly rental than the one with the bankrupt. Whether in other respects it compared as favorably for the landlord as the old lease does not appear.

In the negotiations for the new lease, the landlord insisted as a condition for granting it at all, that Roth not only pay for the use of the premises from the time he took possession, at the rate of rent reserved, but also the amount of such September installment of city taxes and county taxes then past due, and the water rents as provided in the old lease. This, though strenuously opposed by Roth, was eventually acceded to, the landlord agreeing in consideration thereof to present a claim to the trustee for such taxes and water rents, and to turn over to Roth whatever he received from the estate on account thereof. Upon the payment of such moneys, the landlord gave Roth a writing which embodied a receipt of such payment and his said agreement in respect thereof, of which the following is a copy:

"\$6569.03.

Pgh., October 3, 1911.

"In full for rent of premises No. 221 Fifth avenue, Pittsburgh, from July 13th, 1911, to November 1st, 1911, and including the sum of \$2804.63 covering Sept. inst. city taxes 1911, county taxes 1911, and water rent 1911 for said premises. For the said latter sum of \$2804.63 I agree to file a claim in bankruptcy against the Boyd Clothing & Suit Company, former tenants of said building, and if collected, or to any extent collected, will repay the same to said M. L. Roth.

[Signed] G. T. Rafferty."

The claim now under consideration was presented pursuant to said agreement.

In our opinion the liability of the estate to pay this claim is not to be determined solely by the terms of the lease between the landlord and the bankrupt, but primarily by the terms of sale of the bankrupt's property, and, secondarily, by the attitude of the landlord in accepting the purchaser of such property as tenant in place of the bankrupt. As will presently be shown, neither the taxes nor water rents claimed can be said to have been due at the time the sale was made. The receiver did not have possession of the premises after the sale, and made no claim to the lease at or after such sale. That the payment of taxes and water rents came due before the landlord annulled the old lease by granting a new one, and that he could have successfully presented his claim for such taxes and water rent against the estate if he had not received the amount thereof from the new tenant, is not decisive, for he was paid such taxes and water rent by the new tenant, and as he is admittedly pressing this claim against the estate not for himself, but to reimburse Roth under the arrangement made with him when he, in the exercise of his option to terminate the old lease, granted a new one, the estate's liability to respond to such claim is to be measured by Roth's right thereto founded on the terms of his purchase, and not the agreement of the landlord. If Roth could not have directly maintained a claim for such moneys against the estate, he cannot receive the same indirectly. The receiver was not a party to such new lease nor to the arrangement concerning the payment of such taxes, and the estate cannot be bound thereby. However, it is bound to carry out the terms of the sale, and Roth's right to protection from the payment of such taxes and water rents under such terms will be considered, though he has seen fit to seek reimbursement, not on the ground that to protect his purchase from the estate he was compelled to pay what the estate should have paid under such terms, but on the ground that the landlord was entitled to it under his lease with the bankrupt.

The determining question, therefore, is, Was Roth under obligation to pay such taxes and water rents? If not, he should be reimbursed for the moneys paid on account thereof, for such payment was not voluntary, but forced, in order to protect his purchase of the good will of the bankrupt's business. We concur in the findings of both the referee and the District Court that Alpern in his negotiations with the receiver acted as the attorney for Roth as well as Horn Bros. Roth is therefore to be treated, not as an innocent purchaser taking over the property from Horn Bros. without knowledge of the terms of sale, but as one for whose benefit the bargaining took place, and he is bound by all its terms. The trustee says that he had not seen the lease, and knew nothing of its terms, and that at the time of sale he believed the estate owed the landlord only the rent for June and the first six days in July. In response to the question, "What were the terms of sale?" he replied: "Possession was to be given on the morning of the 7th of July, and the purchaser was to keep the estate free and harmless from any obligation of the leasehold from that time on." This statement is not contradicted by Alpern. On the contrary,



it is, in effect, corroborated by the latter's testimony, the written offer and the conduct of the purchaser before and after the sale. The purchase of the lease from the receiver was not considered. Alpern gives the reason for this in the following excerpt from his testimony:

"Q. Was the lease sold at that time? A. The lease was not sold.

"Q. Was there any agreement at all to give possession under that lease?

A. The reason that the lease was not sold was this: At the time negotiations were had with the receiver a lease had been signed by Messrs. Roth and Boyd for the same premises, and I so informed the receiver at the time we closed up, that a lease had been signed up. I don't know whether I told him Roth and Boyd had signed it, but I told him a lease had been signed.

"Q. But no lease had been signed by Mr. Rafferty? A. I understood not."

The bid, as already noted, is based on the idea that the purchaser is to take over the premises by an arrangement with the landlord. Boyd, who was acting in concert with Roth preliminary to and pending the negotiations with the receiver, and who, after the sale, was treated by the landlord in his dispossession notice, as a joint occupant with Roth of the premises, knew that the taxes and water charges in question were considered by the lease as rent, and that only the March installment of such taxes had been paid. Alpern, who had heard Boyd say that he had not paid all the taxes, testified that he did not know whether he told Horn that he (Alpern) understood the taxes were paid, but he thinks he "told Mr. Ellis (receiver) that the record showed that the taxes (September installment) were paid." He makes no answer to the inquiry made by the attorney for the landlord whether he or Horn made any agreement to pay the taxes, but under cross-examination recalls "that one of the inducements" held out to the receiver for his accepting the bid was "that the estate would be relieved of all liability under the lease with the exception of the rent up until the date that they were to take possession."

While rents do not ordinarily embrace taxes, there is no legal reason why the parties may not consider and include the payment of taxes, water charges, and municipal assessments generally in fixing the return to be made the landlord for the use of the premises. That the taxes and water rents were so treated in the lease to the bankrupt, and therein specifically referred to as "additional rents" has been shown, and that Roth and his attorney, as well as Boyd, knew that the payment of taxes and water rents were made rents in such lease, is not open to serious doubt. The prospective bidders, with Boyd, the bankrupt's secretary, as their adviser, were very desirous to get possession of the premises under the old lease. Its terms and conditions were, of course, well known to Boyd, and it is inconceivable that, in fixing the several bids submitted to the receiver, which were conditioned on releasing the estate from future rents, the exact rentals were not known and considered by the bidder. With this knowledge, the word "rents" in the bid included taxes and water rents, and the acceptance of the bid was conditioned on the purchaser paying all such taxes and water rents as well as the monthly installment of the specific yearly reservation that was to accrue from that date.

If the March installment of taxes paid by the bankrupt before the filing of the petition in bankruptcy is the March payment specified

in the lease, and which, in the absence of evidence to the contrary will be presumed, no taxes were payable by the receiver, as, both by the terms of the lease and the city regulations, the next installment would fall due after the sale, and by the undertaking of the purchaser, they were to be paid by him.

Concerning the water rents. The lease fixes no specific date when they were to be paid, and, as the testimony does not disclose whether the amount claimed covers the entire year or when due and payable, the claim in respect thereto must fail for want of proof. The combination entered into between Roth, Boyd, and Horn Bros. preliminary to purchasing the bankrupt's property had for its object the purchase of the bankrupt's property at less than its market value. It was engineered by concealing from the receiver the real purchaser, and accomplished by stifling competition, necessarily resulting to the disadvantage of the estate. The \$1,000 paid to Horn Bros. was not, as alleged, a profit derived from an advantageous bargain made with the receiver, but the price which the purchaser was willing to give for the greater benefit to be realized by him in getting rid of them as competitors for the property, and the inference is justified that such \$1,000 was but the minimum loss sustained by the estate in the sale. Furthermore, in carrying such scheme into effect, the estate probably lost an additional sum through the representation of the attorney that a lease had been signed for the premises. If the landlord had accepted Roth as his tenant under the terms of the old lease, as contemplated by the combine, the present claim would in all probability never have been heard from. That the landlord's refusal to co-operate with the bidder's expectation prevented the purchaser from getting all the anticipated benefits of the combination is no reason why the bidder should be relieved of the obligation of his bid. To allow this claim would not only be contrary to the intention of the parties, but, in the circumstances, an encouragement to similar stifling of competition in the sale of bankrupts' estates.

The decree of the District Court is reversed, and the cause remanded, with instructions to dismiss the claim.

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OTIS et al. v. PITTSBURGH-WESTMORELAND COAL CO.†

(Circuit Court of Appeals, Third Circuit. September 21, 1912.)

No. 1,608.

1. CONTRACTS (§ 170\*)—CONSTRUCTION—PRACTICAL CONSTRUCTION.

When, in the performance of a written contract, both parties give it a practical construction before any controversy arises, such construction, rather than its literal meaning, will prevail.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 753; Dec. Dig. § 170.\*]

2. CONTRACTS (§ 175\*)—CONSTRUCTION—PRACTICAL CONSTRUCTION—EVIDENCE.

Plaintiffs contracted to take and pay for \$25,000 of defendant's bonds on August 1, 1908, and a like amount on the 1st of each month thereafter at \$760 per bond and interest until the entire amount had been

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied.

taken, and were given the privilege of anticipating such monthly deliveries and payments for any and all of the \$250,000 of the issue, receiving time credit for as many monthly payments as were anticipated. Plaintiffs were then given the exclusive option to purchase additional bonds aggregating about \$1,250,000 on specified conditions as to price and commissions, the option to be forfeited if plaintiffs failed to take up or failed to pay for not less than \$25,000 in any one month. The contract further provided that the option deliveries of bonds thereunder were to succeed immediately the deliveries of the bonds purchased under the first paragraph, and that the conditions of anticipating deliveries under the option were to be the same as provided concerning the bonds purchased. Plaintiffs, without anticipating deliveries of the bonds sold outright, took and paid for them as provided, and on April 8, 1909, prior to the expiration of the time limited for the purchase of the bonds outright, bought an additional \$100,000 of bonds which they claimed anticipated monthly deliveries from June 1, 1909, to October 1, 1909, following. On August 24, 1909, plaintiffs requested further deliveries and were refused. *Held*, that the stipulation that deliveries of the option bonds should succeed immediately the deliveries of the bonds purchased under paragraph 1 was not to be given such literal interpretation as to prevent proof of practical construction of the contract before controversy arose; and hence evidence relating to the conduct of the parties which tended to show that it was intended that the right to anticipate deliveries attached to both classes of bonds, and that, if anticipations were made, whether of one class or the other, the requirement to take \$25,000 per month was suspended until such time as would have elapsed after the bonds had been taken in regular monthly installments, instead of in advance thereof, was admissible.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 766; Dec. Dig. § 175.\*]

In Error to the District Court of the United States for the West-ern District of Pennsylvania.

Action by Charles A. Otis and others against the Pittsburgh-Westmoreland Coal Company to recover damages for alleged breach of a contract for the sale of bonds. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Arthur O. Fording, of Pittsburgh, Pa. (Horace F. Baker, of Pittsburgh, Pa., and Squire, Sanders & Dempsey, of Cleveland, Ohio, on the brief), for plaintiffs in error.

George C. Bradshaw, of Pittsburgh, Pa. (Edward E. Robbins, of Greensburg, Pa., on the brief), for defendant in error.

Before GRAY, Circuit Judge, and RELLSTAB, District Judge.

RELLSTAB, District Judge. The plaintiffs in error brought suit to recover damages for the alleged breach of a written executory contract relating to the sale of defendant's bonds. The question presented by the writ of error is whether certain testimony offered by the plaintiffs was relevant and material to the issue made by the pleadings, and the answer primarily involves the interpretation of such contract. The contract bears date July 7, 1908, and, after providing for the sale of \$25,000 par value of bonds outright at a certain price, gives plaintiffs an option to purchase an additional number of like bonds at an increased price upon certain conditions. The alleged breach relates only to the sale of the op-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'y Indexes

tioned bonds, but a reference to some of the terms of the contract dealing with both classes of sales is necessary for a correct understanding of the controversy.

By paragraph 1 plaintiffs agreed to take and pay for \$25,000 of bonds on the 1st day of August, 1908, and a like amount on the 1st day of each month thereafter at \$760 per bond plus interest to date of delivery, until the entire amount had been taken, and were given the privilege of anticipating such deliveries in the following terms:

"Provided, however, that firm (plaintiffs) has the privilege of anticipating said monthly payments for any or all of said \$250,000.00, and in case firm anticipates payments, it is to receive credit for the length of time for as many monthly payments as it has anticipated."

By paragraph 2 plaintiffs were given the exclusive option to purchase additional bonds aggregating about \$1,250,000 upon the following conditions:

"Firm to secure the highest obtainable price for said bonds and to that end give their best skill and ability in making sale thereof; and for all of said bonds sold under this option by firm, coal company is to be credited with \$850.00 per bond, plus accrued interest to date of delivery; and after deducting \$30.00 commission per bond for firm, for selling the difference between the price for which the bonds are sold and said \$850.00 per bond is to be divided equally between coal company and firm, but provided, however, that all of bonds sold by firm, over and above \$900.00 per bond and interest, the commission therefor to be paid to the firm shall be \$20.00 per bond. Said option to firm, however, is to be forfeited and terminated when firm fails to take up and pay for not less than \$25,000 bonds in any one month, and upon the failure of firm to exercise its privilege and to take up and pay for \$25,000.00 bonds for any one month, the option hereby given to firm is to be terminated and become null and void, and each party is to be relieved from any claim or damage against the other. The option herein granted and the deliveries of bonds in this paragraph recited are to succeed immediately the deliveries of the bonds purchased, mentioned in paragraph 1 hereof. The conditions of anticipating deliveries under the option are to be the same as those recited in paragraph 1 before mentioned."

The recital here referred to is the anticipation clause hereinbefore quoted.

And by paragraph 6 "firm agrees that in the sale of said \$250,000 bonds, which it purchases outright as herein provided, it will endeavor to secure the highest obtainable price therefor, in the same manner as for bonds which firm undertakes to sell under the option herein included, and that in fixing the price at which the same are to be offered it will consult with said coal company."

The plaintiffs, without anticipating deliveries of the bonds sold outright, took and paid for such bonds in the installments provided for by the contract. On April 8, 1909, prior to the expiration of the time limited for the purchase of the bonds sold outright, and before the last block of such bonds was taken, plaintiffs bought an additional \$100,000 of bonds from defendant, and which in their statement of claim they declare were purchased in the exercise of such option, and that thereby they anticipated the monthly deliveries and payments due under the terms of such option "from June 1, 1909, to October 1, 1909, inclusive, until which latter date the

plaintiffs were not called upon to take up and pay for any further bonds under the said option, because of the said anticipation." In such statement of claim, they further declare that before said last-mentioned date, to wit, on or about August 24, 1909, plaintiffs "requested of the defendant that it deliver to them \$25,000 par value of the said remaining bonds covered by the said option, and they offered to take up and pay for the same in the manner and at the price provided for in the said option, but the defendant refused to deliver the said \$25,000, par value of bonds, and notified plaintiffs that it would not carry out the terms of the said contract. The plaintiffs made repeated subsequent demands for bonds covered by the said option, to wit, on or about September 28, 1909, October 28, 1909, November 26, 1909, January 31, 1910, February 28, 1910, March 29, 1910, and other dates, with a view of taking them up and paying for them as provided therein, but the defendant neglected and refused, and still neglects and refuses, to furnish the said bonds or any of them as it was obligated to do."

The defendant in its affidavit of defense, in substance, inter alia, admits the performance by plaintiffs of their undertaking concerning the \$250,000 of bonds purchased outright, the giving of such option for additional bonds, and that it sold to plaintiffs \$100,000 of additional bonds. It denies, however, that such additional bonds were sold under such written contract, and "that the plaintiffs thereby anticipated the monthly sale, delivery, and payment due under their said written contract." It avers that plaintiffs did not avail themselves of the terms of such option, and, "having failed to take \$25,000 in par value of said bonds on the first days of June, July and August, 1909, respectively, that said contract was thereby broken by the plaintiffs and rendered null and void under its provisions"; that it, "the defendant, did on July 15, 1909, by written notice to the plaintiffs, cancel said contract and declared the same to be null and void, according to its terms and provisions"; and that such additional bonds were sold under an oral contract distinct from such written contract and founded upon a different consideration, whereby it was orally agreed "that such transactions should not be counted as bonds taken under the terms of said contract." It further avers that such demands for bonds made on August 24, 1909, and the other dates mentioned by plaintiffs "were not made in good faith, but only for the purpose of attempting to revive the option contained in said contract, which had been forfeited by the plaintiffs."

On the issues thus presented by the pleadings, the question whether such \$100,000 of bonds were anticipations under the written option or purchases under a different oral agreement was relevant and material, unless such written agreement did not permit the exercise of such option before June 1, 1909. The excluded testimony was offered by plaintiffs to support their claim that such purchase was an anticipation of such option and within the terms thereof. The learned judge who tried the case overruled said offer upon the ground that, under such written contract, the anticipated monthly deliveries of the op-

tioned bonds could not be made until after the expiration of the time for the delivery of such sold bonds, which he fixed as May 1, 1909. He offered the plaintiffs the privilege of amending their statement of claim by averring that the contract had been modified by the parties thereto in order to allow such anticipation. This, however, the plaintiffs declined to do, and stood upon their statement of claim as herein set forth. The learned judge thereupon directed a verdict for the defendant. In this rejection of the evidence offered and subsequent direction of a verdict the learned judge erred.

While the terms of the contract in several particulars, including these relating to the exact time when the deliveries of the optioned bonds were to be made and when the right to anticipate such deliveries could be invoked, are not as clear and definite as they could have been made, and some obscurity as to the meaning of the parties in these particulars exists, yet, when they are read in the light of the whole context, the following propositions are sufficiently established:

First. That the plaintiffs obtained an exclusive option which went into effect on the execution of the contract and which could not be abrogated by the defendant, unless and until the plaintiffs failed to make the required monthly purchases (a) of the bonds sold outright, and (b) of the optioned bonds after such option was exercised.

Second. That the right to anticipate deliveries attached to both classes of sales and was to enable a sale of a larger amount of bonds at one time than the plaintiffs were compellable to take.

Third. That if anticipations were made, whether of the one or the other class of sales, the requirements to take \$25,000 of bonds monthly were suspended until such time as would have elapsed had the bonds been taken in regular monthly installments, instead of in advance thereof.

Fourth. That the duty of consulting defendant before plaintiffs fixed the price at which defendant's bonds were to be offered applied to the optioned bonds as well as to those sold outright, though a strict grammatical construction would limit the phrase "the same" occurring in such requirement of paragraph 6, to such sold bonds, and that, as the optioned bonds were to be sold to plaintiffs at a price higher than that fixed for the other bonds, the maximum not being specified, but varying with, and depending upon, conditions yet to materialize, the time for exercising the right of anticipating deliveries of such optioned bonds, as well as the determining of the price to be paid therefor, depended largely upon the discretion of the defendant reasonably exercised, as such duty of consultation was primarily for the protection of defendant.

By the light thus shed upon the general intention and purpose of the contract, the concluding clause of paragraph 2, stipulating that the deliveries of the optioned bonds, "are to succeed immediately the deliveries of the bonds purchased mentioned in paragraph 1," is not to be given such an inexorably literal interpretation as to prevent either party from showing that, before any controversy arose concerning the time of exercising such option and the right of anticipation thereunder, they had in selling optioned bonds given it a practical con-

struction at variance with such literal meaning. To ascertain the actual intent of the parties in making a contract is the desideration of all rules of interpretation.

[1] When in the performance of a written contract both parties give it a practical construction, before any controversy has arisen in regard thereto, such construction, rather than its literal meaning, will prevail; for, as Lord Chancellor Sudgen, in *Attorney General v. Drummond*, 1 Dru. & Wal. 353, 366, affirmed 2 H. L. Cas. 837, said: "Tell me what you have done under a deed, and I will tell you what that deed means." Unless the language is so clear as to admit of no reasonable controversy as to its meaning, the court is not likely to go astray if it enforces that construction which the parties, without coercion, have themselves acted upon. *District of Columbia v. Gallaher*, 124 U. S. 505, 8 Sup. Ct. 585, 31 L. Ed. 526; *Lowrey v. Hawaii*, 206 U. S. 206, 222, 27 Sup. Ct. 622, 51 L. Ed. 1026; *Davis v. Alpha Portland Cement Co.*, 142 Fed. 74, 76, 73 C. C. A. 388; *Chicago G. W. Ry. Co. v. Northern Pac. Ry. Co.*, 101 Fed. 792, 795, 42 C. C. A. 25; *Manhattan Life Ins. Co., v. Wright*, 126 Fed. 82, 87, 61 C. C. A. 138; *Central Trust Co. of N. Y. v. Wabash St. L. & P. Ry. Co. (C. C.)* 34 Fed. 254.

[2] The evidence excluded relating to the conduct of the parties concerning such option and anticipation, ere any controversy arose between them in regard thereto, tending to prove such a contract as plaintiffs alleged in their statement of claim, and upon which they assigned their breach, was material and relevant, and should have been received and the parties permitted to try out the issue, viz., under which of the alleged agreements such \$100,000 of bonds were purchased.

The judgment is therefore reversed, with costs, and the record remanded, with instructions to grant a new trial.

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#### STANDARD SCALE & SUPPLY CO. v. REITER.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1912.

Rehearing Denied May 7, 1912.)

No. 1,812.

#### 1. EVIDENCE (§ 448\*)—PAROL EVIDENCE AFFECTING WRITING—EXPLAINING OBSCURITIES IN WRITING.

While parol evidence is not admissible to vary the terms of a written contract, it is admissible to explain what is obscure or ambiguous in the writing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066-2082, 2084; Dec. Dig. § 448.\*]

#### 2. EVIDENCE (§ 463\*)—PAROL EVIDENCE AFFECTING WRITING—SHOWING MODE OF PERFORMANCE OF CONTRACT OF EMPLOYMENT.

In an action for breach of a written contract by which plaintiff was employed as manager of a branch business to be established in Chicago by defendant, by his alleged wrongful discharge, defendant was entitled

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to show a contemporaneous parol agreement between the parties in respect to the duties to be performed by plaintiff as such manager.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2140-2143; Dec. Dig. § 463.\*]

In Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

Action at law by Edward Reiter against the Standard Scale & Supply Company. Judgment for plaintiff, and defendant brings error. Reversed.

Defendant in error, a New York corporation, hereinafter designated as plaintiff, brought suit at law against plaintiff in error, hereinafter designated as defendant, to recover damages for alleged breach of contract made and entered into on February 23, 1904, between defendant's assignor and plaintiff, and being in the words and figures following, viz.:

"Memorandum of Agreement.

"Between the Standard Scale & Supply Co., Limited, of Pittsburgh, Pa., party of the first part, and Edward Reiter, party of the second part.

"The party of the first part is to open a branch house in the city of Chicago, Ills., for the sale of its scales and other goods, such as gasoline engines, steam engines, boilers, steam pumps, dynamos, motors, railway supplies, etc., and have engaged the party of the second part as manager for the period beginning March 1st, 1904, and ending December 31st, 1911; his compensation to be as follows: Thirty-six hundred (\$3,600) dollars per annum, payable in monthly installments of three hundred (\$300) dollars, and 20 per cent. of the net profits, the latter to be paid at the end of each year, as soon as the net profits can be ascertained.

"The cost of scales to be based on schedules to be made up by party of the first part, and all other goods to be charged to the Chicago house at actual cost.

"The territory under the jurisdiction of the Chicago house shall be as follows: Indiana—That portion of the state west of 86 deg., 30 Min. longitude, also that portion of the state on line and North of Wabash Railway running through Butler and Logansport.

"Michigan—That portion of the state located west of 85 deg. longitude. "Also all of the following states: Illinois, Wisconsin, Minnesota, North Dakota, South Dakota, Iowa, Kansas, Nebraska, Arkansas, Missouri, Oklahoma and Indian Territory.

"All mail orders, inquiries and prospects received from the territory mentioned are to be referred to the Chicago house.

"The said party of the second part is to give his best services for the promotion and welfare of the business and be subject to the instructions of the said party of the first part.

"Entered into and signed this 23rd day of February, 1904.

"[Signed] The Standard Scale & Supply Co. Limited.

"By F. B. Gill, Chairman.

"By William H. Black, Secretary.

"[Signed] Edward Reiter."

The declaration alleges that, pursuant to the terms of the contract, the Scale & Supply Company, Limited, opened up such branch house in Chicago for the sale of said designated merchandise at about the date of the contract; that plaintiff entered upon the performance of the contract, and then and there became the manager of said business, and so continued until about June 1, 1904, when defendant succeeded to the business and property of the Standard Scale & Supply Company, Limited, including all rights and obligations under said contract assumed by the assignor thereof, among which was the obligation to pay plaintiff \$300 a month as wages. It is further alleged that on failure of defendant to pay plaintiff's salary

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



for May, June, July, August, September, and October, 1906, plaintiff brought suit in the circuit court of Cook county and recovered judgment for the amount claimed, which was confirmed on appeal; that, on further default of defendant, plaintiff brings this suit to recover salary for November and December, 1906, and for the years 1907 and 1908, and for January and February, 1909, 28 months, at \$300 per month, with interest at 6 per cent. per annum, amounting to \$472.50, to the plaintiff's damage of \$10,000. Affidavit of claim is attached.

On March 29, 1909, the cause was removed to the Circuit Court of the United States. On March 17, 1910, plaintiff filed an amended declaration from which it appears that on November 3, 1906, defendant discharged plaintiff from its employ, as is alleged, without cause. The amended declaration charges that plaintiff was thereby deprived of \$28,800 salary, and \$30,000 in addition thereto as his share of the net profits of the business per annum. These two items the declaration aggregates at the sum of \$50,000, at which it lays its damages.

Thereafter defendant appeared to the amended declaration and filed the general issue. On trial had, the jury returned a verdict in favor of plaintiff for the sum of \$11,000. Motion for new trial was overruled, and judgment entered for \$11,000 and costs, from which judgment this writ of error is prosecuted. A number of errors are assigned by defendant, the only one of which we deem it necessary to consider at this time reads as follows, viz.: "The court erred in sustaining plaintiff's objection to the following question propounded to Edward Reiter, as a witness for the defendant, on direct examination: 'Mr. Reiter, did you have any conversation with any of the officers of the defendant company at or about the time of the making of this contract with reference to the manner in which the machinery lines mentioned in that contract were to be sold and the representation of them obtained?'"

F. W. Winkler and W. S. Oppenheim, for plaintiff in error.

Edwin M. & Raymond M. Ashcraft and Edwin M. Ashcraft, Jr. (Edwin M. Ashcraft, of counsel), for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). [1] The assignment of error above set out challenges the admissibility of evidence offered for the purpose of elucidating some of the provisions of the contract, particularly those which refer to the scope and method of the business therein contemplated.

No rule of law is better settled than that which denies the right of parties to a contract to vary its terms by reference to conversations had before it was concluded and signed. 1 Greenleaf, Ev. § 275; White v. National Bank, 102 U. S. 658, 26 L. Ed. 250; Metcalf v. Williams, 104 U. S. 93, 26 L. Ed. 665; Martin v. Cole, 104 U. S. 30, 26 L. Ed. 647; Dewitt v. Berry, 134 U. S. 315, 10 Sup. Ct. 536, 33 L. Ed. 896. But it has never been the law that contemporary or precedent facts might not be introduced by parol or otherwise to make plain some obscure or indefinite feature of the contract.

In Lowrey v. Hawaii, 206 U. S. 206, 27 Sup. Ct. 622, 51 L. Ed. 1026, the court approves the language of Bradley v. Washington A. & G. Steam Packet Co., 13 Pet. 89, 10 L. Ed. 72, with reference to extrinsic evidence as follows: It (extrinsic evidence) was applied in some cases to—

"ascertain the identity of the subject; in others, its extent; in some, to ascertain the meaning of a term, where it had acquired by use a particular

meaning; in others, to ascertain in what sense it was used, where it admitted of several meanings; but in all the purpose was the same—to ascertain by this medium of proof the intention of the parties, where, without the aid of such evidence that could not be done so as to give a just interpretation of the contract.”

In the case first cited, the court was confronted with what it termed the ambiguous words, “sound literature and solid science” and “inculcation of general learning and knowledge.” It was held that parol evidence should be admitted for the purpose of ascertaining the intention of the parties at the time.

In *Morton v. Jackson*, 1 Smedes & M. 501, 40 Am. Dec. 107, extrinsic evidence was admitted to show the meaning of the term, “swamp land,” as used in a deed. It was permitted in *New Jersey Zinc Co. v. Boston F. Co.*, 15 N. J. Eq. 466, to show the meaning of the term “zinc,” in deed conveying “zinc ores,” and in *Roberts v. Short*, 1 Tex. 378, to show what was meant by the term, “Texas money,” as used in a note.

In *Walker v. Riley & Co.*, 6 Ga. App. 519, 65 S. E. 301, the court admitted parol evidence to explain the words, “local manager.” “Parol evidence thus offered for the sole purpose of defining the meaning of the title conferred upon the employé is not,” says the court, “violative of the rule which forbids that the terms of a valid written contract be varied or contradicted by parol evidence.”

Where an employé was engaged to give “his entire business service” to his employer, parol evidence was admitted for the purpose of showing what was the understanding and intention of the parties. *Davis v. Dodge*, 126 App. Div. 469, 110 N. Y. Supp. 787.

The Circuit Court of Appeals for the Ninth Circuit held in *North Am. Transportation & Trading Co. v. Samuels*, 146 Fed. 48, 76 C. C. A. 506, that parol evidence was admissible to show the kind and quality of goods contracted to be sold, the proportions thereof, and the manner in which it was contemplated the seller should make sales from the stock prior to delivery—citing *Fire Ins. Association v. Wickham*, 141 U. S. 564, 576, 12 Sup. Ct. 84, 35 L. Ed. 860.

Many other cases might be cited to support the doctrine that parol evidence is admissible to explain what is obscure or ambiguous in a contract.

[2] In the present contract, it is provided that the defendant has “engaged the party of the second part” (plaintiff) “as manager,” etc. It was sought by the question set out in the assignment of error above quoted to disclose what were the duties of plaintiff as manager. It appears from the record that plaintiff had a wide experience in the handling of certain so-called side lines, while defendant’s Chicago dealings theretofore were confined practically to the scale business. Plaintiff says:

“The obtaining of the representation of these side lines was the object of opening the store in Chicago. I think that was the object of my employment as manager.” (Record, p. 34.)

From this it will be seen that there is in the record a suggestion, at least, of the unusual character of plaintiff’s duties as manager.

The circumstances create a situation which calls peculiarly for enlightenment as to what was the scope of these duties, with reference to the manner in which the machinery lines mentioned in that contract were to be sold and representation of them obtained. It was therefore error to sustain plaintiff's objection to the question set out in the assignment of errors above quoted.

The judgment of the trial court is reversed, with direction to grant a new trial.

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In re EMERSON, MARLOW & CO.

MANSFIELD v. CHICAGO TITLE & TRUST CO.

(Circuit Court of Appeals, Seventh Circuit. April 23, 1912.)

No. 1,822.

1. **BANKRUPTCY (§ 143\*)**—PROPERTY VESTING IN TRUSTEE—MONEY HELD AS AGENT OR TRUSTEE.

Petitioner, who owned several car loads of turkeys in a cold storage warehouse in Chicago, gave an order to the warehouseman to deliver all or any part of the same to bankrupt, which was a commission dealer in poultry and had agreed to forward the same to a purchaser in New York, without charge to petitioner. They were not shipped to such purchaser, however, but petitioner authorized the bankrupt to handle them as its own, and the bankrupt withdrew a car load and sold the same to a third person, using the proceeds to pay on its own debts. Neither its receiver nor trustee in bankruptcy received such proceeds. *Held*, that the relation between petitioner and the bankrupt with respect to the proceeds was that of debtor and creditor, and that petitioner had no greater rights as against the trustee than any ordinary creditor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 191, 201, 202, 213-217, 223, 224; Dec. Dig. § 143.\*]

2. **CARRIERS (§ 3\*)**—"FORWARDING MERCHANT"—"FORWARDER."

A "forwarding merchant" or "forwarder" is one who ships or sends forward goods for others to their destination by the instrumentality of third persons without himself incurring the liability of a carrier to deliver them, and neither includes a consignor shipping goods nor a carrier engaged in transporting them.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1, 462-478, 966, 967; Dec. Dig. § 3.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2926, 2927.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

In the matter of Emerson, Marlow & Co., bankrupts. From an order of the District Court, George D. Mansfield appeals. Affirmed.

Appellant, hereinafter called "petitioner," filed his amended petition in the District Court for an order on the appellee, hereinafter termed "receiver," to pay over to him the sum of \$5,717.39, alleged to be a trust fund belonging to the petitioner, of which the receiver took possession as an asset of the bankrupt's estate. The receiver filed its answer denying the existence of any such trust fund. On reference duly had, the referee proceeded to hear the cause, and on November 2, 1910, dismissed the said amended petition for want of equity. Petitioner thereupon filed his peti-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

tion for review, which was granted upon the hearing of said petition. On March 7, 1911, the District Court ordered that the said order of the referee disallowing the claim of the petitioner for preference and dismissing his said petition for want of equity be affirmed and the petition dismissed, and that the claim be allowed as a general claim for said sum of \$5,717.39. Petitioner's appeal from said order of the District Court dismissing said petition for review for want of equity is now before the court.

From the record it appears that in December, 1906, petitioner bought from bankrupt, through one Emerson, its president, 10 car loads of turkeys to be delivered in February, 1907; that they were delivered, and placed by petitioner in the Chicago Cold Storage Warehouse Company's warehouse at Chicago, and were paid for by moneys borrowed from the warehouse company on the warehouse receipts issued for the turkeys, as security; that the turkeys were so delivered and paid for; that the price paid was 17 cents per pound; that they remained in storage till the fall of 1907; that in October, 1907, the bankrupt through Emerson, its president, had an offer, so he reported, from De Winter & Co. of New York for the whole lot of turkeys at 21 or 22 cents a pound (net 20 cents in Chicago); and that the bankrupt company agreed to act as the sales or forwarding agent for the owners of the turkeys—there being others in the same situation as petitioner—and to make no charge therefor, Emerson testifying that he felt under the deal, inasmuch as he had persuaded petitioner to buy and had offered to bear the loss, if any, growing out of the purchase, by petitioner. When asked why he made no charge, he replied, "I got that when they bought them." When the financial part of the transaction was discussed, Emerson, president of bankrupt, told McAdam, who had large deals with the bankrupt, perhaps \$2,000,000 a year, and who, as to this turkey deal, was in a similar position to, and negotiated for, petitioner, that he would forward the turkeys, draw the draft against them for 19 cents a pound, and turn the proceeds over to the warehouse company for petitioner, and keep the account separate from his general business. The storage company had orders from petitioner to deliver the turkeys to Emerson with the statement, "they to pay you as taken out, same basis as they pay you on the McAdam turkeys." Petitioner lived in Wisconsin and left his affairs to follow the same course those of McAdam did, though he participated in the interviews of October 17th and 21st. On about October 21, 1907, petitioner was advised through Emerson that De Winter & Co. had stopped shipments temporarily. At the same time Emerson wrote petitioner saying, "If you are satisfied, let us handle the turkeys the same as we would if they were our own." It was in response that petitioner wrote to the warehouse to deliver to bankrupt "any part of my frozen turkeys stored in your house by Emerson, Marlow & Company."

Up to this time none of petitioner's turkeys had been shipped, and he was not known to be in the deal by either De Winter or the Hollis & Rich Company. De Winter & Co. were understood by petitioner to be the purchaser of the whole lot, viz., those owned by petitioner, McCabe, and another; each owning so many car loads. Four car loads of McCabe's had been shipped to De Winter. The bankrupt had drawn against the bills of lading in each case at 19 cents per pound, caused his draft to be cashed by the Union Trust Company Bank of Chicago, and deposited the proceeds of the draft to its own credit in its general account in that bank, and held the same until the shipments were severally accepted and paid for by De Winter & Co., and then paid the amount over to McCabe by check on its general account, thus giving bankrupt several days use of the money in its own affairs. No charge was at any time made by the bankrupt for its services in attending to the transaction. On October 23, 1907, the bankrupt, being pressed for funds, withdrew a car load of petitioner's turkeys from the warehouse, some 30,520 pounds, shipped the same to a firm not theretofore mentioned to petitioner, viz., Hollis & Rich Butter Company of Boston, Mass., drew against the shipment for \$6,500, that being in excess of 19 cents per pound, had the draft cashed by the said bank, and the proceeds placed to the credit of its general account in said bank, and checked the same out

in payment of its own obligations, some of it going to pay drafts drawn upon it by its seven branch houses, which, as petitioner claims, applied the same in payment of their several local debts, and in the purchase of poultry and other products. Hollis, Rich & Co. refused to honor the draft, claiming it was excessive, so that other disposition had to be made of the turkeys, which were afterwards sold for \$5,717.39, the sum to which petitioner now lays claim. It is petitioner's contention that this money, either directly or in a substituted form, came into the possession of the receiver, thereby augmenting the bankrupt's estate, and that, whatever its form in the receiver's hands, it is a trust fund, which belongs to petitioner. On the other hand, the receiver contends that the funds sent by bankrupt to its branch houses were not for the purchase of poultry but for the payment of debts owing their several local banks from the bankrupt, and that purchases at the western branches for a few days prior to the bankruptcy were unpaid being represented largely by checks on the various local banks not presented at the time of the bankruptcy.

The referee found that the relation existing between petitioner and the bankrupt was that of debtor and creditor, that the funds received by the bankrupt on account of the said turkeys have not been traced other than that they, as a part of the commingled funds, were paid out for debts, expenses, supplies, poultry, and produce as aforesaid, and that the evidence failed to show that the bankrupt's estate has been benefited or augmented by said turkey deal; that neither the receiver nor the trustee herein received either of said sums of \$6,500 or \$5,717.39, or any part of either thereof, as such, or in substituted form.

The assignments of error present the two propositions: (1) That the court erred in holding that the relation between petitioner and the bankrupt was that of debtor and creditor; and (2) that petitioner had no lien upon the bankrupt's estate in the receiver's or trustee's hands.

George H. White, Abram E. Mabie, Willard F. Conkey, and John A. Irrmann, for appellant.

Samuel Alschuler, Percy V. Castle, Arista B. Williams, Jesse R. Long, and Howard P. Castle, for appellee.

Before KOHLSAAT and MACK, Circuit Judges, and SANBORN, District Judge.

KOHLSAAT, Circuit Judge (after stating the facts as above). [1] Petitioner, together with McCabe, who represented and acted for him in his absence, and Emerson, who acted for the bankrupt, testify that the transaction was intended to be out of the regular course of business; that the turkeys were not billed to the bankrupt; and that it was the intention that the bankrupt should be simply a forwarding agent. This, standing by itself, would be satisfactory evidence that such was the case. When, however, we come to consider the course of business subsequent to the alleged agreement, a different situation arises. The bankrupt was practically given possession of all petitioner's turkeys for the purpose of enabling it to carry out the transaction with De Winter & Co. It was permitted to deal with them as if they belonged to it. In its financial distress it proposes to give that grant of authority a wide construction, and tide itself over a hard place. Up to that time it had made no shipment for petitioner. It conceived the idea of withdrawing enough turkeys from petitioner's stock in the warehouse (as to which there would be no one to question its acts) to enable it to procure a sum sufficient to relieve its immediate needs. To do that, it drew a draft

for more than the turkeys were worth, attached it to the bill of lading, secured the money from its bank on a discount thereof, and proceeded to enrich its general bank account to that extent, and sent the turkeys to a theretofore unnamed consignee, willing to take all the chances of the draft not being honored or the turkeys accepted, so long as it could obtain several days relief. This scheme may have been, and probably was, in its details unknown to petitioner; but he, through the confidence reposed in the bankrupt, made the thing possible, and not only so, but permitted the bankrupt to act with all the powers and appearance of a factor or commission man. There is nothing in the record, except testimony of the petitioner, McCabe, and bankrupt, as to what the latter was to do in the premises to characterize the transaction as other than an ordinary commission deal with prepaid commissions. The transaction has none of the features of a forwarding agency or merchant.

[2] "Forwarding merchant" or "forwarder" are defined in the Century Dictionary as meaning:

"Specifically in the United States, one who ships or sends forward goods for others to their destination by the instrumentality of third persons. \* \* \* Neither a consignor shipping goods, nor a carrier engaged in transporting them is a forwarder. The name is applied strictly to one who undertakes to see the goods of another put in the way of transportation without himself incurring the liability of a carrier to deliver them."

Assuming that there was a statement made that the bankrupt should act simply as a forwarding agent in the deal, can it be contended that when the parties afterwards enter into a course of dealings which clearly are those involving the relations of principal and factor, the transaction shall be interpreted by the prior conversation? Would not the acts themselves control, rather than the term by which they now are, or perhaps were, at the beginning designated?

It appears that the lot of turkeys, of which those in suit were a part, all controlled at the beginning by the bankrupt, some 2,000,000 pounds, were supposed, and represented by the bankrupt, to be substantially all the turkeys in the country. Petitioner and McCabe each owned about 250,000 pounds. It is apparent that any one of the owners might ruin the market; so that it was important that they should all be marketed under one management. This would seem to have been Emerson's motive in offering to take care of the "outletting." He was evidently running the deal and handling the turkeys as his own. The fact that Emerson was to pay the proceeds of shipments to the warehouse company in satisfaction of petitioner's indebtedness to it throws some light on the subject.

Interpreting the initial undertaking as stated by petitioner in the light of the manner in which it was carried out, it would seem that petitioner and his witnesses at the time failed to comprehend the significance of the terms alleged to have been used in the inception of the transaction. The law merchant may not be overcome by the misuse of some of its terms. It is conceded that petitioner is chargeable with whatever knowledge McCabe had of the methods used by the bankrupt in selling the turkeys. He therefore knew that

the latter was dealing in its own name with consignees; that he was not known in the deal; that moneys were paid to and to be paid out by the bankrupt to the petitioner and McCabe; that it had full control of shipments and was using its own judgment in protecting the market from a slump, and was dealing with the turkeys just as though they were its own, and also knew that its powers with regard to the same and its course of business in handling them was as full and complete, and in all respects comporting with those of any factor or commission man. Under the facts of this case, we are unable to see how any trust relation arose between petitioner and the bankrupt, other than that which attends to too free exercise of confidence in one whose integrity is implicitly relied on. Were it otherwise, however, we are unable to say from the evidence that any part of the moneys realized from the sale of the turkeys came to the hands of the receiver or trustee in any form. The referee found that the funds received by the bankrupt on account of said turkeys have not been traced, and that no part of the same came to the hands of the receiver or trustee as such or in any substituted form. When the course of business between the bankrupt and its seven branch houses is considered, together with the latter's methods of handling the poultry trade, it would be straining the facts and the law to declare that any part of the estate came to the hands of either of said bankruptcy officials charged with a lien for this particular fund. The principles of law contended for by petitioner are too well settled to require citation; but the facts support the master's report, which and of itself is very persuasive, and not to be overcome except in very clear cases.

We find no error in the judgment of the District Court, and it is therefore affirmed.

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In re EMERSON, MARLOW & CO.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK v.  
CHICAGO TITLE & TRUST CO.

(Circuit Court of Appeals, Seventh Circuit. April 23, 1912.)

No. 1,823.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

In the matter of Emerson, Marlow & Co., bankrupts. From an order of the District Court, the Continental & Commercial Trust & Savings Bank, as trustee of the estate of Edwin L. McAdam, bankrupt, appeals. Affirmed.

Elmer H. Adams, Dwight S. Bobb, Asa G. Adams, Abram E. Mabie, and John A. Irrmann, for appellants.

Samuel Alschuler, Percy V. Castle, Arista B. Williams, Jesse R. Long, and Howard P. Castle, for appellee.

Before KOHLSAAT and MACK, Circuit Judges, and SANBORN, District Judge.

KOHLSAAT, Circuit Judge. This case and case No. 1,822, decided herewith (199 Fed. 95), are companion cases, based upon substantially the same statement of facts and involving the same principles of law.

The judgment of the District Court herein is therefore affirmed for the reasons set out in the opinion filed in that case.

## CASSIDY v. SILVER KING COALITION MINES CO.

(Circuit Court of Appeals, Eighth Circuit. August 15, 1912.)

No. 3,708.

## 1. MINES AND MINERALS (§ 43\*)—PATENT FOR MINING CLAIM—RELATION TO DATE OF FINAL RECEIPT—EFFECT OF INTERMEDIATE CONVEYANCE.

Two of the four locators of a mining claim, after doing all the assessment work thereon for two years, took steps to forfeit the rights of their co-owners therein by notice. Thereafter they applied for and obtained a patent in their own names, but after final receipt and before issuance of the patent sold and conveyed the claim by deed. *Held*, that the patent, when issued, became operative by relation from the date of final receipt, and their conveyance passed the legal title and divested them of all interest; that, conceding that they did not legally extinguish the interest of one of their co-owners, but took title to his share in trust, the trusteeship passed to their grantees, and they could not thereafter convey it to him or to another.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 125-129; Dec. Dig. § 43.\*]

## 2. MINES AND MINERALS (§ 38\*)—SUIT TO RECOVER EQUITABLE INTEREST IN MINING CLAIM—LACHES.

Where an attempt was made by his co-owners to forfeit the interest of one of the locators of a mining claim for failure to contribute to the assessment work, and the claim was afterward patented to the other owners, who sold and conveyed the same, a delay of 25 years by such part owner after the location of the claim, and 12 years after the patent was recorded, before asserting any right therein, was such laches as will bar his right to maintain a suit in equity to recover an interest therein.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½-113; Dec. Dig. § 38.\*]

Appeal from the Circuit Court of the United States for the District of Utah.

Suit in equity by Charlotte Cassidy against the Silver King Coalition Mines Company. Decree for defendant, and complainant appeals. Affirmed.

John A. Shelton, for appellant.

Dickson, Ellis, Ellis & Schulder and A. C. Ellis, Jr. (W. H. Dickson and Russell G. Schulder, of counsel), for appellee.

Before ADAMS and SMITH, Circuit Judges, and WILLARD, District Judge.

WILLARD, District Judge. This is a suit, brought in 1910, by Charlotte Cassidy, widow and heir of James P. Cassidy, to quiet her title to an undivided quarter of the Captain mining claim, located on April 6, 1881, in the names of E. P. Cassidy, Timothy Madden, Andrew Lundin, and Peter Anderson; it being claimed that James P. Cassidy was E. P. Cassidy, one of the locators. The mine is situated in Park City, Summit county, Utah. After proceedings by Lundin and Anderson to forfeit the interest of Madden and John Cassidy, Lundin and Olson, the mother of Anderson, and who had succeeded to his rights, applied in 1895 for a patent.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



They paid for the claim, and a final receipt was issued by the receiver of the land office on December 27, 1895. The patent was issued on May 21, 1896.

On January 20, 1896, a deed for the Captain claim was filed in the recorder's office of Summit county, executed by Lundin and Olson in favor of David Keith and Thomas Kearns. This registration was after the issuance of the final receipt. The deed, however bore the date of December 21, 1895, which was before the issuance of such receipt. But it appeared from the instrument itself that it was not acknowledged until January 15, 1896, and the undisputed parol testimony showed that it was not delivered until after it was acknowledged. This evidence overcomes any prima facie presumption that the deed took effect on the day of its date. It did not in fact take effect until after Lundin and Olson had bought the claim and had obtained the final receipt. By subsequent conveyances the defendant has succeeded to all the rights of Keith and Kearns.

Nearly 14 years afterwards and on September 8, 1909, James P. Cassidy procured a quitclaim deed from Lundin for the whole claim, and by judicial proceedings against the heirs of Olson, which culminated in a decree dated May 29, 1910, it is claimed that he procured a conveyance from said heirs of an undivided one-eighth.

In a suit prior to the present one, and brought against the same defendant, commenced by James P. Cassidy in December, 1908, and therefore before he obtained the conveyances just mentioned, he claimed that the defendant held the title to a quarter interest of the claim in trust for him, and asked for a conveyance, thus setting up an equitable title. In the present case, however, the plaintiff strongly insists that her claim is legal, and not equitable; that she shows a patent from the United States to Olson and Lundin, and a legal conveyance from Lundin, and from the heirs of Olson of an undivided one-fourth of the property. The fact that the case appears on the equity side of the court counsel explains by referring to a statute of Utah, which authorizes the owner of vacant and unoccupied property to maintain an action against a person setting up an adverse claim thereto for the purpose of having such claim determined, and by saying that the remedy afforded by that statute can be enforced upon the equity side of the federal court. If, however, it should turn out that she has no legal title, but only an equitable one, the same laches which defeated her husband in the former suit will now defeat her here.

For the purpose of the discussion we assume that James P. Cassidy is the E. P. Cassidy named as one of the locators, although that is not altogether clear from the evidence. We assume, also, that the forfeiture proceedings against John Cassidy were not sufficient to determine the interest of James P. Cassidy.

[1] The deed from Lundin and Olson to Keith and Kearns, upon which the defendant's title rests, was in substance as follows:

"Witnesseth, that the said parties of the first part, for and in consideration of the sum of twenty-five hundred dollars, lawful money of the United

States of America, to them in hand paid by said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised, released, and forever quitclaimed, and by these presents do grant, bargain, sell, remise, release, and forever quitclaim, unto the said parties of the second part, and to their heirs and assigns, forever, all the right, title, and interest, estate, claim, and demand, both in law and equity, as well in possession as in expectancy, of the said parties of the first part, of, in, or to that certain portion, claim, and mining right, title, or property on that certain vein or lode of rock, containing precious metals of gold, silver, and other metals, and situate in the Uintah mining district, Summit county, Utah, and described as follows, to wit: All of the Captain lode mining claim and all of the Uintah lode mining claim, as surveyed for patent and described in field notes and plat of the official survey on file in the United States land office, at Salt Lake City, Utah. Together with all the metals, ores, gold and silver bearing quartz, rock, and earth therein, and all the rights, privileges, and franchises thereto incident, attendant, and appurtenant, or therewith usually had and enjoyed, and also all and singular the tenements, hereditaments, and appurtenances thereto belonging, and the rents, issues, and profits thereof, and also all the estate, right, title, interest, possession, claim, and demand whatsoever of the said parties of the first part of, in, or to the premises, and every part and parcel thereof. To have and to hold, all and singular, the premises, with the appurtenances and privileges thereto incident, unto the said parties of the second part. And the parties of the first part, for their heirs, do hereby agree to and with the party of the second part that they have full right and power to sell and convey the said premises, and that the said premises are now free and clear from all incumbrances, sales, or mortgages made or suffered by the said parties of the first part."

What did that deed convey? Although the patent was not issued until 1896, and after the deed was delivered, yet when the patent did issue it became operative as of the date of the final receipt, which was before the deed was delivered. *U. S. v. Detroit Lumber Co.*, 200 U. S. 321, 335, 26 Sup. Ct. 282, 50 L. Ed. 499; *Benson Mining Co. v. Alta Mining Co.*, 145 U. S. 428, 12 Sup. Ct. 877, 36 L. Ed. 762. The case must be considered, then, as if the patent had been issued on December 27, 1895. As will be seen hereafter, there is nothing inequitable in applying the doctrine of relation announced in these cases to this suit.

It is certain that, when the United States issued the patent, it passed to the grantees therein all the interest which the government had in the land. After it was issued the United States held nothing, either for itself or in trust for Cassidy. If a trust relation had existed before between the government and Cassidy, the trusteeship passed from it by this conveyance. After the patent, if any one held the interest of Cassidy in trust, it must have been Lundin and Olson. It being considered that the patent was issued on December 27, 1895, Lundin and Olson after that date were, upon the theory most favorable to the plaintiff, trustees for Cassidy. In January, 1896, they conveyed by the deed above quoted to Keith and Kearns. It is plain that after that deed they retained no interest of any kind in the property. No construction of the deed is permissible which would transfer to Keith and Kearns three-quarters of the land, and retain the other quarter in Lundin and Olson in trust for Cassidy. As the United States by its patent severed its relations with Cassidy, and cast them on Lundin and Olson, so Lundin and Olson by their deed severed any trust re-

lations which they might have had with Cassidy, and cast them upon Keith and Kearns. After that deed neither Lundin nor Olson was a trustee for Cassidy; neither one had any interest of any kind in the land. So that when, nearly 15 years afterwards, Lundin undertook to quitclaim the property to Cassidy, nothing passed by his deed, for he had nothing to convey. The same thing is true of the judicial conveyance from the heirs of Olson. Nothing passed by that conveyance, because those heirs had nothing to convey.

[2] The case then stands as it would stand, had no deed ever been made by Lundin to Cassidy, or no conveyance made to him from the heirs of Olson. Thus standing, plaintiff now appears with only an equitable title. To the enforcement of that equitable title the laches of the plaintiff and her husband is a complete bar. Plaintiff's counsel seems to be of that opinion, for he says in his brief, on page 9:

"If James P. Cassidy was, on the 21st day of December, 1895, the owner of a one-quarter interest in the Captain lode claim, and if, by the issuance of the patent on May 21, 1896, the Silver King Mining Company was vested with the legal title as to such one-quarter interest, which was held in trust by it for the said Cassidy, then there might be some question as to whether or not the complainant's suit should not be held to be barred. Under the state of facts assumed, the Silver King Mining Company and its successor, the Silver King Coalition Mines Company, would be the trustee of a constructive trust; and if the suit had been one to declare and enforce such trust, such suit, according to some of the authorities, might (if the trustee denied the existence of the trust and objected on account of the delay to the maintenance of the suit) properly be held to have become barred, even though the trust relation was clearly proved, and there had been no previous repudiation of the trust by the trustee. In a suit brought by the holder of the equitable title against one who held the legal title, for the purpose of quieting his title, the same rule would possibly apply."

To show what the plaintiff and her husband knew, or ought to have known, for the 20 or 25 years during which they remained silent and inactive, it may be well to refer to some of the facts which appear in the case. In an affidavit made since litigation over this claim arose, plaintiff swore to a complaint which stated that James P. Cassidy left Utah on December 15, 1882, and became a resident of Montana, where he resided until his death on December 16, 1909. There is no competent evidence to show that he ever returned to Utah. On September 6, 1884, Lundin and Anderson gave notice to Tim Madden and John Cassidy that they had performed the assessment work of Madden and Cassidy on the Captain claim for 1882 and 1883. This notice was given for the purpose of forfeiting their interest. It was published for 12 weeks in a newspaper at Park City. The notice and proof of publication were filed in the recorder's office for Summit county on August 19, 1886. No part of the sum due for this assessment work was ever paid by any one. On December 24, 1894, Anderson, Lundin, and Olson gave notice of their intention, as co-owners of the claim, to hold and work it after 1894. This notice was filed in the local office on December 29, 1894. On October 9, 1895, Lundin

and Olson made application for a patent. In the application they stated that they were the sole owners of the claim. They attached copies of the forfeiture notices against Madden and John Cassidy, and an affidavit that E. P. Cassidy was John Cassidy. Notice of this application for a patent was posted on the claim, and it remained there for more than two months. It was published for ten weeks in a newspaper at Park City. The defendant and its grantors paid all the taxes upon the property from 1897 to 1910.

The first step which Cassidy took to assert his rights, so far as the evidence shows, was the commencement of a suit against the defendant on December 1, 1908. For more than 25 years he made no effort to find out what had become of his interest in the Captain claim. He was a miner, and must have known of the laws and regulations which required yearly labor in order to preserve his interest. He must have known that, if the claim had not been entirely abandoned, some of his companions must have done the assessment work which he ought to have done. The records of Summit county contained papers showing the attempted forfeiture of his rights. The most casual inspection of those records after August 19, 1886, would have disclosed this fact. A simple letter of inquiry to the local United States land office at any time after 1895 would have told him that he should move promptly if he desired to assert his claim, yet for more than 12 years after this date he did nothing and said nothing. The officers of the defendant company never heard of his claim until he commenced his first suit in December, 1908. Under the circumstances of this case, no cause of action which he may have had, whatever it may be called, can survive after such delay.

The decree of the court below is affirmed, with costs.

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MILLER v. WESTON et al.†

(Circuit Court of Appeals, Eighth Circuit. August 15, 1912.)

No. 3,614.

**1. COURTS (§ 489\*)—JURISDICTION OF FEDERAL COURTS—SUITS RELATING TO PROBATE OF WILLS.**

Under Const. Colo. art. 6, § 23, and Rev. St. Colo. 1908, § 7082 et seq., which vest in the county courts exclusive jurisdiction of all probate proceedings, and to decide therein on the genuineness and validity of any writing purporting to be a will, and to admit it to probate or deny its probate, and do not confer on the courts of law or equity of the state jurisdiction to determine any of such matters, except in direct appellate proceedings from the county court, a federal court in that state is without jurisdiction of a suit to prevent the probate of a will or to have it adjudged invalid.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324-1341, 1372-1375; Dec. Dig. § 489.\*]

Probate jurisdiction of federal courts, see note to Bedford Quarries Co. v. Thomlinson, 36 C. C. A. 276.]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied December 6, 1912.

**2. EQUITY (§ 150\*)—PLEADING—MULTIFARIOUSNESS OF BILL.**

A bill against the executors named in a will and the beneficiaries thereunder to have it declared invalid and denied probate, in which another defendant is also joined for the purpose of having a deed from the testator to such defendant adjudged void for fraud, and canceled, is multifarious.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 342, 371-379; Dec. Dig. § 150.\*]

Appeal from the Circuit Court of the United States for the District of Colorado.

Suit in equity by George A. Miller against William E. Weston, I. S. Smith, Julia Holst, and others. Decree for defendants, and complainant appeals. Reversed, with directions to dismiss for want of jurisdiction.

John T. Bottom, for appellant.

Fred Herrington, for appellee Holst.

G. K. Hartenstein (I. O'Mailia, on the brief), for other appellees.

Before ADAMS and SMITH, Circuit Judges, and REED, District Judge.

REED, District Judge. The appellant, George A. Miller, a citizen of Missouri, brought this suit in the Circuit Court against the defendants, William E. Weston and I. S. Smith, as individuals and as administrators, to collect of the estate of David F. Miller, deceased, and others, all citizens of the state of Colorado or states other than Missouri, to prevent the probate of a paper purporting to be the last will and testament of said David F. Miller, deceased, in which the said William E. Weston and I. S. Smith, are named as executors and testamentary trustees, and the defendants, other than Julia Holst, as devisees or legatees in said will or their legal representatives. No other ground of federal jurisdiction is alleged than the diverse citizenship of the parties. The defendants, other than the defendant Julia Holst, demurred to the bill upon the grounds, among others, that there was no equity in the bill, and that the Circuit Court was without jurisdiction of proceedings to probate a will, contest the same, or to deny its probate; and the defendant Julia Holst, upon the further ground that as to her the bill was multifarious. The demurrers were sustained, the bill dismissed, and the complainant appeals.

The bill is voluminous, covering 34 pages of the printed record. It is sufficient to say, that among its many allegations it is alleged in substance: That David F. Miller, alleged to be a resident of the city and county of Denver, in the state of Colorado, died in Fremont county, that state, December 7, 1906, while temporarily therein, leaving the appellant, George A. Miller, as his son and only heir at law surviving him, and what purports to be the last will and testament of said deceased, in which the defendants William E. Weston and I. S. Smith are named as executors and testamentary trustees, and others of the defendants, than Julia Holst, as legatees and devisees thereunder, or their legal representatives; that on December 21, 1906, said defendants William E. Weston and I. S. Smith filed said purported will in the county court of Park county, Colo., for probate, and

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

due notice thereof was given to the appellant, who within the time required by the law of Colorado filed in said court notice of his intention to contest said will, and objections thereto alleging that said paper was not the last will and testament of David F. Miller deceased; that deceased was mentally incapable of making a will at the time he signed said paper; that he was induced to sign the same by the fraud and undue influence exerted upon and over him by the defendants other than the minor defendants, and objected to the probate of said alleged will.

The paper alleged to be the last will of said David F. Miller is set forth in the bill as follows:

"I, the undersigned, David F. Miller, of Fairplay, in the county of Park, state of Colorado, \* \* \* do make and declare the following as my last will and testament:

"1. I will and direct that my funeral expenses and all my just debts be promptly paid. \* \* \*

"2. I hereby constitute William E. Weston and I. S. Smith, of Fairplay, Colorado, and either of them, should the other be dead or refuse to act, executors of this will and trustee of my property, real and personal, and all rights and credits, to whom, on the admission of this will to probate, the title and ownership of my said property rights and credits shall go, in trust, however, for the realization of said rights and credits and conversion into money of said real estate and personal property according to their best ability and judgment under the supervision of the court of probate, and for the distribution of all the proceeds, after first paying my funeral expenses and my debts as above directed as well as all expenses of administration, including full compensation to my said executors, as next hereinafter stated."

The next eight paragraphs make certain devises or bequests to sisters of the deceased and other persons, and to the defendants John D. Buyer, Julia Ryan, and Mary Hammond. The ninth paragraph bequeaths to George A. Miller, the appellant, the sum of \$3,000, and the tenth, \$300 each to his four minor sons, naming them.

The paper purports to have been signed by David F. Miller, at Fairplay, Park county, Colorado, August 22, 1905, in the presence of four witnesses, one of whom is "Isaac S. Smith." What purports to be a codicil modifying the eighth paragraph of the will purports to have been signed by David F. Miller, at Fairplay, Park county, Colorado, May 21, 1906, in the presence of three witnesses. The paragraphs of the will, other than above set forth, and the codicil, are not material to a determination of the questions presented by the demurrers.

As to the defendant Julia Holst, it is further alleged that, through her fraud and undue influence over the said David F. Miller, she induced him to sign a deed to her of certain property in the city of Denver, which deed was never delivered by the deceased in his lifetime; that after his death she fraudulently obtained said deed from his private papers, and placed the same of record in the city and county of Denver, Colorado; and it is prayed as against her that said deed and the record thereof be canceled, set aside, and adjudged void.

The dominant purpose of the bill, as to the defendants other than Julia Holst, obviously is for a decree that the paper purporting to be the last will and testament of said David F. Miller, deceased, is not such will, that the probate thereof be denied, and that appellant be

decreed to be the owner of his father's estate free from any of the provisions of said will; and, as to the defendant Julia Holst, that the deed of the real estate in the city of Denver, alleged to have been made by David F. Miller to her, but never delivered, and the record thereof, be set aside and adjudged void.

The only grounds of the demurrers that we deem it necessary to consider are those of the defendants, other than Julia Holst, which challenge the jurisdiction of the Circuit Court over the matter of the probate of the alleged will of David F. Miller, and that of the defendant Holst, alleging that as to her the bill is multifarious. An extended discussion of these is quite unnecessary.

[1] The Supreme Court of the United States has frequently considered and determined the question of the power of a Circuit Court of the United States over the probate, or revocation of the probate of a will. In *Farrell v. O'Brien*, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101, a suit to annul the probate of a will which had been admitted to probate by the proper probate court in the state of Washington, the authorities bearing upon this question are reviewed at some length by the present Chief Justice, then Mr. Justice White, after which he states the conclusion of the court as to the principles deducible from them as follows:

"An analysis of the cases, in our opinion, clearly establishes the following:

"First. That as the authority to make wills is derived from the state, and requirement of probate is but a regulation to make the will effective, matters of pure probate, in the strict sense of the words, are not within the jurisdiction of courts of the United States.

"Second. That where a state law, statutory or customary, gives to the citizens of the state, in an action or suit *inter partes*, the right to question at law the probate of a will or to assail probate in a suit in equity, the courts of the United States, in administering the rights of citizens of other states or aliens, will enforce such remedies.

"The only dispute possible under these propositions may arise from a difference of opinion as to the true significance of the expression 'action or suit *inter partes*,' as employed in the second proposition. When that question is cleared up, the propositions are so conclusively settled by the cases referred to that they are indisputable. Before coming to apply the propositions we must, therefore, accurately fix the meaning of the words 'action or suit *inter partes*.'

"The cited authorities establish that the words referred to must relate only to independent controversies *inter partes*, and not to mere controversies which may arise on an application to probate a will because the state law provides for notice, or to disputes concerning the setting aside of a probate, when the remedy to set aside afforded by the state law is a mere continuation of the probate proceeding; that is to say, merely a method of procedure ancillary to the original probate, allowed by the state law for the purpose of giving to the probate its ultimate and final effect. We say the words 'action or suit *inter partes*' must have this significance, because, unless that be their import, it would follow that a state may not allow any question to be raised concerning the right to probate at the time of the application, or any such question thereafter to be made in ancillary probate proceeding, without depriving itself of its concededly exclusive authority over the probate of wills."

The law of Washington is then referred to, and the conclusion is reached that under that law a proceeding for the probate of a will, or to annul the probate of one, is not an independent suit "between parties," but is the procedure established by the state for the settle-

ment of the estates of deceased persons and the distribution thereof according to their wills, or the law of the state if they leave none, of which proceedings the courts of law or equity in that state are not given jurisdiction, and that the Circuit Court of the United States in that state has not, therefore, jurisdiction of such a proceeding.

The law of Colorado is not essentially different in this respect from the law of Washington. Article 6, § 23, of the Constitution of Colorado provides:

"County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlements of estates of deceased persons, appointments of guardians, conservators and administrators, and settlement of their accounts. \* \* \*

The statutes of Colorado provide in detail for a hearing in the county court, upon the filing therein of a paper purporting to be the last will and testament of a deceased resident of the county, and a determination by it whether or not such paper is the will of such person, the fixing of a day for such hearing, the giving of notice to all persons in interest, the filing of objections by any person desiring to contest the will, or object to the validity of all or any portion of the contents thereof, the hearing and determination of such objections, and for an appeal from the decree or order of the court in such proceedings to the district court, and to the appellate or Supreme Court of the state. Revised Statutes of Colorado 1908, § 7082 et seq. Neither the Constitution nor the statutes of the state confer upon the courts of law or equity in that state, or any other court than the county court, any jurisdiction to admit a will to probate, or to annul such probate after it has been allowed by the county court; and the only provision for reviewing the order of the county court, admitting a will to probate, or denying its probate, to which our attention has been called, is by appellate proceedings in the proper appellate court.

The appellant contends in argument that the alleged will is void upon its face because it offends the "rule against perpetuities." This is based upon certain words in the second paragraph of the will, which reads:

"I hereby constitute William E. Weston and I. S. Smith, of Fairplay, Colorado, and either of them, should the other be dead or refuse to act, executors of this will and trustee of my property, real and personal, and all rights and credits, *to whom, on the admission of this will to probate,* the title and ownership of my said property rights and credits shall go, in trust, however, for the realization of said rights and credits. \* \* \*

The italicized words are the words which it is claimed render the instrument void. This in effect calls for a construction of that portion of the will, and until the will shall be admitted to probate it is purely a moot question; for, should the will be not admitted to probate, there is nothing for any other court than the court of probate to construe. The statutes of Colorado, set forth in the briefs of counsel, direct that the county court, if the instrument be found to be a will, shall hear and determine, before it shall finally admit the same to probate, whether or not any portion of the will is void, and, if so, to admit the will to probate in so far as it shall be found to be valid, and it shall be executed to that extent only; and any portion of the



estate not conveyed by the will, because of the invalidity of any portion thereof, shall be held to be intestate property and be administered as such by the executors. If the entire contents of the will be held void, the estate shall be administered as in other cases of intestacy. Section 7095, Rev. Stats. of Colorado 1908. Inasmuch as the alleged invalidity of the will, or any portion thereof, if it be found to be a will, is to be determined by the probate court before finally admitting it to probate, such determination inheres in and is, of necessity, a part of the probate proceeding. The Circuit Court, therefore, has no more jurisdiction to determine, in advance of the probate of the will, the validity or invalidity of that part of the will to which appellant objects, than it has of any other part of the probate proceeding.

[2] The demurrer of the defendants other than Julia Holst to the bill was therefore properly sustained, but upon the ground that the Circuit Court had no jurisdiction to either admit to probate or deny the probate of the alleged will of David F. Miller, and that of the defendant Julia Holst was properly sustained upon the ground that as to her the bill was clearly multifarious. 1 Street's Federal Equity, §§ 441, 442. And see *Oliver v. Piatt*, 3 How. 333-411, 412, 11 L. Ed. 622.

The court, however, dismissed the bill as to all defendants, apparently for want of equity; at least it does not affirmatively appear that it was dismissed for want of jurisdiction, or that as to the defendant Holst because it was multifarious. The bill should have been dismissed as to all of the defendants, except the defendant Holst, for want of jurisdiction only, and without prejudice to the right of the appellant to contest the will of David F. Miller in the probate court, if he shall be so advised; and as to the defendant Holst it should have been dismissed upon the ground that it was multifarious.

The cause will therefore be reversed, and remanded to the United States District Court for the District of Colorado as the successor of the United States Circuit Court for that District, with directions to dismiss the bill without prejudice as to all of the defendants, other than the defendant Holst, for want of jurisdiction, at appellant's cost, and as to the defendant Holst, without prejudice, because it is multifarious. The appellees will recover their costs of this court. It is ordered accordingly.

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CITY OF MILWAUKEE v. KENSINGTON S. S. CO.

KENSINGTON S. S. CO. v. CITY OF MILWAUKEE.

(Circuit Court of Appeals, Seventh Circuit. April 23, 1912.)

Nos. 1,817, 1,833.

1. NAVIGABLE WATERS (§ 20\*)—LIABILITY FOR NEGLIGENCE—UNSAFE BRIDGE OVER NAVIGABLE STREAM.

A decree affirmed, holding a city solely liable for an injury received by a steamer by striking against the stone abutment of a drawbridge, through which she was being towed; it appearing that the tugs were not in fault, that the timbers by which the abutment had originally been

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

guarded had been allowed to rot away, and that the city had been notified of its dangerous condition.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 73-99; Dec. Dig. § 20.\*]

## 2. ADMIRALTY (§ 122\*)—COSTS—EQUITABLE DISTRIBUTION.

The owner of a vessel injured, while being towed through a draw-bridge, by striking against the unguarded masonry, brought suit therefor against the towing tugs; and the claimants brought in the city, which maintained the bridge, under the fifty-ninth rule. The city was held solely in fault and liable for the injury. *Held*, that the claimants of the tugs were entitled to recover their costs from libellant, which was responsible for their being incurred.

[Ed. Note.—For other cases, see *Admiralty*, Cent. Dig. §§ 797-827; Dec. Dig. § 122.\*]

Appeals from the District Court of the United States for the Eastern District of Wisconsin.

Suit in admiralty by the Kensington Steamship Company against the tugs Starke and Welcome, Sophie Meyer and others, claimants, in which the City of Milwaukee was impleaded. From the decree (182 Fed. 498), libellant and the city both appeal. Affirmed.

The parties in the court below were the Kensington Company, owner of the Kensington, libellant, the steam tugs Starke and Welcome, Sophie Meyer, Veronica Starke, and William C. Starke, executrix, executor, and trustees of the estate of Conrad Starke (former owner of the tugs), answering claimants, and the city of Milwaukee, brought into the case pursuant to the petition of claimants under the fifty-ninth admiralty rule, which provides for the bringing in of any other vessel, or any other party, when suitable allegations showing fault or negligence thereof shall appear by petition. The steamer was injured by striking the abutment of a bridge, while being towed by the tugs. The questions litigated were whether the tugs or the city was liable for the collision, and, the city having been found liable, how the costs of the tug owners should be paid. The decree finds the damages to be paid by the city to the steamer, with interest, \$1,905.22, and the costs \$213.95. It also charges the steamer with the costs of the tug owners, \$55.86. Both the libellant and the city appeal.

It appears from the record that on the 3d day of December, 1907, the tugs Starke and Welcome were towing the steamer Kensington stern first, without cargo, but with water ballast, down the Milwaukee river at the port of Milwaukee. The Starke had a line from her bow and the Welcome had a line from her stern. The Kensington was not working her engines, the power being supplied by the Welcome at her stern. The length of the Kensington is 400 feet over all, and her beam is 50 feet. It is alleged that, when the Kensington entered the east draw of the State Street bridge, her starboard side about abreast of the center of the boiler house, at the light water mark, struck the upper and northerly portion of the easterly abutment of the State Street bridge, denting and fracturing one of the plates, and injuring the frame. The steamer was brought down stern first, because there was no place in the upper Milwaukee river to wind her. She was drawing 14 feet aft and 4 feet forward. When the accident happened her stern was probably 40 feet into the draw of the bridge. She proceeded in tow to Elevator A at the port of Milwaukee, where she was slightly listed by pumping out some of the water ballast, and a puncture, such that "you could about stick your finger into," was found, with cracks radiating two or three inches in different directions. The puncture was about a foot above the light water mark, but about 3 or 4 inches below the water line at that time.

It further appears that when the bridge was originally constructed the plans called for a cluster of piles near the point of collision, to protect the bridge and tend to the safety of passing vessels. The piles were left out,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

however, and the abutment protected by timbers. These had rotted away at the time of the accident, leaving the stone ledge entirely unprotected, and found by the trial court to have been under water. As to this point the evidence is not clear. It does appear, however, that the steamer was overloaded aft, and, being towed stern foremost, the tendency to sheer was difficult to overcome; the draw being only 13 feet wider than the steamer. The evidence very strongly tends to show that the tugs were carefully operated. No specific act or omission on their part is established. The mere fact of injury does not show negligence. In *re W. H. Simpson*, 80 Fed. 153, 25 C. C. A. 318. It is also shown that it is a common thing for large steamers, being towed stern foremost, to touch or graze the State street abutment. It appears from the record that the captains of the tugs knew of the condition of the bridge, as well as the owners of the tugs. About eight months before the accident the Milwaukee Tugboat Line, by C. J. Meyer, sent a letter to the Milwaukee board of public works, calling attention to the dangerous condition of several of the draws, among others that on State street, and giving notice that in case of injury to a tow it would hold the city liable for damage caused by the want of protection at such places. Both tug captains testified that, after the accident, they could see the ledge by running their boats through the draw, thus creating such a wave as to expose it to view. However, the evidence shows reasonable care on their part, and that the condition of the ledge was the sole cause of the injury.

Clifton Williams, for appellant.

M. C. Krause, for tugs Starke and Welcome.

John B. Richards, for appellee.

Before KOHLSAAT and MACK, Circuit Judges, and SANBORN, District Judge.

SANBORN, District Judge (after stating the facts as above).  
[1] 1. We are entirely satisfied that the decision appealed from is fully supported by the evidence, and should not be disturbed, so far as the liability of the city is concerned. The ledge was a dangerous obstruction to navigation. Easily remedied by the maintenance of piles, it was the duty of the city to put them there, and there keep them. Failure to do this was negligence, the proximate cause of the injury. The bridge itself was an obstruction to navigation, permitted only to serve the convenience of commerce on land. Clearly it was the duty of the city to make it as safe as was reasonably possible. *Clement v. Metropolitan West Side El. R. Co.*, 123 Fed. 271, 59 C. C. A. 289, and *Vessel Owners' Towing Co. v. Wilson*, 63 Fed. 626, 11 C. C. A. 366, both in this circuit; *Great Lakes Towing Co. v. Kelley Island L. & T. Co.*, 176 Fed. 492, 100 C. C. A. 108, Fourth Circuit; *The Nonpareil* (D. C.) 149 Fed. 521. The case of *Kelley Island L. & T. Co. v. Cleveland* (D. C.) 144 Fed. 207, followed in *Munroe v. Chicago* (D. C.) 186 Fed. 564, was reversed on appeal, and a decree ordered against both the city and the towing company. 176 Fed. 492, 100 C. C. A. 108, *supra*.

[2] 2. The question of the propriety of charging the steamer with the costs of its unsuccessful attempt to show fault on the part of the tugs has not been decided, apparently, in any reported case. The trial judge wrote a separate opinion on this point. He said:

"The principle seems to be that in such a case the costs will be taxed against the party who renders it necessary that such costs and expenses should be incurred. This seems to be an equitable principle. Applying it to

the instant case, the libelant was solely responsible for the costs and expenses incurred by the tug company. It brought such company into litigation and failed to maintain its contention against it. Why should it not reimburse the innocent party, whom it has brought in and compelled to incur these costs and expenses? Certainly the city of Milwaukee had no responsibility in the premises as between it and the tug company. The costs and expenses of the tug company were largely incurred before the city of Milwaukee was brought into the case, and there would seem to be no equitable ground upon which these costs should be taxed against the city of Milwaukee.

"There is another equitable feature which must not be lost sight of. The libelant, having failed to establish its contention against the tug company, would have gone out of court with empty hands and liable for a full bill of costs in favor of the tug company, had not the tug company caused the city of Milwaukee to be brought in by its petition under the fifty-ninth rule. The tug company was thus instrumental in rendering the libelant's recovery possible. It seems, therefore, only fair that the libelant should be held responsible for the costs and expenses of the tug company.

"In admiralty, as in equity, the prevailing party is generally entitled to costs; but they do not necessarily follow the decree, and are always in the exercise of a sound discretion, to be allowed, withheld, or divided according to the equities of the case."

The court properly applied the general rules governing such cases, and the decree should be affirmed on both appeals.

Affirmed.

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#### CITY OF CHICAGO v. GOODRICH TRANSIT CO.

(Circuit Court of Appeals, Seventh Circuit. April 23, 1912.)

No. 1,864.

#### 1. NAVIGABLE WATERS (§ 19\*)—OBSTRUCTION BY WATERWORKS CRIB—INJURY TO VESSEL BY COLLISION—LIABILITY.

The city of Chicago and a lake steamer approaching the city in a dense fog both held in fault for a collision between the steamer and a waterworks crib maintained by the city in the lake near the harbor entrance; the city because those in charge of the crib failed to sound proper fog signals in addition to the lights, and the steamer because the master and mate, both of whom were entirely familiar with the harbor and the position of the crib, were negligent in maintaining a speed of 6½ miles an hour through the fog, which obscured the lights, and with the wind behind them.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 59-63, 68-72; Dec. Dig. § 19.\*]

#### 2. NAVIGABLE WATERS (§ 19\*)—SPEED IN FOG—WHAT CONSTITUTES "MODERATE SPEED."

What constitutes a "moderate speed" on the part of a vessel in a fog cannot be determined by any hard and fast rule, but depends on the dangers which are known or should be anticipated in the particular case.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 59-63, 68-72; Dec. Dig. § 19.\*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4551, 4552.

Collision rules, speed of steamers in fog, see note to *The Niagara*, 28 C. C. A. 532.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Suit in admiralty by the Goodrich Transit Company, as owner of the steamer City of Racine, against the City of Chicago. Decree for libellant, and respondent appeals. Reversed.

William H. Sexton, Corp. Counsel, of Chicago, Ill. (Charles M. Haft and Bernard J. Mahony, Asst. Corp. Counsel, both of Chicago, Ill., of counsel), for appellant.

Charles E. Kremer, of Chicago, Ill., for appellee.

Before KOHLSAAT and MACK, Circuit Judges, and HUMPHREY, District Judge.

HUMPHREY, District Judge. On July 30, 1909, the steamer City of Racine, bound from Racine to Chicago, struck the Chicago Avenue waterworks crib, belonging to the city of Chicago and located in Lake Michigan, near the entrance to the harbor. The hour was 4:02 in the morning. There was a heavy fog, through which the vessel had been running for two hours; but the fog enveloped the crib less than a half hour before the collision. The wind was due north, blowing 10 miles per hour. The vessel was going almost south at the rate of 12 to 13 miles per hour, and checked to half that speed 12 minutes before the collision. The light on the crib was burning, but through the dense fog could not be seen more than 200 feet. The evidence is conflicting as to whether any fog signal was sounded from the crib. The crib keepers testified that the bell was ringing constantly for a half hour before the accident, and the crew testified that they were listening for the sound, but did not hear it. The trial court found that the collision was caused wholly by the negligence of the appellee, and rendered judgment accordingly.

[1] The city having placed near the mouth of the harbor an obstruction to navigation, the legal obligation rested upon it to provide on the crib and to keep in use suitable fog signals. This record clearly shows that a light alone is not an efficient fog signal for safe navigation. An audible signal was necessary under the law. If this were all, the case would present no difficulty. But the law looks to the conduct of those on the steamer, as well as those on the crib, which raises the more complex question as to the duty of a captain of a ship approaching a harbor through a fog, and particularly the question of moderation of speed.

Regardless of any negligence on the part of appellee, the vessel was bound to proceed with such caution as a safe navigator would observe, in view of those dangers of weather and location which were within his knowledge. The captain of the Racine was as familiar with all the dangers growing out of the time, place, and accompanying circumstances as any man could be. He had passed over the route thousands of times (he testified 3,000 or 4,000 times). He knew the location, not only of the crib in question, but numerous other cribs in the vicinity, some of which he had passed a short time before the accident. The crib which caused the collision had been there over 20 years, and the steamer Racine had passed by it all those years. The captain and his mate had passed it also during all those years,

either in this boat or some other. There was no danger known to navigation, at the point in question, which was not familiarly known to these two men—how far the light would throw its beams, the distance which sound waves would carry, the caprices of both, how each would be affected by atmospheric conditions, rain, snow, wind, or fog and by the direction and velocity of the wind. No authority could have a better knowledge than this captain and mate as to the uncertainty of receiving signals by the medium of the eye or the ear at the time and place in question.

We think the dangers of the situation, as he knew them to exist, required a higher degree of care from the master of the steamer than he exercised. He had run through the fog for about two hours at full speed, about 13 miles per hour and sounding his fog whistle every minute. It was then 3:50 a. m., and he testifies that he reduced speed one-half, knowing he was within 10 or 12 minutes of the crib. The steamer and the wind were going in the same direction; the wind 10 miles per hour. The captain was waiting for signals to tell him where the crib was, although he had estimated it exactly; for he struck it at 4:02 a. m., just where he thought he would reach it. He knew that the signal to the eye would be shortened by the fog, and that the signal to the ear would be shortened by the wind, yet, with a full knowledge of these facts, he speeded along at  $6\frac{1}{2}$  miles per hour, when he might have had the vessel under such control as to avoid injury. If the officers of the vessel needed anything to impress them with the uncertainty of crib signal by light or bell in the given condition of fog and wind, they had it in the fact that they had recently passed other cribs, where they usually saw and heard signals, and that they saw and heard none that morning.

[2] Appellee, to sustain this decree, relies with some confidence upon the utterance of this court in the case of *The Conestoga*, 178 Fed. 42, 101 C. C. A. 170. We do not think that case can be held to control this. The decree, which was reversed in the *Conestoga* Case, was based upon a rule of navigation requiring the *Conestoga* to reduce speed to a rate no higher than was necessary to maintain steerageway, and the court held that the facts of that case did not justify so drastic a rule. The question there, as here, was as to moderation of speed—a mixed question of law and fact as to the sufficiency of the moderation. The two cases as to the surrounding facts are not on all fours. The *Conestoga* was going  $4\frac{1}{2}$  miles per hour; the *Racine*,  $6\frac{1}{2}$ . It does not appear that the captain had such knowledge of his dangerous proximity to the crib in the *Conestoga* Case as in the case at bar. No hard and fast rule as to moderation of speed can be enforced in every case, and the citing of cases will serve no good purpose. The rate of speed must be commensurate with those dangers which are known or must be anticipated. Judged by this reasonable standard, we think there was negligence on the part of appellant, which contributed to the injury. Appellant should therefore pay one half the damages and costs, and appellee the other half.

Decree reversed, and cause remanded, with directions to proceed in accordance with this decision.

## In re ISSUING WRITS OF ERROR.

(Circuit Court of Appeals, Sixth Circuit. October 11, 1912.)

## COURTS (§ 382\*)—WRITS OF ERROR—ISSUANCE—POWER TO ISSUE.

Rev. St. § 1004 (U. S. Comp. St. 1901, p. 713), as amended by Act Cong. Jan. 22, 1912 (37 Stat. 54), provides that writs of error returnable to the Supreme Court or a Circuit Court of Appeals may be issued as well by the clerks of the District Courts under the seal thereof as by the clerk of the Supreme Court or of a Circuit Court of Appeals, and when so issued they shall be, as nearly as the case will admit, agreeable to the form of writ of error issued by the clerk of the Supreme Court or the clerk of a Circuit Court of Appeals. *Held* that, where a writ of error from the Supreme Court has been allowed by a judge of the Circuit Court of Appeals to review a decision of that court, it should be issued either by the clerk of the Supreme Court or the clerk of the Circuit Court of Appeals, and not by the clerk of the District Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1019, 1020; Dec. Dig. § 382.\*]

In the matter of authority to issue writs of error from the Supreme Court to the Circuit Court of Appeals.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. A writ of error from the Supreme Court has been allowed by one of the judges of this court to review one of our decisions. The question is, By the clerk of which court should the writ be actually issued? We think we should determine and announce the practice to be followed by the members of this court, as now constituted, under Revised Statutes, § 1004 (U. S. Comp. St. 1901, p. 713), as amended January 22, 1912 (37 Stat. 54).

Previous to the amendment, the statute made no provision for the issue of writs from the Supreme Court to the Circuit Court of Appeals, nor from the latter courts to the Circuit and District Courts; the statute having been passed before the Circuit Courts of Appeals were organized. Previous to the amendment, it was the custom of the clerk of the Circuit Court for the Southern District of Ohio to issue writs of error for the Supreme Court for review of our judgments, upon allowance of the writ by one of the judges of this court, by analogy to the practice on error from the Supreme Court of the United States to a state court. *Buell v. Van Ness*, 8 Wheat. 312, 5 L. Ed. 624; *Ex parte Ralston*, 119 U. S. 613, 7 Sup. Ct. 317, 30 L. Ed. 506. So far as we know, there has been no practice in this respect since the amendment of 1912.

The amended statute reads:

"Writs of error returnable to the Supreme Court or a Circuit Court of Appeals may be issued, as well by the clerks of the District Courts, under the seal thereof, as by the clerk of the Supreme Court or of a Circuit Court of Appeals. When so issued, they shall be as nearly as the case may admit agreeable to the form of a writ of error issued by the clerk of the Supreme Court or the clerk of a Circuit Court of Appeals."

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The issue of writs of error both to and from this court was thus provided for. We think the natural and thus the correct construction of the amendment is that the writ of error may be issued by the clerk of the court to which it is returnable or by the clerk of the court whose judgment is to be reviewed, and thus that the clerk of this court has authority to issue the writ in question, leaving no authority therefor in the clerk of the District Court. To say the least, unless the clerk of this court has such power, it is not, in our judgment, lodged in the clerk of the District Court.

We therefore think we should not approve the issue by the clerk of the District Court of writs of error from the Supreme Court for the review of our judgments; but the judges of this court will indorse allowance upon such writs to be issued by the clerk of either the Supreme Court or this court, whichever plaintiff in error may prefer. We realize that our construction of the statute is not binding on the Supreme Court, and that the latter may dismiss a writ which, in its judgment, is improperly issued. A plaintiff in error need not, however, be prejudiced by the course we are taking. The power of the clerk of the Supreme Court to issue the writ is unquestioned; and if a plaintiff in error is not entirely satisfied of the power of the clerk of this court to issue the writ, he can and should save any question by having the writ issued by the clerk of the Supreme Court. A plaintiff in error must take the responsibility in this regard. We assume that, under present rule 40 of the Supreme Court, its clerk would issue the writ on its allowance by a judge of this court. But, if not, any Justice of the Supreme Court may allow the writ, and none the less from the fact that it has already been once allowed by a judge of this court.

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CLARK v. JOHNSON et al.

(Circuit Court of Appeals, Seventh Circuit. April 23, 1912.)

No. 1,819.

PATENTS (§ 322\*)—INFRINGEMENT—ACCOUNTING FOR PROFITS.

On an accounting for infringement of the Hurlbut reissue patent, No. 11,696 (original No. 563,664), for a dental spittoon, a finding by the master affirmed that the entire value of defendant's article as a marketable commodity was attributable to the infringing features, and that the burden rested on defendant to show what part of its profits arose from other sources, and for lack of such proof that complainant was entitled to recover all profits.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 590-595; Dec. Dig. § 322.\*]

Accounting by infringer of patent for profits, see note to Brickill v. Mayor, etc., of City of New York, 50 C. C. A. 8.]

Appeal from the Circuit Court of the United States for the District of Indiana.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



Suit in equity by Albert C. Clark against George E. Johnson, L. E. Hunter, Elizabeth E. Chapin, administratrix of A. A. Chapin, deceased, and W. P. Denny. From final decree, complainant appeals. Reversed.

On March 14, 1902, appellees were adjudged to have infringed claims 1, 2, 3, and 4 of letters patent, reissue No. 11,696, granted September 27, 1898, to F. Hurlbut, and duly assigned to appellant, hereinafter termed complainant (original No. 563,664, granted July 7, 1896), for a dental spittoon. An injunction was issued as prayed, and an accounting ordered. For this purpose the cause was referred to a special master, Mr. Thomas J. Logan, who was required to take the evidence and report to the court his conclusions upon certain questions propounded in the decree, among others, several directing the master to ascertain what profits and damages appellant was entitled to, if any. The claims in suit read as follows, viz.:

"1. In a spittoon, an inner and an outer bowl, the inner bowl being revoluble; and a water-injector adapted to direct a jet of water against said revoluble bowl to revolve the same.

"2. A dental spittoon having an outer and an inner bowl, the inner bowl being revoluble within the outer bowl; a water-injector adapted to throw a stream of water against the inner surface of the inner bowl; and an adjustable fixture carrying the injector by which it is made removable from the inner bowl.

"3. In a dental spittoon, an inner bowl and an outer bowl, the inner bowl being revoluble; a water-injector held to direct water against the inner surface of the inner bowl to revolve the same; and a fixture which holds the water-injector, the water-injector being adjustable in the fixture to change the direction of the stream which it directs against the revoluble bowl to modify the speed of the revolution of the bowl.

"4. In a dental spittoon, an outer and an inner bowl, the inner bowl being revoluble in the outer bowl; the water-injector for directing the stream of water against the surface of the inner bowl to revolve the same; and a removable cap placed over the upper edges of the two bowls secured to the outer bowl."

Appellee's device is known as the "Peerless spittoon."

Questions 5, 6, 7, and 8, submitted to the master, read as follows, viz.:

"5. To what extent the invention of the claims in suit is for a new machine, and to what extent an improvement in an old machine.

"6. Whether defendants' infringing spittoons contain other features not covered or included in the claims in suit, and, if so, the proportionate value such features sustain to the entire spittoon.

"7. Whether defendants' spittoons contain any improvements of value not covered by said claims in suit, but which belong to defendants.

"8. Whether the defendants' spittoons would be useless for their special purpose without the use of complainant's invention, and whether known substitutes would render the defendants' spittoons salable."

In reply to question 5, the master reports as follows, viz.: "The following parts were used in the Peerless spittoon during the infringing period (not naming the infringing parts) to make it an operative dental spittoon: (1) An upright iron rod, with spreading base, known as the supporting stand for the flushing device. (2) Iron bracket-arms to hold the bowls, or flushing device, which was attached, by a movable slide, to the upright iron rod. (3) Hose or tubing, with metal connections, to supply running water to the bowls. (4) Hose or tubing, with metal connections, to carry waste water from bowls. (5) Automatic saliva ejector, consisting of rubber tubing and connections. (6) Mouthpiece for saliva ejector tubing. (7) Valve connections for nozzle and ejector. (8) Water regulator or floor valve. (9) Gold and gas trap. (10) Glass holder and connection. (11) One water outlet and valve above bowl."

In answer to said question 6, the master reports as follows, viz.: "(a) Defendants' infringing spittoons contain other features not covered or included in the claims in suit. (b) The proportionate value such features sustain to the entire spittoon has not been developed by the defendants' evidence."

To question 7, the master replies: "Yes; defendants' spittoons contain im-

provements of value not covered by said claims in suit, which belong to defendants."

Reporting as to question 8, the master says: "Defendants' spittoons would be useless for their special purpose without the use of complainant's invention, i. e., the flushing device, unless a serviceable substitute was put in its place. The White dental flushing device, known as the 'Barker mill' device, was a known substitute, which would render the defendants' spittoons salable."

The special master also finds, in answer to question 9, that "the entire value of the Peerless spittoon, as a marketable article, under the law, is attributable to the four claims mentioned" (being the four claims above set out). The master further reports that defendants received no profits from the infringement; that Ransom and Randolph, dealers for whose acts defendants are responsible, realized a profit of \$1,420.19; and that, while complainant suffered damages from the infringement, the evidence furnished no reasonable basis or data on which to calculate the same.

The master further finds that, if defendants should make their inner bowl stationary and use the water injector as a spiral flushing device, then, according to the overwhelming evidence in this case, such an arrangement of parts "would furnish the defendants' spittoon with a substitute in place of complainant's device that would make the spittoon salable." He further quotes approvingly the opinion of Judge Grosscup, speaking for this court concerning the White dental spittoon in *Justi v. Clark*, 108 Fed. 659, 47 C. C. A. 565, as follows, viz.: "The White dental spittoon, in existence before 1890, seems to have been the point at which the art, up to the Hurlbut spittoon (July 7, 1896), had reached is climax. The White spittoon was a single stationary bowl, through which arose centrally, nearly to the level of the rim, a vertical rod carrying a water-spraying device that, turning pivotally on suitable bearings, distributed the water over the inner surface of the bowl, subjecting its surface to a spray, such as comes to a lawn from a water sprinkler. It was to a certain degree cleanly and tasteful and went into general use." The opinion goes on to say, further, that in the White spittoon the sprinkler revolves, while the bowl is stationary; in the Hurlbut, it is the bowl that is revoluble.

The master finds, further, that the infringing period herein embraces only the years 1898 and 1899, during which time the S. S. White and Peerless were the only spittoons sold in the ranks of the American Dental Trade Association. It appears that the device of the patent was handled independently at that time. The White spittoon was not covered by a patent. The master finds that the White dental cuspidor, Barker mill flushing device, had been upon the market a number of years preceding the Clark and Peerless, and was in general use by dentists. Clark's and the Peerless devices, and others caused the popularity of the White to wane with the public. "The evidence shows that for many years it was a practical dental spittoon, used extensively in the dental profession, and of undoubted commercial value." He then reports: "The evidence above cited, together with the exhibits of the respective spittoons, drives me to one conclusion only, and that is that the White flushing device of the Barker mill type, at the time heretofore referred to, would afford the defendants a 'known substitute' which would render the defendant's spittoon salable."

After citing various authorities, the master concludes: "\* \* \* I am irresistibly driven to the conclusion that the four claims infringed by defendants constitute the dominant and controlling features in the Peerless spittoon, that the adoption of those features in the Peerless spittoon was the primary cause for its extensive sale, that the improvements covered by complainant's patent constituted the chief value of the Peerless spittoon sold by defendants, and that without them no sales would probably have been made." The master further finds "that with the attachment of the combined gold and gas trap" (defendants' patented device) "the Peerless cuspidor sold for \$5 more than the same was sold without it," and holds that the burden was on defendants to show that this feature contributed to the profits made, and also to show the proportion of the sale price belonging to defendants, and further reports that he is unable, under the evidence, to separate or apportion the profits pertaining to the patented feature of defendant's device, and

that, "because of the blending of the lawful with the unlawful, the defendants cannot be allowed any part of the profits derived from the sale of the entire spittoon." Therefore, upon the hearing of all the evidence, he proceeds to make his said replies to the court.

Complainant and defendants thereupon presented to the court their several exceptions to the report, all of which, with the exception of that numbered 4, presented by defendants, were overruled by the court on April 8, 1910. That order provided that defendants' exception 4, which had reference to the master's answer to question 9, and reads as follows, viz.: "The entire value of the Peerless spittoon, as a marketable article, under the law, is attributable to the four claims mentioned under No. 5 of these findings, and which were infringed by defendants in the manufacture and sale of the Peerless spittoons"—be sustained. Afterwards, and on March 11, 1911, the court entered a final decree requiring defendants to pay to complainant the sum of \$1 as nominal damages sustained by reason of the infringement, and that the complainant pay costs of accounting to defendants, save the sum of \$600 allowed the master, which complainant was ordered to pay to him.

From these orders complainant took an appeal to this court. For errors, he assigns: (1) The order of the court sustaining defendants said exception 4; (2 to 6 and 8 to 13) the action of the court in reference to certain features of the master's manner of accounting; (7) the order of the court setting aside the finding of the master, which awards to complainant on accounting the sum of \$1,420.19; (14) the order of the court overruling the complainant's exception to the master's finding that defendants themselves made no profits; (15) the overruling of complainant's exception to the master's report with reference to features used by defendants, not found in claims in suit, also as to a known substitute for defendants' spittoon; (16 to 24) that the court overruled complainant's exceptions to the several findings of the master as to damages; (25) that the costs were taxed against complainant.

Other facts appear in the opinion.

Josiah McRoberts, of Chicago, Ill., for appellant.

Robert S. Taylor and Elwin M. Hulse, both of Ft. Wayne, Ind., for appellees.

Before KOHLSAAT and MACK, Circuit Judges, and SANBORN, District Judge.

KOHLSAAT, Circuit Judge (after stating the facts as above). On the hearing of this cause before the Circuit Court, as here, defendants invoke the first clause of the rule as to accounting laid down in *Garretson v. Clark*, 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371, both parts of which provide that:

"The patentee must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show by equally reliable and satisfactory evidence that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature"

—claiming that the evidence herein furnishes a basis for the application of the first clause of the rule, viz., apportionment between those features of defendants' device which are covered by the patent and those which are open to the defendant. The patent involved in the *Garretson* Case covered a mop head. The court there further says:

"When a patent is for an improvement, and not for an entirely new machine or contrivance, the patentee must show in what particulars his improvement has added to the usefulness of the machine or contrivance."

The court finds that in that case there was no attempt to apportion the profits between the patented and the other features, and adds:

"His [patentee's] evidence went only to show the cost of the whole mop and the price at which it was sold. And of course it could not be pretended that the entire value of the mop head was attributable to the feature patented. So the whole case ended, the rule was not followed, and the decree is therefore affirmed."

The rule was followed in *Westinghouse v. N. Y. Air Brake*, 140 Fed. 545, 72 C. C. A. 61, with reference to a patent for an improvement in air brakes—a quick-action attachment for triple valves. The latter was an operative commercial device which was in use many years before the attachment of the quick action device. The court held the profits should have been apportioned, and reversed the case.

In *Philp et al. v. Nock*, 17 Wall. 462, 21 L. Ed. 679, the rule was applied to a patented ink bottle lid. "When," says the court, "the infringement is confined to a part of the thing sold, the recovery must be limited accordingly."

*Mowry v. Whitney*, 14 Wall. 620, 20 L. Ed. 860, involved a patent for improvement in process for making car-wheels. The court says:

"It is the additional advantage the defendant derived from the process—advantage beyond what he had without it—for which he must account."

In that case wheels could be made just as satisfactorily without the process as with it.

This court held in *Elgin Wind-Power Pump Company v. Nichols et al.*, 105 Fed. 780, 45 C. C. A. 49, that where a part of a windmill device, not indispensable to the operative mill, is infringed, the profits to be accounted for must be limited to the use of the patented part and that a plaintiff has the burden of proof as to such profits and damages. That not having been done, the decree was reversed, with direction to enter a decree for nominal damages only.

On the other hand, complainant claims to have brought his case within the second clause of the rule laid down in *Garretson v. Clark*, *supra*, which rule seems to have been followed by the master in making his report herein.

This rule was followed in *Crosby Steam Gage & Valve Company v. Consolidated Safety Valve Company*, 141 U. S. 441, 12 Sup. Ct. 49, 35 L. Ed. 809. The case involved a patent for improvement in safety valves for steam boilers or generators. The master reported that the entire commercial value of the valves manufactured and sold by defendant was due to the use of the patented device; that no substitute has been suggested to him; that the peculiar form which infringers used was but the form in which they clothed the device of the patent. The court approved the finding and awarded a decree for all profits, not making any allowance for loss in valves destroyed or exchanged, nor for expenses incurred in making experimental and defective valves, nor for improvements covered by subsequent patents of defendant and used in connection with the infringing device.

In *Elizabeth v. Paving Company*, 97 U. S. 142, 24 L. Ed. 1000, the court held the Nicholson pavement to be a complete thing con-

sisting of a combination of elements; that the defendants used the whole of it; that if they superadded the Brocklebank addition, they failed to show that such addition contributed to the profits realized; that the burden of proof was on them to do so; and allowed in diminution of profits the royalty of \$14,000 paid for the Brocklebank and Trainer patent. The same rule was applied by this court in *Orr & Lockett Hardware Company v. Murray*, 163 Fed. 54, 89 C. C. A. 492, with reference to a patented store service ladder. There, however, there was no attempt to show that any part of the sale value arose from the use of articles other than the device of the patent. The court holds the burden to be on the infringer to show profits arising from other sources. This rule was followed by this court in *Mackie v. Cazier*, 157 Fed. 88, 84 C. C. A. 591.

As set out in the statement of facts, the master reports:

"That the four claims infringed by defendants constitute the dominant and controlling features in the Peerless spittoon; that the adoption of those features in the Peerless spittoon, was the primary cause for its extensive sale; that the improvements covered by complainant's patent constituted the chief value of the Peerless spittoon sold by defendants; and that without them no sales would probably have been made."

If the master be correct in holding the spittoon in suit to be a unitary idea and conception, then his further conclusions must prevail. It is true he holds that there are a number of items embraced in the device which are not made parts of the dental spittoon in terms. There is no good reason why the supporting and adjusting elements required in a dental spittoon should not be held to be embraced in the terms, "in a spittoon," "in a dental spittoon," used in the claims. They do not in any event constitute such elements as, under the present circumstances, would warrant the claim that they added to the profits realized on sale of the patented spittoon, and should be taken into account on an accounting.

As to the features which the master finds were added to the device of the patent and which were of value, as, for instance, the spider or bowl supporting attachment found by the master to be worth \$10 to defendants' spittoon; the automatic saliva injector said by witness Denny to be worth \$10 to defendants' spittoon; the combined gold and water trap valued by the witness Denny at \$5, corroborated by the witness Johnson, who says that defendants' spittoon sold for \$5 more with the combined gold and gas trap than without it—as to these items, can it be said from the evidence that they added to the profit realized on the sale of defendants' spittoon or gave advantage in selling the same? The burden was on defendants to show how and in what degree they contributed to the marketing of defendants' device, under the facts of this case. It was not enough to give the values of these additions to the Peerless spittoon. The master was entitled to know how much of the profit was attributable to these additions. The evidence of value, it is true, was sufficient to advise the master of the defendants' claim that they contributed to the profits of sales by their own improvements or additions, but the claim was not established by the evidence. In *Crosby Valve Company v. Safety*

Valve Co., *supra*, the court, in the absence of specific proof that they enhanced defendants' profits on sales, held them to be part of the clothing with which defendants dressed up complainant's device.

From the record it is apparent that by far the leading and most attractive addition to the spittoon of the patent in suit was the highly ornamental porcelain bowls. The patent called for metal revoluble bowls. The great weight of the evidence is to the effect that it was this feature which forced complainant to resort to glass bowls. Undoubtedly the strength and beauty of this substitution of material and appearance was the main cause of the success of the Peerless spittoon and the greatest contributor to the receipts from the sale of the infringing device, and it is upon this feature that counsel for defendants rests his argument. But can it be said that a change in materials or in decoration of a device is one of those elements which a court may take into consideration in apportioning the profits? Surely not. It is only a form in which the patented spittoon is clothed. The items for which allowance of profit may be made must be of a distinct and independent character. Increase in attractiveness in coloring, material, or form are but matters of taste, and not of substance. We are thus led to hold that, as to the matter of accounting for profits, the defendants have failed to sustain the burden of proof required in such cases.

The master finds that the record fails to present a state of facts which will support a decree for damages. In that we concur. As to the details of the accounting by the master, we are satisfied that substantial justice has been done. True, as claimed by defendants, other methods for arriving at the profits might have been followed, as, for instance, in view of the finding of the master as to the White spittoon, it might have been proper to proceed upon the theory laid down by Judge Drummond in *Turrill v. I. C. R. Co. et al.*, Fed. Cas. No. 14,272, 24 Fed. Cas. 390, a case involving a machine for repairing rails, where it is said that the proper basis for estimating the profits caused by the infringement is the cost of repairing the rails on the patented machine, as compared with the cost by other known methods. The same rule is laid down in *Mowry v. Whitney*, *supra*, and by this court in *Columbia Wire Company v. Kokomo Steel & Wire Company*, 194 Fed. 108, decided at January, 1911, session.

However, the question is not properly before us, except so far as it bears upon the objection of defendants to the long period of time covered by the accounting, and need not be further considered. The decree for an accounting herein was entered March 14, 1902. The decree disposing of the exceptions to the master's report was entered April 8, 1910. The final decree was entered March 11, 1911. Complainant began taking evidence on July 1, 1902. Thus, approximately, the matter of the accounting was pending nine years. This delay is not satisfactorily accounted for. Nor is it shown to be due to any considerable extent to defendants' acts. In view of the harassments attending upon such investigations, delays of this character are deemed inequitable, and to be discountenanced.

It is the opinion of the court that the decree of the Circuit Court,

sustaining the exception of defendants to the finding of the master with reference to matters set out in defendants' said fourth exception, was error; that that exception should have been overruled, and the master's report approved as presented; that the final decree awarding complainant nominal damages and taxing costs against complainant likewise constituted error; that both of said decrees should be vacated; that the Circuit Court should enter a decree in favor of complainant for said sum of \$1,420.19, together with costs and one half of the master's fees, and the other half of master's fees be taxed against complainant. The cause is reversed and remanded, with directions to the Circuit Court to enter a new decree in accordance herewith.

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MONASH-YOUNKER CO. v. VAN AUKEN et al.

VAN AUKEN et al. v. MONASH-YOUNKER CO.

(Circuit Court of Appeals, Seventh Circuit. February 20, 1912.

Rehearing Denied May 7, 1912.)

Nos. 1,810, 1,818.

PATENTS (§ 328\*) — VALIDITY AND INFRINGEMENT — DISCHARGE VALVE FOR STEAM RADIATOR.

The Van Auken patent, No. 828,153, for improvements in valves for radiators for discharging air and water of condensation from steam-heating systems was not anticipated and discloses invention, but the scope of the invention is limited by the prior art to the particular means in combination described and shown; as so construed, *held* not infringed.

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

Two suits in equity by Byron E. Van Auken and by the Consolidated Engineering Company against the Monash-Younger Company. Decree for complainants in one suit, and defendant appeals. Reversed. Decree for defendant in the other, and complainants appeal. Affirmed.

For opinion below, see 187 Fed. 141.

The appellants Van Auken and Consolidated Engineering Company (in No. 1,818) are the complainants in two successive bills filed against the Monash-Younger Company, as defendant, charging two several infringements of letters patent No. 828,153, issued to Van Auken August 7, 1906, for "improvements in valves for radiators," on application filed August 1, 1903.

The earlier bill involved an alleged infringement in the manufacture and use of a valve mentioned in the testimony as the "Boegen valve," purporting to be made under subsequent letters patent No. 959,297, issued to J. E. Boegen. It appears to have been heard together with another bill filed by the complainants, joined with one Canfield, against the same defendant, charging like infringement of letters patent No. 890,555, issued to Canfield and Van Auken June 9, 1908, on their application filed March 22, 1902. Both bills were dismissed, on final hearing of the issues, upon the ground of noninfringement, as stated in the opinion of the trial court, reported 187 Fed. 141. The appeal No. 1,818 is from the decree dismissing the first-mentioned bill, founded on

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

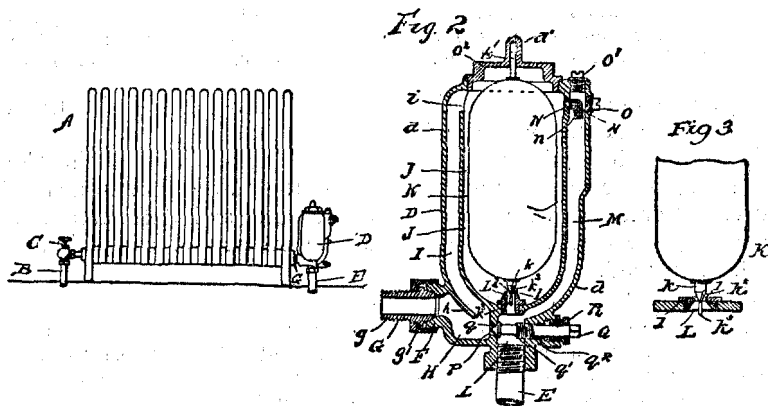
Van Auken's sole patent (No. 828,153), brought by the complainants therein, and does not involve the bill wherein Canfield was joined as complainant.

Pending the final decree above mentioned, the complainants therein filed their second bill against the same defendant, which involves an alleged infringement of Van Auken's patent (No. 828,153) in the manufacture and use of a valve referred to as the "Leuthesser valve," purporting to be made under subsequent letters patent No. 946,970, issued to F. W. Leuthesser. The complainants made application thereunder for an injunction (pendente lite) restraining such alleged infringement, and upon hearing thereof an injunctive order was granted—no opinion thereupon appearing of record—and the defendant prosecutes therefrom the above-entitled appeal, No. 1,810.

The testimony under both of these bills filed by the present complainants is contained in a single record (1,810) and the appeals were heard together. Both are considered, accordingly, in one opinion.

The specifications of Van Auken's patent in suit (No. 828,153) thus describes the objects of the invention: "This invention relates to valves designed to be placed upon the discharge ends of radiators of steam-heating systems for the purpose of discharging the air and water of condensation from the radiators; and the object of the invention is to provide means whereby when the air contained in the radiator to which the device is attached has been forced from the radiator through this device by the pressure in such radiator being greater than the pressure on the discharge end of this apparatus no considerable quantity of steam will be discharged from the radiator, while water of condensation forced into or deposited in the device will be automatically discharged therefrom when more than a given quantity of such water of condensation is contained in the float-chamber thereof. A further object of the invention is to obtain a device of the kind named and for the purpose set forth which will produce a minimum of noise in the operation thereof, particularly when applied to a vacuum steam-heating system."

The drawings are:



The general description, for reference to the drawings, appears as follows:

"In the drawings referred to, Figure 1 is a side elevation of a radiator with a device embodying this invention attached thereto, such figure showing also the attachment of the steam-supply pipe to the radiator and the attachment of a pipe to the discharge end of this apparatus, such pipe being adapted to constitute the vacuum-pipe of a vacuum steam-heating system. Fig. 2 is a vertical sectional view, on an enlarged scale, of the device embodying this invention; and Fig. 3 is a view showing in detail a leakage-groove in the valve attached to the float of the apparatus.

"A reference letter applied to designate a given part is used to indicate such part throughout the several figures of the drawings wherever the same appears.



"In Fig. 1, *A* is a radiator in a steam-heating system, *B* is a steam-supply pipe to radiator *A*, and *C* is a valve which when closed prevents admission of steam to radiator *A* and which must be open in order to permit steam to flow from steam supply pipe *B* into radiator *A*. *D* is a side elevation of a device embodying this invention attached to the discharge end of the radiator *A*, and *E* is a pipe attached to the discharge end of this apparatus.

"For the construction of the device embodying this invention particular reference is made in the description to Fig. 2 of the drawings, wherein *d* is the outer shell or casing of the device. *F* is the stem of the device, by means of which the device is attached to the radiator, preferably by a union *G*, consisting of the parts *g g'*. *H* is a well in the shell *d*, adjacent to the stem *F*. *J* is the float-chamber of the device. *K* is a float in float-chamber *J*. Radiator *A* and float-chamber *J* are connected by a conduit comprising a passageway through stem *F* to well *H* and a passageway *I* from well *H* to such float-chamber. Passage *I* discharges into float-chamber *J* above the level of the water therein required to lift the float *K*, as at *i*. *h* is a continuation of the side wall of the casing to below the top of the passage in stem *F*, forming a weir. Float *K* is provided at the lower end thereof with valve *k*, seating on seat *l*, to close outlet *L* when the float is in its lowest position, and at its upper end with guide-stem *k'*, moving loosely in the recess *d'*, provided therefor in shell *d*. *k<sup>2</sup>* is a groove in valve *k*, forming a leakage therethrough when the valve is seated. *k<sup>3</sup>* is a stem to valve *k*, extending below the valve-seat *l* into the outlet *L*, such stem tending to keep the valve-seat clean in the operation of the apparatus. Valve-seat *l* is preferably raised slightly above the bottom of float-chamber *J* for the same reason—that is, to tend to keep the valve-seat clean. *M* is a vertically extending passageway communicating at its upper end, as by means of the restricted passageway *N*, with the float-chamber *J*, and at its lower end with the outlet *L* below the seat *l* of valve *k*. The restricted passageway *N* is of such diameter that when steam passes therethrough some of such steam is converted into water of condensation. *O* is a cap provided to close the opening in the wall of shell *d*, through which the elbow *n* (provided with the restricted passageway *N* therethrough) is inserted in its place in passageway *M* and screwed into position substantially as illustrated in Fig. 2 of the drawings. *O'* is a cap closing the upper end of passageway *M*. *O<sup>2</sup>* is a cap closing the upper end of the float-chamber *J*."

The claims whereof infringement is alleged in No. 1,818 are:

"1. Valve mechanism for discharging air and water of condensation from steam-heating systems by differential pressure, comprising a float-chamber, a liquid-discharge passage communicating therewith, a float for governing said discharge-passage, a conduit adapted to provide communication between a radiator and said float-chamber, a liquid seal arranged to be sealed by the accumulation of water of condensation in said conduit, thereby increasing the differential pressure on opposite sides of said liquid seal, whereby a portion of the accumulated water of condensation is forced into said float-chamber, and an air-discharge passage arranged to discharge the air after it has passed said liquid seal.

"2. Valve mechanism for discharging air and water of condensation from steam-heating systems by differential pressure, comprising a float-chamber, a liquid-discharge passage communicating therewith, a float and a valve attached thereto for governing said discharge-passage, a conduit adapted to provide communication between a radiator and said float-chamber, a liquid seal arranged to be sealed by the accumulation of water of condensation in said conduit, thereby increasing the differential pressure on opposite sides of said liquid seal whereby a portion of the accumulated water of condensation is forced into said float-chamber, and an air-discharge passage arranged to discharge the air after it has passed said liquid seal.

"3. Valve mechanism for discharging air and water of condensation from steam-heating systems by differential pressure, comprising a float-chamber, a liquid-discharge passage communicating therewith, a float and a valve attached to the under side thereof for governing said discharge-passage, a conduit adapted to provide communication between a radiator and said float-

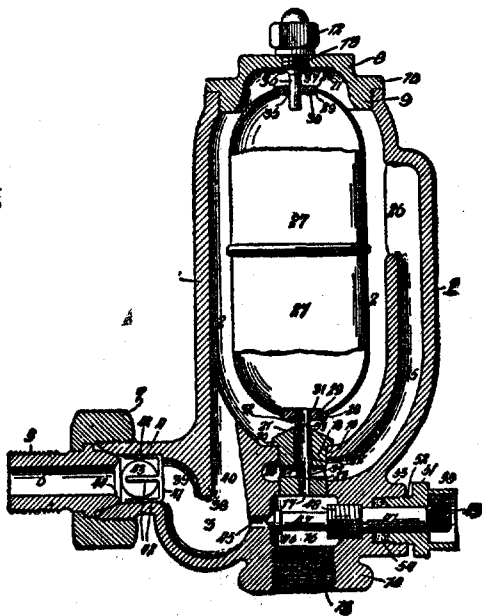
chamber, a liquid seal arranged to be sealed by the accumulation of water of condensation in said conduit, thereby increasing the differential pressure on opposite sides of said liquid seal, whereby a portion of the accumulated water of condensation is forced into said float-chamber, and an air-discharge passage arranged to discharge the air after it has passed said liquid seal.

"4. Valve mechanism for discharging air and water of condensation from steam-heating systems by differential pressure, comprising a float-chamber, a liquid-discharge passage communicating therewith, a float and a valve rigidly attached to and extending below the under side thereof and moving therewith to open and close said discharge-passage, a conduit adapted to provide communication between a radiator and said float-chamber, a liquid seal arranged to be sealed by the accumulation of water of condensation in said conduit, thereby increasing the differential pressure on opposite sides of said liquid seal, whereby a portion of the accumulated water of condensation is forced into said float-chamber, and an air-discharge passage arranged to discharge the air after it has passed said liquid seal."

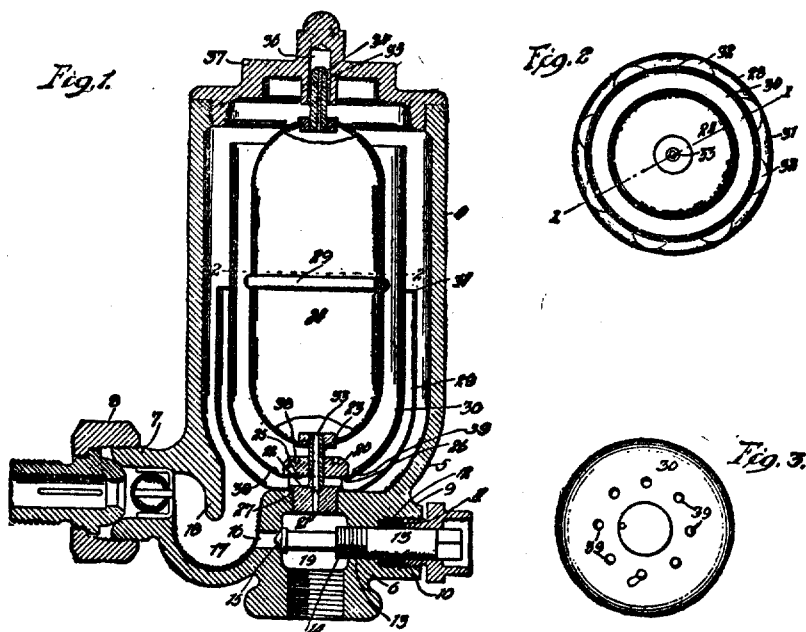
The complainants contend that the remaining claims—5 to 9 inclusive—are involved with the foregoing in the second suit (No. 1,810), but claim 5 is sufficient for all purposes of the opinion, namely:

"5. Valve mechanism for discharging air and water of condensation from steam-heating systems by differential pressure, comprising a float-chamber, a liquid-discharge passage communicating therewith, a float for governing said discharge-passage, a conduit adapted to provide communication between a radiator and said float-chamber, and opening into said float-chamber above the line of flotation of said float, a liquid seal arranged to be sealed by the accumulation of water of condensation in said conduit, thereby increasing the differential pressure on opposite sides of said liquid seal, whereby a portion of the accumulated water of condensation is forced into said float-chamber, and an air-discharge passage arranged to discharge the air after it has passed said liquid seal.

The "Boegen valve," charged to be an infringement in No. 1,818, appears in the drawings of the Boegen patent as follows:



The "Leuthesser valve," enjoined in No. 1,810 as an infringement, is thus shown in the drawings of Leuthesser's patent.



Other facts involved under the issues are stated in the opinion.

Thomas A. Banning, of Chicago, Ill., for Monash-Younger Co.

Taylor E. Brown, of Chicago, Ill., for Byron E. Van Auker, and another.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). These appeals are several, brought from a final decree in one suit and an injunctive order in another suit, successively instituted by the complainants, Van Auker and Consolidated Engineering Company, against the defendant, the Monash-Younger Company, for alleged several infringements of a single patent, No. 828,153, issued to Van Auker August 7, 1906. The bill first filed, involving an alleged infringement by the defendant's so-called "Boegen valve," was dismissed on final hearing of the issues, and the complainants' appeal from such decree is designated as No. 1,818. Therein the opinion of the trial court—reported 187 Fed. 141, conjointly with another bill for infringement not involved in the appeal—overrules the defense interposed of anticipation by prior patents, but sustains the defenses of limitation of the scope of the claims and of noninfringement thereunder. In the subsequent suit, however, the alleged infringement was another device adopted by the defendant, called the "Leuthesser valve," and upon hearing of a motion to enjoin the use thereof, pendente lite,

an injunctive order was granted—no opinion being filed—and the defendant appeals therefrom in No. 1,810.

For convenience both appeals were submitted and heard together—with the testimony in both suits embraced in one record (No. 1,810), but stipulated as applicable to either—and they are so treated in this opinion. Thus the defenses set up and urged under the primal bill (in appeal No. 1,818), both (1) of anticipation by prior patents and publications and (2) of limitation of the scope of invention and claims by the prior art, are made applicable to the second bill and order appealed from (in No. 1,810), so that these issues are involved alike in both appeals, leaving only the issue of infringement under each bill to be considered separately.

The Van Auken patent in suit (No. 828,153) was granted under an application filed August 1, 1903, for "improvements in valves for radiators," and both usefulness and popularity of the device and substantial improvement therein over the pre-existing valves or traps for analogous purpose are established facts under the evidence. It discloses a compact device of the well-known float-valve type, adapted for use in a vacuum system of steam-heating. As aptly stated in the brief for complainants, it is provided with means, when attached to the radiator, to "continuously and automatically carry away the air" and "automatically and intermittently carry away the water of condensation, while at the same time forming such a barrier between the outlet pipe and the radiator" that "waste of steam" is prevented. "Placed on the discharge of the radiator" and connected "with the return line in the vacuum system," it "automatically separates the air and the water of condensation from the steam and discharges the former while retaining the latter."

Invalidity of the patent is asserted upon two grounds—(a) for "complete anticipation" by prior patents and (b) for want of "proper mechanical combinations"—but we believe these contentions of the defendant are without merit and that neither requires discussion, aside from this remark: That the prior patents relied upon (British and American) are specifically mentioned in the opinion of the trial court, above referred to, and that we concur in the ruling thereof in so far as it upholds the validity of Van Auken's patent.

The issue of infringement presented under each appeal hinges upon interpretation of the patent claims in suit, respectively, with the scope of invention therein, under limitations imposed by the prior art, as the controlling inquiry. In support of each charge of infringement, it is contended on behalf of the complainants that Van Auken discovered and disclosed in the patent "a new principle for discharging air and water of condensation" from such heating systems, "striking out in an entirely new direction" from the old devices and "by the use of his new principle of operation" he disclosed "certain fundamental ideas in valve construction," and is well entitled to claim pioneer invention in that art. This contention, if tenable in the light of the prior art, would leave no escape from infringement by both of the devices adopted by the defendant. It is predicated, however, on the provision in the patent of a so-called "liquid seal" in the con-

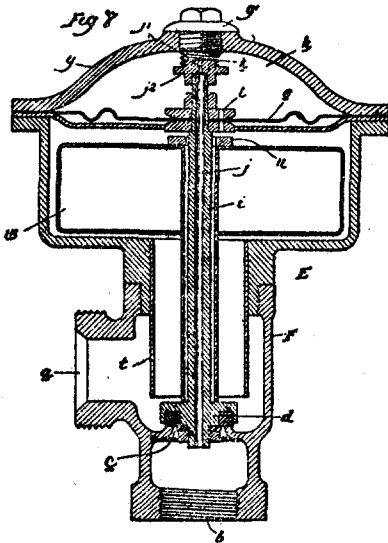
duit from the radiator "to increase differential pressure and force the water up into the float-chamber" of the valve, and likewise discharge the expelled air "through the seal," alleged to be a departure from the entire prior art and contrary to "all its teachings"; in other words, that it was the patentee's discovery, "that air could be made to pass through a liquid seal by a differential pressure." So, if like use and function of this means is plainly disclosed in one or more prior valve devices, the patent claims must be limited accordingly, and the broad interpretation sought on the part of the complainants, through its alleged discovery by the patentee, is unauthorized. With the inquiry thus narrowed, we believe the evidence to be sufficient for its solution, without entering upon the other questions discussed in the briefs, whether disclosures of the prior art, in steam traps and plumbing devices, would not bar such broad definition of the invention.

Various prior patents, British and American, are in evidence and exhaustively discussed in the expert testimony and in the arguments of counsel, directed primarily to the issue of anticipation, but offered and discussed as well for proof of the prior art involved in the present inquiry. Four of these prior art references are deemed sufficient for mention in our opinion, namely: British patents, (a) No. 941, issued to Vickerman in 1860, and (b) No. 11,741, issued to Donnelly in 1900; United States patents, (c) No. 302,622, issued to Coffee in 1884, and (d) No. 673,250, issued to Ford, April 30, 1901. For interpretation of each of these patents, their disclosures of various means and functions are in dispute between the parties, and the evidence in respect of the devices of Vickerman, Coffee, and Ford is not satisfactory for complete understanding of all their co-operating means; but we are satisfied that the means and function of a liquid seal are disclosed therein, for passing at the inlet (automatically) both water and air, through differential pressure. The Donnelly patent, however, discloses completely, as we believe, both means and function of the liquid seal of the Van Auken patent, in so far as concerns the present inquiry, and if Donnelly's disclosure anticipates therein the Van Auken invention, in the sense of the patent law, it becomes immaterial whether the other references are anticipations in any measure.

Donnelly's British patent (No. 11,741) was granted in 1900, so that it was "more than two years prior to" Van Auken's application for his patent, August 1, 1903. It is contended on the part of the complainants that the actual date of Van Auken's invention is established by his undisputed testimony as November 16, 1896, and that he is thus entitled to priority over subsequent patents and publications. This view of the date of invention appears to be adopted in the opinion below, which states that "the invention of Van Auken, embodied in both patents, was made in 1896," and "disclosed by Van Auken to Canfield, July 15, 1901"—the other patent referred to being No. 890,555, issued to Canfield & Van Auken, on their application of March 22, 1902, for another form of radiator-valve containing the so-called "liquid seal." Also, under interference proceedings in the Patent Office Van Auken was awarded priority over rival applicants for

analogous devices, but the issues there presented are plainly distinguishable from the present inquiry. The only invention here involved is that of the patent combination in suit, so that the question of priority hinges on the date of such invention; and neither fact nor date of the alleged Van Auken concept of the liquid seal, as a means to discharge both air and water from the radiator, can serve to broaden the scope of invention in this patent, unless it originated therein as part of the invention. In view, therefore, of its earlier embodiment in the Canfield & Van Auken application, we are not satisfied that the testimony carries back the invention of Van Auken's patent in suit to 1896, or any specific date prior to his application for a patent. Whatever may be its actual date, however, we are of opinion that the statutory amendment of 1897 (Act March 3, 1897, 29 Stat. c. 391, p. 692; sections 4886 and 4920, 3 U. S. Comp. Stat. 1901, pp. 3382, 3394) is applicable thereto, and that the invention cannot be carried back "more than two years prior to his application." Thus the Donnelly patent (pleaded in the answer as an anticipation) is prior in legal effect and pertinent as a disclosure of the prior art.

The Donnelly device exhibits a valve for attachment to the discharge end of the radiator, "adapted to automatically control the discharge of air and water of condensation from the" radiator, illustrated in Fig. 7 of the drawings as follows:



It describes and shows means for a water seal in the conduit from the radiator, substantially like that of Van Auken, whereby the air and water discharged from the radiator "pass through the seal by differential pressure," the water entering a float-chamber and operating the float, as in Van Auken's valve, except that the water enters below the float, instead of "above the line of flotation of said float" as specified in Van Auken's patent. They are not alike in means and arrangement for expelling water and air from the valve, and the Donnelly device differs substantially in its additional motor provision of a flexible diaphragm, with which the float co-operates to close the vent and the resulting suction "allows all the water to discharge

into the return pipe." These differences do not require analysis for the purposes of this inquiry, as we believe the above-mentioned disclosure of the water seal and its function, co-operating with the float and other means, clearly anticipates the like provision for a water seal in Van Auken's device, leaving no room for its interpretation as Van Auken's discovery.

The further contentions of the complainants in support of broad claims—(1) that Donnelly's valve was abandoned as worthless after trial in this country, and (2) that the rulings of the Patent Office, in the course of the above-mentioned interference proceedings, interpret the claims broadly—do not require extended discussion. In respect of the Donnelly valve, it appears that the Warren Webster Company used them for some time, but the diaphragms became crystallized in use and many of the valves were taken out for that reason, that they then made a valve of like structure, omitting the diaphragm feature, with adaptations for use of the float, and have used it with entire success, although they have taken license therefor under Van Auken; and this testimony furnishes strong evidence of utility in such provisions of Donnelly applicable to the issue. The rulings referred to of the Patent Office, not only related to a different issue, but are without force in any view for solution of the inquiry into the Donnelly disclosure.

We are of opinion, therefore, that the scope of invention in Van Auken's patent is limited by the above-mentioned prior disclosures, and that the claims are not generic, but must be limited to the particular means in combination specified in the patent and drawings.

1. Are the claims thus defined infringed by the defendant's "Boegen valve," involved in appeal No. 1,818? In several features its departure from the Van Auken specifications is unmistakable and conceded:

(1) Van Auken's inlet conduit is carried up between the valve casing and the float-chamber, as described "above the line of flotation," to discharge the water into the chamber at the top—with various advantages over prior means as pointed out in the specifications and testimony—while the Boegen conduit delivers the water at the bottom of the float-chamber, as shown in the above-mentioned earlier devices of Donnelly and Canfield & Van Auken. Thus Van Auken's improvement (as described) in this particular is not adopted by the defendant.

(2) This difference results in another distinction in their water seals. As stated by complainants' expert, the Van Auken seal "is formed entirely in the conduit and by only a small quantity of water and this seal is entirely separate and distinct from the water in the float-chamber; while in the defendant's device the 'complete seal' against the passage of steam" is not so effected. It is operative only when the float-chamber is partially filled with water, so that the Van Auken "benefit of having the seal entirely undisturbed by the rise and fall of the water in the float-chamber is not present" in the Boegen valve.

(3) The valves differ substantially in the provision for water discharge, as pointed out in the opinion below, as follows:

"Van Auken empties the float-chamber as soon as the water gets high enough to buoy up the float, while defendant keeps the water constantly at a point just below the flotation line. Van Auken discharges only the water of condensation by the rising of the float, while defendant discharges water, floatage, and air by a like operation. The working of the device is in this respect sufficiently different from Van Auken's, and on a sufficiently

different principle, to avoid infringement, even if the claims as to the conduit are to be given a broad construction, instead of the narrowed one here adopted. Defendant's water outlet is entirely new, and accomplishes a somewhat improved result."

(4) The air discharge passage of Van Auken is outside the float-chamber and independent of the float, while the Boegen valve discharges through the float, with consequent benefits which do not require specification.

We believe noninfringement to be clearly established by these departures from the patent device—in the main adaptations from the prior art—and that the complainants' bill was rightly dismissed (appeal No. 1,818) on that ground.

2. We are not advised of the distinctions in the Leuthesser valve from the Boegen valve which were found by the court below sufficient to enjoin the former as an infringement, although dismissing the bill charging infringement in use of the Boegen valve; and we have vainly searched throughout the expert testimony and elaborate briefs submitted on behalf of the complainants for any distinction thereof which would justify affirmance of both rulings. Under the foregoing interpretation of the Van Auken patent and claims, however, we are impressed with no view of the Leuthesser (patented) device, as used by the defendant, upon which infringement can be charged. Its inlet conduit provision is differentiated from Van Auken equally with that of Boegen. While it is true that the water from the radiator is initially forced upwards in the valve near "the line of flotation," it is not there discharged into the float-chamber, but is separated therefrom by an annular form of shield for conduit, which conveys the water to the bottom of the float-chamber, where it is discharged thereto through perforations in the shield. It thus serves alike with the Boegen conduit for an inlet delivery at the bottom, and not for Van Auken's top delivery, although it may be an improvement over either form for the purposes of the float. The outlet provision for discharging the water from the float-chamber is outside that chamber, alike with that of Boegen distinguishable from the Van Auken means and method; and the air discharge is through the float, as in Boegen's device, but differently arranged, for which advantages are claimed over either of the other methods.

Accordingly, we are of opinion that the proof fails to establish infringement—irrespective of any presumption arising from the Leuthesser patent "that there was a substantial difference between the inventions" (*Kokomo Fence M. Co. v. Kitselman*, 189 U. S. 23, 23 Sup. Ct. 527, 47 L. Ed. 689)—and that the bill charging such infringement must be dismissed.

The decree, therefore, appealed from in No. 1,818 is affirmed, and the injunctive order appealed from in No. 1,810 is reversed, with direction to the court below to dismiss the complainants' bill therein for want of equity.



BLESER v. BALDWIN.

(Circuit Court of Appeals, Seventh Circuit. April 23, 1912.)

No. 1,847.

1. PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—ACETYLENE GAS GENERATING LAMP.

The Baldwin patent, No. 656,874, for an acetylene gas generating lamp, was not anticipated and discloses invention, but in view of the prior art is not entitled to a broad construction with reference to equivalents. Claim 1 *held* infringed by the lamp of the Bleser patent, No. 949,349, and claims 2, 3, 4, 5, 6, and 10 not infringed.

2. PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—ACETYLENE GAS GENERATING LAMP.

The Baldwin patent, No. 821,580, for an improvement in acetylene gas generating lamps, *held* valid, but not infringed.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

Suit in equity by Frederick E. Baldwin against Jacob Bleser. Decree for complainant, and defendant appeals. Affirmed in part, and reversed in part.

Appellee was granted two patents for improvements in acetylene gas generating lamps. The prior one was granted August 28, 1900, as number 656,874, and the other was granted May 22, 1906, and numbered 821,580. This suit was instituted to restrain infringement of claims 1, 2, 3, 4, 5, 6, and 10, of the first-named patent, and claims 1 and 4 of the second-named patent, on January 21, 1909. The answer sets up the usual defenses of want of validity and noninfringement. In a general way, both patents cover devices having, (1) a water reservoir located above; (2) a receptacle for containing calcium carbide; (3) a tube leading from the former down into either direct or indirect co-operation with the contents of the latter, and distributing water thereto; (4) a valve controlling the flow of water from the reservoir to the calcium carbide chamber through said tube; and (5) a rotatable stem extending outside the reservoir so as to form a handle, and extending downward to and carrying the valve, and then passing on down through, and some distance below the connecting tube. In both, the flow of water is regulated by the pressure of the gas generated in the calcium carbide chamber, acting upon the column of water in the tube, and by the valve arrangement.

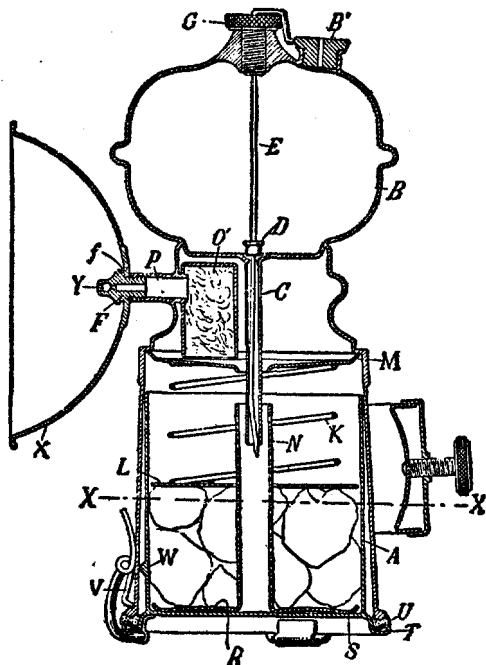
In the first-named patent the stem serves (1) to rotate the valve into and out of the seat, and (2) to clear the inside of the tube from obstructing accretions. The latter is accomplished by bending the wire which acts as a spring core, and serves to steady the valve in the device of claims 2, 3, 4, 5, 6, and 10, of the first patent, and claims 1 and 4 of the second patent, and by the piston-like action of the stem of claim 1. Claim 10 of the first patent pertains only to the manner of adjusting gas generation to the requirements of the lamp.

In the second patent, the stem protruding below the bottom of the tube is lengthened and bent at an angle so as to stir up the calcium carbide, which has a tendency to clog and cake about the tube opening. Each device provides for a burner. The tube and stem in the first patent in suit have only indirect contact with the carbide body, since these extend into a vertical foraminous tube resting upon and rising from the floor of the carbide chamber. This tube holds the carbide away from the end of the tube and stem. In the latter patent, these ends are not protected from, but extend well into

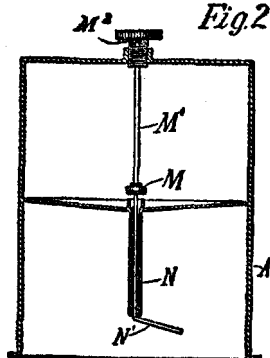
\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the mass of carbide. The construction and operation of the devices of the patents in suit, so far as here involved, will be readily understood from the drawings here produced.

*Fig. 1*



*Fig. 2*



It will be noticed that the protruding end of the stem, below the tube *O* in the carbide chamber is pointed. This, the patent asserts, secures the delivery of the water to the carbide in small drops or particles. An excess of water supplied to the carbide results in an excess of gas, which, in turn, stops the flow of water through the tube. The valve is manually adjusted, so that, otherwise than as above stated, there is no automatic adjustment of the water supply. The water pressure is determined by the height of the water column in the tube and tank. When the gas pressure exceeds the water pressure, there may be said to be an excess of gas pressure, and the supply of water will be resisted. It is therefore evident that the required pressure must be adjusted to meet the volume of gas required by any given burner. Some of these, of course, will consume more gas than others. In order to meet these varying conditions, the required pressure must be ascertained.

"In constructing my lamps," says the patent, "after deciding on the special form of burner to be used and determining that pressure of gas, with which it burns best, I make the water tube of such length that the mean height of the water in the reservoir, added to the length of the tube, will afford a pressure approximately equal to that which the lamp requires. The result will be that should the pressure in the gas chamber become too great, the supply of water will be automatically shut off, but as soon as the pressure in the gas chamber becomes normal or less, the water will drop slowly or rapidly as may be required."

Appellant cites three patents in the prior art, viz.: Patent No. 591,132, granted to Handsby, October 5, 1897, for an acetylene gas lamp; patent

No. 638,449, granted to Dolan, December 5, 1899, for an acetylene gas generating lamp; and patent No. 644,910 to Hallows and Tucker, on March 6, 1900, for a like lamp.

The first-named patent calls for a water chamber, a storage or pressure chamber, and a carbide chamber. The partition floor between the two latter is a perforated diaphragm, and that between the first two is a flexible diaphragm. The valve which controls the flow of water into the tube which supplies water to the carbide rests upon a valve stem which is fastened to the floor of the carbide chamber. The water tube through which the valve stem extends, depends from the flexible diaphragm or floor of the water receptacle, in which also is located the valve seat, into the carbide body. The valve stem, the patent says, may be secured to the perforated diaphragm which separates the gas chamber from the carbide chamber, or it may be secured to the top cover of the water receptacle. It is intended to be rigid in any case. To close it, the flexible floor of the water tank must be lifted to contact with it by the gas pressure in the gas tank or chamber. There seems to be no reason why the flow of water through the water tube would not also be stopped by the gas pressure whenever it became excessive, just as in the patent in suit. That it could ever become excessive seems doubtful, since the pressure of the gas would operate to close the valve long before it would affect the water in the tube, because the weight or pressure of the water in the water chamber would be only a fraction of that obtaining at the bottom of the water tube in the carbide chamber. The valve stem is incapable of being rotated to clear the inner walls of the tube or agitate the carbide. The Dolan patent covers a flexible diaphragm, as in Handsby. The valve is carried by a fixed stem attached rigidly to a rod which depends from a nut located in the flexible diaphragm which is placed above the water chamber. The excess gas is conducted to the space between the water chamber and the valve carrying diaphragm. This latter being lifted by gas pressure closes the valve and cuts off the water supply. The carbide chamber is rotated at intervals to free the carbide from the lime and other accumulations. When the pressure of gas is removed, the diaphragm is released and the valve is dropped from its rest.

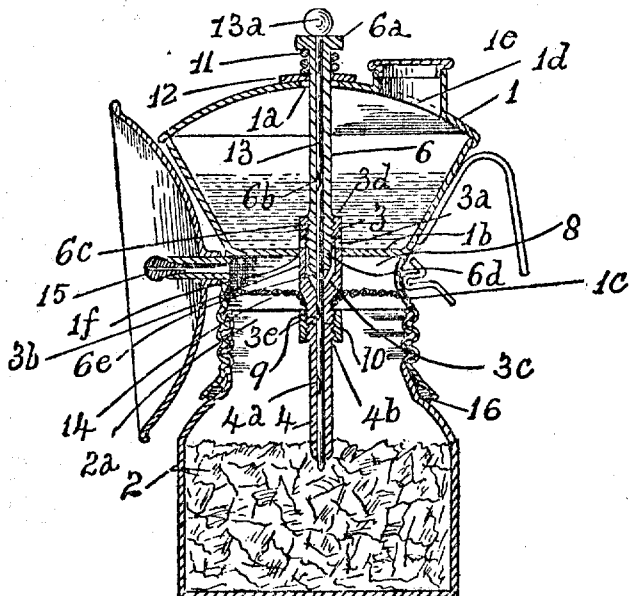
The patent to Hallows and Tucker has the water and carbide chambers. The water is conducted through tubes or a water jacket paralleling the sides of the two chambers, and next thereto down under the floor of the carbide chamber, and thence to the tube rising from that floor to the top of the carbide body, the entrance to which is controlled by a plug or valve operated by a revoluble stem which terminates at the top of the lamp in a milled nut. When the plug or valve is rotated out of its seat, the water ascends the tube and overflows into the carbide. There is no provision made for the cessation of the generation of gas, though it is not apparent why the gas pressure would not stay the upward flow of the water in the tube. According to the specification, when the pressure of gas is excessive, the gas escapes through the water supply tubes or jacket at the side of the chambers, passing up to the water chamber, and thence out into the atmosphere.

Owing to the arrangement, there seems to be no need of a tube cleaner, though the rotatable tube is shown in the supply tube in the carbide chamber; its only suggested use being the operation of the water supply plug or valve.

Appellant's device is substantially that of patent No. 949,349, granted to him February 15, 1910, for an acetylene gas generator lamp, and is shown in figure 2 of that patent, so far as essential on this hearing. It has the water and carbide chambers, the water supply tube governed by a valve carried by a stem having a central bore through which passes a needle—both separately operated by external handles. In the patent in suit, the needle is called the valve stem. Here the hollow tube carries the valve, which is rotated into and out of its seat at the bottom of the water chamber when desired. The needle is said to fit the bore in the valve stem, also the opening through the valve body and the feed tube loosely, extending slightly below the latter. It is designed to be slid up and down so as to clean the bore. The bottom of the water supply tube enters the carbide mass, carrying the needle point somewhat in advance of it. The water passes along the needle

through the valve stem and is delivered to the carbide from the needle point, as in the patent in suit. In case of excessive generation of gas, the flow of the water is regulated by the back pressure of the gas upon the column of water in the tube, as in appellee's device.

The following drawing fairly discloses appellant's lamp:



On the hearing before the Circuit Court, the prayer of the bill was granted, defendant was enjoined from further infringing the patents in suit, an accounting was ordered, and judgment for costs decreed against appellant. The cause is now before the court on appeal from that order. The errors assigned are that the court erred in holding that each and all of the claims in suit were valid; that appellant infringed each of them; and in entering a decree in favor of appellee and refusing to enter a decree in favor of appellant. Further facts are stated in the opinion.

A. H. Adams, C. E. Pickard, J. L. Jackson, and A. M. Fitzgerald, for appellant.

M. B. Philipp and James Q. Rice, for appellee.

Before KOHLSAAT and MACK, Circuit Judges, and SANBORN, District Judge.

KOHLSAAT, Circuit Judge (after stating the facts as above). [1] It was not new in acetylene gas lamps to so adjust the pipe and needle or stem running therethrough as that the latter should move automatically up and down within the pipe, and thereby clear it from accumulations. This was attained in the Handshy patent, where the pipe moved up and down the stem, being the reverse of the movement of the stem and pipe in suit.

It was new to claim the regulation of water supply by means of gas pressure upon the column of water in the water supply tube. No reason is perceived, however, why the same result could not have been

attained in the Handshy and Hallows and Tucker patents, were these patents not provided with easier means for relief from excessive pressure. It was also new to secure more complete scouring of the inner walls of the water supply tube near its lower end, by bending the needle or stem therewithin, so as to give it stiff resilient bearing against the inner wall of the tube, and at the same time securing steadiness of the valve, in case of jolting or rough handling. None of the patents of the prior art disclose a stem protruding from the bore in the lower end of the water supply pipe. The patent claims for this a better method of distributing or delivering the water to the carbide. It sets out that the water should be delivered in small drops or particles and asserts that this result follows the use of a sharp pointed stem.

Inasmuch as the water supply pipe in the first patent in suit delivers the water into what is called a foraminous tube, through the meshes of which the water passes to the carbide, the advantage of this feature does not seem considerable. This patent has many other elements, but the foregoing are deemed sufficient for the purposes of this suit. Taking into consideration the features above mentioned, the somewhat novel arrangement of the parts, and the presumption arising from the grant, we deem the validity of the patent duly established, qualified, however, by the disclosures of the prior art as above set out. It is evident, however, that it covers no wide field of invention and is not entitled to a broad construction with reference to equivalents. The second patent in suit is for alleged improvements upon the first.

[2] As above stated, these consist in its means for agitating the carbide, and the location of the lower end of the water tube and protruding stem within the carbide mass. The former has some merit of a modest kind. It is new and useful, and, in our judgment, entitled to recognition as involving some inventive thought. The latter is found in Handshy. As to the tube: even were this arrangement thereof not found in the prior art, it falls short of invention. Without it, the other feature is valueless. It is obviously the only thing to do, where it is sought to stir up the packed carbide or carbide refuse by the use of a stem projecting from the end of the tube. Some claim is made that appellant's device discloses a stem, bent near its lower end to operate as appellee's does. This is strenuously controverted by appellant.

An inspection of Exhibit D, being one of appellant's lamps, alleged to disclose a bent stem, satisfies us that the stem is not bent. The Bleaser patent does not call for it, and the proofs do not justify such a finding. Evidently, the tube is imperfect, its wall not being uniform in thickness around its perimeter, thus throwing the needle slightly out of true; but the evidence fails to show that there was any intention to bend it, nor does there appear to have been any advantage in doing so. We do not deem the position of appellee in regard to its being bent well taken. It follows that appellant does not infringe the second patent in suit, and as to that the bill is dismissed for want of equity. Since appellant's needle or stem is so constructed as not to bear frictionally against the inner walls of the water supply tube, it is not the stem of claims 2, 3, 4, 5, and 6 of the first patent in suit.

Claims 2 and 6 set out that the bent stem will prevent rotation of the valve stem. Claim 4 functions the stem to prevent rotation of the valve itself, while claims 2 and 5 ascribe to the stem the function of keeping the inner walls of the water supply tube clean—all operated by a plug which may be manipulated from outside the lamp. The subject-matter of claim 10, which seeks to graduate the height of the water column to the requirements of the burner, was anticipated in the Hallows and Tucker patent, so far as need be here considered. There is no evidence that appellant has appropriated it. Therefore none of these claims are deemed to have been infringed by appellant. Appellant's needle, which in some respects corresponds to appellee's bent stem, differs from it in that it does not carry the valve, is not bent, does not operate as a brake, and may be moved up and down, and, as seems apparent, rotated without interfering with the water supply tube or any other element of his combination.

The Bleser patent calls for a needle fitting loosely into the tube and other hollow parts of which it constitutes the core. Its function is "to clean the tube 4 and remove any obstruction from the end thereof." It is clearly the stem of claim 1 of the patent in suit, save for the fact that it does not carry the valve member. In other respects its mission is the same as that of the stem of claim 1, which claim calls in part, for "a plug closing and opening into the reservoir, a stem carried by the plug and extending through the reservoir and water tube, and a valve secured to or carried by the stem and controlling the passage from the reservoir into the said tube, as set forth." With regard to appellant's lamp, as a complete device, it appears that it has a plug closing and opening into the reservoir by means of a series of parts through which the needle extends, a valve secured to or carried by those parts arranged to operate as a tube, which valve controls the passage from the reservoir into the water supply tube, and a needle extending through and beyond the tube, like that of claim 1. Those correlated parts, constituting a tube, as above stated, and carrying the valve, together with the needle, are the equivalent of appellee's stem considering them as an equivalent, and taking into account the identity of functions of appellee's stem and appellant's needle from the valve down through and beyond the water supply tube, we have an appropriation of appellee's device by appellant down to that point, wanting only the pointed stem or needle, which appellee claims enhances the efficiency of his device. As in Handshy, so in the appellant's device, the lower end of the water supply tube contacts with the carbide mass, therefore the need of the movable needle to agitate the mass, as well as clear the tube. Does the extension of the needle through the water supply tube at the place of contact with the carbide mass alter the case? This feature is shown only in the device of the second patent in suit, but there the needle or stem protrudes from the tube at considerable length, and substantially at a right angle to the tube. This has been held above not to be infringed by appellant. Nor would the extension of the tube and stem of claim 1 to absolute contact with the carbide mass change the character of the device of that claim. To all intents and purposes it is in contact with that mass.

The intervention of the foraminous tube *N*, avoids the need for using the stem to agitate the carbide. If, however, it should become necessary, it is fully adapted to that end. The difference between the two is not deemed important enough to constitute an essential element of the combination of claim 1. This, taken together with the fact that appellant regulates the flow of water by gas pressure, a method not disclosed in the prior art, leads to the conclusion that his device is but an unsuccessful attempt to evade appellee's conception as shown in claim 1 of the first patent in suit. This claim presents the minimum of patentable novelty, but we deem that little entitled to the protection of the statute, and therefore hold it valid and infringed. As to claims 2, 3, 4, 5, 6, and 10, of patent No. 656,874, and claims 1 and 4 of patent No. 821,580, the decree appealed from is reversed and remanded with direction to the Circuit Court to dismiss the bill for want of equity as to said claims. The order appealed from decreeing validity and infringement of said claim 1 of said first-named patent is affirmed.

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CHARLES BOLDT CO. v. TURNER BROS. CO.

(Circuit Court of Appeals, Seventh Circuit. April 23, 1912.)

No. 1,836.

1. PATENTS (§ 43\*)—DESIGNS—INVENTION.

Originality and the exercise of the inventive faculty are as essential to the validity of a design patent as of a mechanical patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 50; Dec. Dig. § 43.\*]

2. EVIDENCE (§ 52\*)—JUDICIAL NOTICE—EFFECT.

The court may take notice of what is common knowledge in a patent case, and the presumption of validity arising from the grant may be overcome as effectually by facts within the judicial knowledge, if adequate, as by the introduction of evidence.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 52.\*]

3. PATENTS (§ 328\*)—INVENTION—DESIGN FOR BOTTLE.

The Boldt design patent, No. 39,921, for a design for a bottle, is void on its face for lack of patentable invention.

Appeal from the Circuit Court of the United States for the District of Indiana.

Suit in equity by the Charles Boldt Company against the Turner Bros. Company. Decree for defendant, and complainant appeals. Affirmed.

Appellant brought suit in the Circuit Court to restrain infringement of design patent No. 39,921, granted April 20, 1909, to Charles Boldt for a design for bottles. The specification and claim read as follows, viz.:

"Be it known that I, Charles Boldt, a citizen of the United States, residing at Cincinnati, in the county of Hamilton and state of Ohio, have invented a new, original, and ornamental design for bottles, of which the following is a

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

specification, reference being had to the accompanying drawing, forming part thereof.

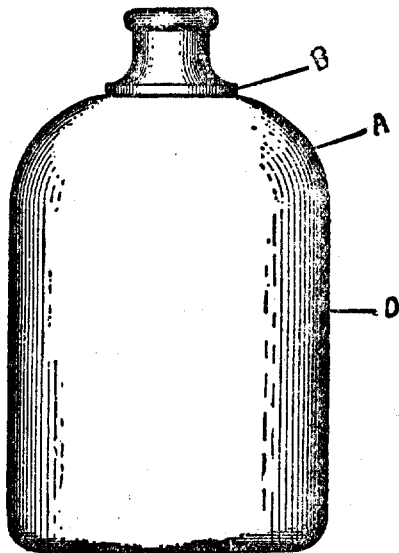
"Figure 1 is a side elevation of a bottle, showing my new design and Fig. 2 is a perspective view thereof.

"I claim—

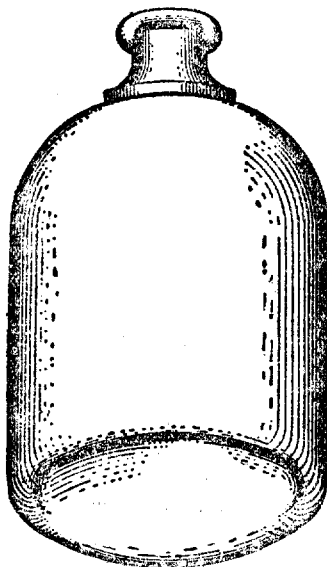
"The ornamental design for a bottle as shown."

The drawings are shown as figures 1 and 2 now produced:

*Fig. 1*



*Fig. 2.*



Appellee interposed a general demurrer, which was sustained by the Circuit Court. Appellant having elected to stand by its bill, the cause was dismissed by the court for want of equity, and is now before this court on appeal from that order. The errors assigned are: (1) that the court held the patented device did not involve invention and was void; (2) that the court held the patent void on demurrer. Other facts appear in the opinion.

Littleford, James, Frost & Foster, of Cincinnati, Ohio (Walter F. Murray and Francis B. James, of counsel), for appellant.

Lewis M. Hosea and Walter A. Knight, for appellee.

Before KOHLSAAT and MACK, Circuit Judges, and SANBORN, District Judge.

KOHLSAAT, Circuit Judge (after stating the facts as above).  
[1] Section 4929 of the Revised Statutes, as amended by Act May 9, 1902, c. 783, 32 Stat. 193 (U. S. Comp. St. Supp. 1911, p. 1457), under which the patent was granted, reads as follows, viz.:

"Sec. 4929. Any person who has invented any new, original, and ornamental design for an article of manufacture, not known or used by others in this country before his invention thereof, and not patented or described in any printed publication in this or any foreign country before his invention



thereof, or more than two years prior to his application, and not in public use or on sale in this country for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law and other due proceedings had, the same as in cases of inventions or discoveries covered by section forty-eight hundred and eighty-six, obtain a patent therefor."

Section 4929, as it stood before amendment (Act of July 8, 1870, c. 230, § 71, 16 Stat. 209 [U. S. Comp. St. 1901, p. 3398]), so far as pertinent here, is as follows, viz.:

"Any person who, by his own industry, genius, efforts, and expense, has invented and produced any new and original design for a manufacture \* \* \* or any new, useful, and original shape or configuration of any article of manufacture, the same not having been known \* \* \* may \* \* \* obtain a patent therefor."

It will be noted that the words of the 1870 statute, viz., "new and original design," have in the later act been supplemented by the addition of the word "ornamental," and that the numerous subjects of patented protection enumerated in the former act have been summed up in the language, "of any article of manufacture" of the later act. Both acts call for an invention. Says the court in *Smith v. Whitman Saddle Co.*, 148 U. S. 674, 13 Sup. Ct. 768, 37 L. Ed. 606, a case decided under the former act:

"The exercise of the inventive or originative faculty is required, and a person cannot be permitted to select an existing form and simply put it to a new use any more than he can be permitted to take a patent for the mere double use of a machine. If, however, the selection and adaptation of an existing form is more than the exercise of the imitative faculty and the result is in effect a new creation, the design may be patentable."

In *Northrup v. Adams*, 12 O. G. 430, 2 Ban. & A. 567, 568, Fed. Cas. No. 10,328, Mr. Justice Brown, then on the district bench, held that the law applicable to design patents did "not materially differ from that in cases of mechanical patents," and that "all the regulations and provisions which apply to the obtaining or protection of patents for inventions or discoveries \* \* \* shall apply to patents for designs," and that "to entitle a person to the benefit of the act, in either case, there must be originality and the exercise of the inventive faculty \* \* \* there must be something akin to genius—an effort of the brain as well as the hand. The adaptation of old devices or forms to new purposes, however convenient, useful, or beautiful they may be in their new role, is not invention."

This doctrine is laid down in *Hammond v. Combined Harvester Works*, 70 Fed. 716, 17 C. C. A. 356, *Myers v. Sternheim*, 97 Fed. 625, 38 C. C. A. 345, *Pelouze Scale Co. v. American Cutlery Co.*, 102 Fed. 916, 43 C. C. A. 52, and very many other cases. Indeed, it is difficult to understand how the language of the statute could be otherwise construed. It has been held that a new and pleasant design which enhances the value of the object to which it is to be applied is a compliance with the statutory requirement of invention and novelty. *Smith v. Stewart* (C. C.) 55 Fed. 481, and *Untermeyer v. Freund* (C. C.) 37 Fed. 342. It is, of course, extremely difficult to clearly mark the line at which symmetry and attractiveness cease to

be mere matters of good taste and become touched with a spark of inventive genius. Indeed, a glance at the decisions which have sustained design patents seems to suggest that there may be often more inventive genius displayed by the court in finding invention in design patents than the inventor disclosed in placing it there. However, the statute means something, and when this is comprehended it is the duty of the courts to give it effect.

Courts have found invention in designs for chairs, washers, lampshades, bedsteads, lamps, badges, stoves, harness trimmings, saddles, spoons, casing for disinfecting apparatus, grass-hooks, brooches, neck-scarfs, bottle-stoppers, sign plates, bicycle saddles, reflectors, lace trimming, hose supporters, hat bands, monuments, inkstands, and many other devices. In *Jammes v. Carr-Lowry Glass Co.* (C. C.) 132 Fed. 827, the Circuit Court for the Southern District of New York sustained a patent for a bottle design. The description of that bottle covers more than half a page of fine type. It had a neck in "the form of a symmetrical perpendicular cylinder \* \* \* terminating at the bottom in a rim C, similar to the top rim 'A,' the same being \* \* \* in the form of a circle around the bottom of the neck in a horizontal plane. \* \* \*" It had concave fluting, a star at the bottom, and very many supposedly beautifying features. In the present instance the bottle is described by appellant as follows, viz.:

"The upper part *A* of the body of the bottle is semispherical. This part resembles a half of a globe, which is flattened at the top. Upon this is set the neck, which terminates in a circular base or collar *B*. The neck and its base *B* have the appearance of bearing firmly upon the flattened top of the globe *A*. The height of the cylindrical part *D* of the body of the bottle is equal to the diameter of that part, thus making it symmetrical. The appearance made by placing upon this symmetrical cylindrical body part *D* a semi-globular top *A* and of resting upon top of this globe a broad base *B* of the neck, is one of symmetry and strength. This appearance is not the result of any one feature, but is the combined effect of the whole upon the eye."

Undoubtedly appellant is entitled to have its bottle considered as a whole—a unitary body. Whether or not the device of a design patent satisfies the requirements of the statute is a matter to be determined from the impression it makes upon the mind through the eye. If it is pleasing, and found to be new and original, upon an inspection of the disclosures of the prior art and use, and, in addition, leaves a distinct sensation of an unusual and desirable form or arrangement of forms upon the mind, while at the same time its suggestions are wholesome and proper, then, as a rule, it may be sustained as a device within the statute, even though the elusive "spark of genius" may have assumed the humble luminosity of the glowworm. Certainly, if the strict rules which apply to mechanical and process patents are to prevail in reference to design patents, there would seem to have been very little occasion for the enactment of section 4929. Appellant contends that the question of validity may be tested by the manner with which the article clothed in the device of such a patent is received by the purchasing public. As with mechanical patents, that may be taken into consideration as a make-weight, but it is never determinative of the fact of invention.

It is true, as appellant says, that all patents are granted in order to promote the arts or sciences, or both, but the provision of the Constitution was never intended to grant a monopoly just for the purpose of stimulating the natural instincts of mankind to make goods and merchandise attractive (as provided in the German Petty Patent Act of 1891), and therefore salable, without requiring that the conception shall display a degree of originality and beauty which bespeaks for itself a paternity of inventive thought. Invention calls for more than the exercise of a mere desire to please for mercenary ends. "Inventive genius," says Judge Grosscup in *Westinghouse Airbrake Co. v. Chicago Brake & Mfg. Co.* (C. C.) 85 Fed. 794, "has given to mankind most of its present material civilization. The magnificent flower of civilization, everywhere surrounding us, has opened from germs that were fructified from the brains of inventors." Even in the case of design patents this must not be lost sight of.

Appellant has, with commendable diligence and skill, classified the main body of the decisions of the federal courts upon the questions here involved, and deduces that, after going through the original phase of broad construction, the later phase of narrow construction, and again the last and present phase of broad construction of design patents, the courts have settled down to the proposition that, if the design be new, pleasing, and one which increases the sale of the article, it is patentable. The attitude of the courts with regard to design patents, during the second or so-called middle phase, was, it is said, brought about by a too strict construction of the decision of the court in *Smith v. Whitman Saddle Co.*, *supra*. Neither that decision nor the statute have, however, been modified as to the significance of the term "invention," used in both, and it may be assumed that, notwithstanding the construction which appellant claims the courts have later placed upon them, that term has not become meaningless, and must yet be deemed the main feature to be taken into consideration in determining the validity of a design patent.

[2] The question of how the courts are to arrive at a conclusion as to validity or invalidity permits of no fixed or arbitrary dicta or course of reasoning. Appellant asks, "To whom must the design be pleasing to be patentable?" and contends that the judge should not assume to decide; that it is the public which must be held to be the arbiter. Perhaps if there were any conclusive way of ascertaining what the public thinks upon the subject, that might illuminate the question from an *ad hominem* standpoint. Surely, the multiplication of opinions, which must necessarily be divided in such a case, could not be relied upon or permitted to override the opinion of those who must take the responsibility of deciding. Here there are none of the elements which, as in mechanical patents, can be elucidated by expert evidence. The bottle, as a manufactured article, has no rival in the field of public knowledge. Even though the prior art may not be produced in evidence, yet if we may call into service what is known to all, and find that the device is, in all material respects, long since anticipated, and in common use, it is difficult to see how further evidence or opinion could assist us. Furthermore, as in the realm of mechanical patents, it does not constitute invention to add two or

more elements together, leaving each to perform the same function as before, so it is not invention to do this in a design device.

In the range of common knowledge, such as is disclosed in works of art, especially in the pottery and bottle arts, we find suggestions of the bottle in suit. For instance, the lower part of bottle No. 4 of Morton and Leed Chemistry, shown in appendix to defendant's brief, and the top of the common vase shown as No. 20 in said appendix, are both well-known articles, very old and readily recognized. These put together make the bottle in suit. The shape is found or suggested in numerous old devices in and outside of the bottle art. To repeat, it is inconceivable that the facts should be affected by the interposition of further pleadings and evidence. They could avail nothing as against the judicial knowledge of the court. That the court may call to its service common knowledge in a patent case is held in *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200; *Slawson v. R. R. Co.*, 107 U. S. 649, 2 Sup. Ct. 663, 27 L. Ed. 576; *Richards v. Elevator Co.*, 158 U. S. 299, 15 Sup. Ct. 831, 39 L. Ed. 991, and many other cases.

To be sure, there springs from the grant of even a design patent the presumption of validity. That presumption, however, may be overcome as effectually by facts within the judicial knowledge, if adequate, as by the introduction of evidence, and such we hold to have been the result of judicial knowledge in the present case.

[3] The bottle in suit is one of plain surfaces, and has no suggestion of ornamentation. Its claim for novelty and invention rests wholly in its shape. Under the present statute, the design must be ornamental. This may consist in the matter of outline as well as in external ornamentation, but, whether it be in matter of outline or imposed or other ornamentation, the statute requires that it embody features of no uncertain originality and beauty. We can discover no distinct compliance in the bottle in suit with the requirements of the statute. We find in it no degree of invention, nor do we think there is in it anything new, original, or ornamental, as those terms are used in the statute. Such being the view of the court, it follows that there was, in the judgment of this court, no error in the action of the circuit court in sustaining the demurrer and dismissing the cause, on the hearing upon the demurrer, for want of equity.

The judgment of the Circuit Court is therefore affirmed.

Since writing the foregoing opinion, we have been shown the opinion of the Circuit Court of Appeals for the Sixth Circuit speaking through *SATER*, District Judge, holding that the *Boldt* bottle lacked patentable novelty, and affirming the decree of the Circuit Court dismissing the bill for want of equity.

## ALEXANDER v. DE MOULIN BROS. &amp; CO.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1912.  
Rehearing Denied May 7, 1912.)

No. 1,803.

## PATENTS (§ 328\*)—INVENTION—INITIATION APPARATUS.

The De Moulin patent No. 555,499, for an initiation apparatus for secret societies, is a mere aggregation of old and well-known devices, each operating separately to produce its own independent result, and is void for lack of patentable invention.

Appeal from the Circuit Court of the United States for the Southern Division of the Southern District of Illinois.

Suit in equity by De Moulin Bros. & Co. against Lewis E. Alexander. Decree for complainants, and defendant appeals. Reversed.

Fred L. Chappell, of Kalamazoo, Mich., for appellant.

Fritz & Hoiles (C. A. Snow & Co., C. E. Doyle, William Crichton Clarke, Albert Salzenstein, of Springfield, Ill., and F. W. Fritz, of counsel), for appellees.

Before BAKER and SEAMAN, Circuit Judges, and ANDERSON, District Judge.

ANDERSON, District Judge. This is an appeal from a decree awarding an injunction and an accounting of profits and damages for infringement of claims 1, 2, and 6 of letters patent No. 555,499, March 3, 1896, to De Moulin, for initiation apparatus for secret societies. Claims 1, 2, and 6 are as follows:

"1. In an apparatus of the class described, the combination of a stand in the form of an open box, a platform arranged within the stand, located at and closing the top thereof, and adapted, when unsupported, to fall precipitately to the bottom of the stand, locking devices for rigidly supporting the platform at the top of the stand, alarm mechanism automatically operated by the falling of the platform and adapted to startle a candidate, and means for tripping the platform, substantially as described.

"2. An apparatus of the class described, comprising a stand, a platform arranged within the top of the stand, and adapted, when unsupported, to fall to the floor, means for rigidly supporting the platform at the top of the stand and for tripping the same by hand, and a flexible covering concealing the platform and projecting beyond the edges thereof, substantially as and for the purpose described."

"6. The combination of a stand, a platform arranged to fall within the stand, means for rigidly supporting and for tripping the platform by hand, a bell, a bell-hammer mechanism for actuating the bell-hammer, and a lever connected with the actuating mechanism and holding the same normally out of operation and arranged to be engaged by the platform in falling, whereby the actuating mechanism is released, substantially as and for the purpose described."

Appellee's expert, Wolhaupter, says of these claims:

"I find that said claim 1 of the patent in suit is not limited to any particular construction of locking devices for rigidly supporting the platform at the top of the stand, nor to any particular kind of alarm mechanism, nor to any particular kind of means for tripping the platform. Hence any construction of locking devices capable of rigidly supporting the platform at the top of

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
199 F.—10

the stand, any construction of alarm mechanism, automatically operated by the falling of the platform, and any kind of means for tripping the platform, would respond to the construction called for and specified in said claim 1. \* \* \* I find that the above-recited claim 2 of the patent in suit is not limited to any particular construction of the means for rigidly supporting the platform at the top of the stand, but specifies that the tripping of these means is 'by hand.' Aside from this, claim 2 of the patent in suit introduces into the combination the additional feature of a flexible covering arranged to conceal the platform. \* \* \* While the above-recited claim 6 of the patent in suit is not limited by any description of the means for rigidly supporting and for tripping the platform by hand, it does describe and call for an alarm mechanism, including a bell, a bell-hammer mechanism for actuating the bell-hammer, and a lever connected with the actuating mechanism and holding the same normally out of operation, and arranged to be engaged by the platform in falling, whereby the actuating mechanism is released."

Appellee in his brief says:

"The device covered by the patent in suit has become known to the trade as a 'Traitor's Judgment Stand.' It consists of a stand in the form of a box with an open top, one end of the box being provided with a step to enable an initiate of a secret society to step onto the judgment stand. The open top of the stand or box is normally closed by a platform, which is rigidly supported by means of any suitable form of locking devices. The locking devices are arranged to be tripped by some one near the stand, and the platform then drops through the stand to the floor, a distance of about one foot or eighteen inches, with the initiate standing thereon. The falling of the platform is accompanied by alarming noises, such as the explosion of a blank cartridge and the ringing of a bell. In the patent in suit, the falling of the platform, due to the release of the locking devices for the platform, serves to explode the blank cartridge, and the platform in falling brushes past an arm which starts the ringing of a spring-operated alarm bell. The drop platform of the judgment stand in the patent has a carpet secured thereto, the carpet being larger than the platform, so as to project beyond the edges thereof and cover the upper edges of the stand, as well as the platform."

And further:

"An examination of the so-called prior art, as cited by the Patent Office when the application was pending, and as developed by the defendant in this suit, and as hereinafter fully discussed, shows that the device of the patent in suit was a *fundamental* or *pioneer* invention. The De Moulin traitor's judgment stand was not an improvement on some other judgment stand or initiation device. It was the *first* traitor's judgment stand. The patentees did not put better locking devices on an old judgment stand, or provide a flexible covering for a stand which had no covering, or add alarm devices to an old construction of judgment stand. There was nothing in the prior art to suggest even the *idea* of the judgment stand. The patentees, therefore, had no assistance from the prior art either in *conceiving* or *developing* their invention. They first had to evolve the broad idea of an initiation device provided with a drop platform, alarm devices, and means for concealing the character of the apparatus, and then devise and develop means for embodying that idea in a practical and operative structure. The patentees made no claim that they were the first inventors of an alarm bell, by itself, or a cartridge holder, or a platform, or a carpet, or a box; but they did claim that they were the first to conceive the *idea* of assembling these devices in the form of an initiation device or amusement apparatus, and the first to embody that idea in a practical and operative structure."

Thus it appears from the claims themselves, from the testimony of appellee's expert, and from the statements of appellee's counsel in his brief, that the idea for which novelty or invention is claimed is the idea of assembling together, in the form of an initiation device,

a number of devices, each of which was old. The claims are not limited to any particular forms of these devices—any form will do. It is only necessary, in order that they respond to the claims, that they be the familiar and well-known forms of the device; i. e., a platform with a trap floor held in place, a tripping device, a device for firing a cartridge, when operated by the falling of the platform, and a device for ringing a bell, when operated by the same means.

In our judgment, this was a *mere* assembling of these devices—a *mere* aggregation—and did not involve invention. There was no new result reached by this assembling of devices. Each device produced its own independent result. The attendant pulled the trigger, and the trap fell. As the trap fell, it operated (by well-known and familiar means) alarming devices.

These several devices do not act together, and, thus acting, produce a new result, or an old result in a new way. Each acts in the old way, and each produces the old result. If to produce for the first time the platform, concealed with a covering and provided with a trigger to drop the candidate, involved invention, and if to produce for the first time the operating mechanisms which cause the noises to startle him likewise involved invention, it cannot be invention to collect these things in a device which shall both drop and startle him. The device for dropping him and the mechanisms to startle him, each being old, the patentee did nothing but assemble them in what he calls a judgment stand.

The claims should have been held invalid for want of patentable novelty.

Cause reversed, with directions to dismiss the bill.

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EGGLESTON v. MILWAUKEE HEATER MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. April 23, 1912.)

No. 1,852.

PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—RELIEF DEVICE FOR WATER SYSTEMS.

The Eggleston patent, No. 838,394, for a relief device for water systems, comprising a pressure and relief attachment which may be used with steam or hot water heating systems, claims 6, 7, and 8 are not for the same subject-matter as that abandoned by the cancellation of original claims 2, 3, and 4, but are a more accurate embodiment of the patentee's conception and cover a new combination of merit and disclose invention; also *held* infringed.

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

Suit in equity by Lewis W. Eggleston against the Milwaukee Heater Manufacturing Company. Decree for defendant, and complainant appeals. Reversed.

Appellant, hereinafter called complainant, filed his application for a patent for a relief device for water systems, which was granted December 11, 1906, as patent No. 838,394, after numerous modifications in its way through the Patent Office.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The patent is distinctly for a relief device, and in no manner involves the water system itself, save as a means for regulating it. As originally presented, there were nine claims. Claims 2, 3, and 4, as originally presented, read as follows:

"2. A relief device for a water system, presenting a bowl containing mercury, a tube open below and dipping into said mercury, and means for connecting said bowl with said water system to receive the pressure thereof.

"3. A relief device for a pressure system, comprising a substantially vertical tubular body, a centrally disposed tube arranged within said body and adapted to support a mercury column, and means for making communication from said pressure system to said body.

"4. A relief device of the class described, comprising a substantially vertical tube, an inner tube arranged within the same, and a sealing fluid at the lower extremity of said tubes, the surface whereof may receive a pressure to support a column of said fluid in said tubes."

They call, in substance, for a bowl containing a mercury seal, a vertical tubular body, an inner tube arranged within the tubular body, open below and dipping into the mercury-bowl at its lower extremity, and means for making connection with the water system pressure. These claims the examiner rejected on the German patent, No. 88,332, granted to David Grove on October 23, 1896, for "heating construction blow-off apparatus for steam heating and the like." In this device, when the pressure in the system arrives at a predetermined point, the mercury seal is lifted thereby into an enlarged tube or chamber, into the bottom of which the mercury falls and from an outlet pipe extending from the top of which the steam, air, or water escapes into the atmosphere until the pressure is reduced, whereupon the mercury is returned through a small tube at the bottom of the chamber, to reconstitute the seal. The examiner bases his conclusion upon the statement that it does not involve invention to substitute the Trane form of seal, or that of Reynolds, No. 741,548, for the Grove seal. These two latter are vacuum or low pressure seals designed to effect the release of air or the like from the heating system. Original claim 1, which called for a relief device presenting a mercury column supported by the pressure in the system, means for the escape of water through the column, and an expansion tank there beyond to which the water might escape, was likewise rejected on the Grove patent, the Olney English patent of 1883, and the Purnell British patent, No. 2,391, with the statement that the tank is not a material feature of the device as claimed. Present claim 1 was added February 17, 1906. Original claim 5 as amended, which called for a lower bowl, a horizontally enlarged expansion-head, and a tubular body extending from the bowl to the head and attached to both bowl and head—a claim which, on a fair construction, presents merely the external outline of the device of the patent; was also rejected by the examiner on the Grove patent. Complainant's solicitor, before the examiner, seems to have entirely misunderstood the scope of this claim when he sought to have it construed as an operative device in his argument of September 23, 1905. There can be no doubt, when all the language of the claims and specification are considered, that this claim was clearly defective.

Present claim 2 was substituted for original claim 6 by complainant. Original claim 7 became claim 3. Original claim 8 became claim 4, and original claim 9 is the present claim 5. Claims 6 and 7 were added March 1, 1906, and claims 8 and 9 were added on April 17, 1906—all of the four last named on the suggestion of the examiner. As thus manipulated, the patent issued. On June 15, 1908, complainant instituted this suit for infringement.

Appellees, hereinafter termed defendants, made answer denying validity of the patent in suit and infringement thereof, and setting up a number of patents in the prior art, of which mention need here be made only of Mott and Edgar patent, No. 600,440, granted March 8, 1898, for "relief device for hot water heating"; patent No. 686,666 granted to Trane for a "steam heating system"; D. F. Morgan patent No. 722,127, granted March 3, 1903, for a "steam heating plant"; patent No. 741,548, granted to Reynolds, October 13, 1903, for "vacuum heating system"; British letters patent No. 1,705, granted to Olney April 5, 1883, for valves to be used in connection with "hot



water apparatus for heating, etc.”; British letters patent granted to Purnell on September 25, 1861, and numbered 2391, for “warming apparatus”; British patent No. 4393, granted October 10, 1881, to Shields for “safety valve for domestic boilers and hot water apparatus”; German patent to Grove, No. 88,332, granted October 23, 1896, for a blow-off apparatus for steam heating and the like. The claims in suit read as follows, viz.:

“6. A pressure and relief attachment for a pressure hot water heating system, comprising a receptacle containing a mercury well, a chamber in communication with said receptacle, a tube extending from said well to the chamber to allow the formation of a mercury column under pressure from the system, the arrangement being such that a predetermined pressure may be maintained in the system, and water may pass from and return to the system through the mercury under sufficient variation from said pressure.

“7. A relief device of the class described comprising a tube to contain a mercury column, means for connecting said tube to a water system whereby the pressure of said system may form and support said column and an extension beyond said tube into which water may escape through said mercury column, and from which the escaped water may return through said mercury column.

“8. In a device of the class described, a mercury-chamber, a boiler connection extending laterally from the mercury-chamber, a bulb supported above the latter, a pipe depending from said bulb into the mercury-chamber, and a tank connection at the upper end of the bulb the parts being so arranged as to allow water to pass and repass through the mercury.”

—being those claims inserted at the suggestion of the examiner. Figs. 1 and 2 of the drawings, below set out, sufficiently show the device of the patent:

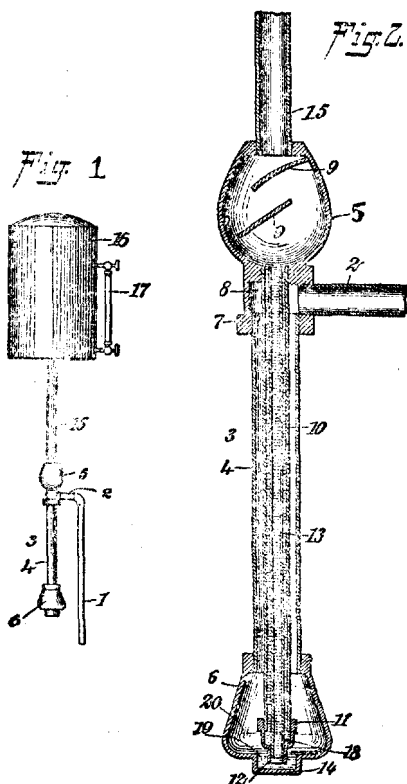


Fig. 2 shows a device having two tubes, 10 and 13, in which may be employed two mercury columns. The addition of tube 10 was new with complainant, and is covered by claims not in suit. It supplements tube 13, aids in the free circulation of the mercury, and results in the attainment of a steadier pressure. The claims in suit, it is contended by complainant, call for only one tube connecting the interior of the two bowls, the lower bowl 6 and upper chamber 5. When the pressure of the system supplied through the pipe 2 and the chamber 8 causes the fluid surrounding tube 13 and within the tubular body 4 to bear upon the body of mercury contained in receptacle 6, the latter is forced up tube 13 and at length into the head 5. As soon as the nipple 12 is free from the mercury, the fluid rushes into tube 13 and by reason of the system pressure, forces its way through the mercury which by that time is spread out in head 5 so as to create a short column, and escapes beyond the seal in bubbles or otherwise, and thus relieves the pressure of the system. When the latter has been reduced to atmospheric pressure, or less, the mercury passes back into tank 6 and re-forms the seal. In the meantime, the water which has escaped, is held above the seal so that substantially none of it is wasted. Its absence from the system creates something akin to a vacuum, whereupon the atmospheric pressure forces it through the new-found seal, out of nipple 12 and back into the system. The tank 5, together with the pipe 15, and expansion tank 16, are provided with space to hold whatever water escapes. Thus the same body of mercury forms a seal at tank 6, then when forced up the tube 13, forms a new seal in tank 5, and when the pressure is reduced, returns and re-forms the seal at tank 6.

The patents above recited cover either the provision for the high pressure relief of the patent in suit or the low pressure or the vacuum-controlled return of the water. No one of them covers both processes. Concretely stated, complainant's claim is for a device whereby water may be forced under the system pressure through the seal without serious loss of temperature or pressure in the system, and then be restored to the system when the pressure is reduced, without decrease in volume, all by the use of one body of mercury. In all these heating systems, it is essential that the body of water in the system be maintained substantially intact. Defendants insist that the alleged infringing device is for a different purpose and applicable to a different heating system.

It will be seen that complainant's water is in immediate contact with the mercury column. In defendant's device the mercury and water are separated by a cushion of air, as in Matt and Edgar and Angrich, so that, in case of undue pressure, the air is made to lift the mercury seal. Other minor differences exist, but in the main the devices are otherwise similar, and operate in the same manner.

Defendants insist that their device is structurally and functionally different from complainant's; that complainant avoids blow-outs, while theirs does not; and that it is no concern of complainant's whether their seal permits and provides for the return of air inasmuch as his device is limited to the use of water.

On the hearing, the Circuit Court sustained the patent upon grounds not here in controversy, held that the subject-matter of original claims 2, 3, and 4 was the same as that contended for by complainant on this hearing; that that subject-matter had been abandoned when the claims 2, 3, and 4 were canceled; that they could not be recalled; and dismissed the bill for want of equity, from which decree this appeal is prosecuted, and the entry of which is assigned as error.

Russell Wiles, Philip C. Dyrenforth, and Charles Turner Brown, for appellant.

Leverett C. Wheeler, for appellee.

Before KOHLSAAT and MACK, Circuit Judges, and SANBORN, District Judge.

KOHLSAAT, Circuit Judge (after stating the facts as above). The substance of the claims in suit, so far as here involved is a pressure and relief attachment for use in connection with a hot water heating system, containing the following elements, viz.: (1) A mercury well; (2) a chamber in communication therewith; (3) a tube extending from said mercury well to said chamber to allow the formation of a column of mercury in response to system pressure, and a receptacle enclosing said well, chamber, and tube—all so arranged that water may pass from and return to the system through the mercury.

The original specification seems to have contemplated this combination, but it remained for the examiner to voice it properly. It is defendants' contention that this combination was abandoned when original claims 2, 3, and 4 were canceled in response to the rejection by the examiner. But a study of the language of those claims does not justify this construction. If they were ever intended by the applicant to cover the substance of the claims in suit, they failed of their purpose. The attempt of defendants to read into these three claims the double feature of passing and returning the fluid by reference to the then prior art does not commend itself. Certainly in dealing with the proceedings in the Patent Office the court should not, by any inference, debar an applicant from the reward of his diligence in securing the benefits of his invention. Especially is this the case whenever it appears that the proceedings are not prosecuted with that discrimination and caution which a case involving this well developed art should command. It is not the spirit of the patent statutes to place the procurement of patents on technical grounds, and beyond the reach of ordinarily skillful persons. In rejecting claims 2, 3, and 4 the examiner held that there could be no invention in substituting the Trane seal for the Grove seal. He evidently did not pass upon the question of a high pressure and a low pressure seal in one device and employing but one body of mercury. If anything were wanting to make this conclusive, we may cite his action in suggesting the claims in suit. The court will not assume that the examiner would suggest and give to an applicant a patent for a device which he knew to have been surrendered to the public. It would, in the opinion of the court, be straining both the facts and the law to hold that claims 2, 3, and 4 were identical with those in suit. Every reasonable intendment should prevail in support of the contrary proposition, and we therefore hold that the applicant did not abandon whatever of invention, if any, there is in the claims in suit, when he canceled claims 2, 3, and 4, as originally filed. As before stated, the claims in suit cover an attachment to a hot water heating system, and not a hot water heating system as such. It is evident that it must be treated as an entity, entirely independent of the system. It is a device in no manner dependent upon the character of the system pressure, whereby the mercury column is lifted. That may be water, air, steam, or gas. It applies to any system in which it is desirable to facilitate the relief of

pressure affording an avenue of escape under controlled conditions, and, when atmospheric pressure is restored, facilitate the return of water or air to the system, through the use of mercury seals, effected by the use of a single body of mercury. There is no force in defendant's contention that it should be limited to hot water heating systems, or to a device in which the mercury is directly moved upon by water. Was there any patentable novelty in so combining the concepts of the two lines of devices of the prior art—i. e., those covering the application of a mercury seal to the protection of a hot water, hot air, gas, or steam heating system by permitting the pressure to be relieved by the escape of fluid or other substance when necessary and those which provide for a restoration of the fluids of the system to normal conditions under atmospheric pressure, when required—as to accomplish both results in one device, and with one body of mercury? The Olney patent, above cited, accomplished something like this by the use of two mechanical valves. There is a marked distinction to be drawn between the mercury seal and a mechanical valve: The former never fails to operate; the latter is subject to all the defects of metal-working automatic devices. Rust and friction serve to make the latter uncertain.

The Mott and Edgar patent employs for its release of pressure, a mercury seal, and for its restoration of elements to the system, an automatic mechanical valve. Nowhere in the prior art do we find the combination of the claims in suit. That they call for a combination seems clear from the fact that they, by various skillful and novel adjustments, secure the combined effects of the herein so-called high pressure and low pressure or vacuum safety and restoration devices of the prior art by the use of only one mercury column and the elimination of a number of elements, which would be necessarily present, were the device to constitute an aggregation. The idea of a device which would pass out of the system and then at the proper time return to the system the water or air required to keep it in working order in the condition best accomplishing the end in view is both ingenious, useful, and new—not broadly new, but to a degree which invades the realm of invention, the state of the art considered. The claims in suit are therefore held to be valid.

If the concept of the patent in suit is that of an independent attachment to a system for hot water or steam or hot air heating, and devised only for the purpose of protecting such system, and in and of itself a separate and distinct entity, then the fact that defendants use an air cushion between their water and mercury columns has no bearing upon the subject-matter of this suit.

Thus stripped of everything but the elements which enter into the relief device itself, it is apparent that the defendant's construction is practically the same as that of complainant. It is true that the defendant's mercury well 6 is comparatively small. If, however, it accomplishes the same end as complainant's, and in the same way, the size is not material. The idea of each is identical.

We conclude that the court erred in dismissing the bill for want of equity.

The decree of the Circuit Court is reversed, with directions to proceed further in conformity herewith.

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UNITED WIRELESS TELEGRAPH CO. et al. v. NATIONAL ELECTRIC  
SIGNALING CO.

(Circuit Court of Appeals, First Circuit. September 10, 1912.)

No. 953.

On petition by appellee for rehearing. Denied.

For former opinion, see 198 Fed. 386.

Before COLT, Circuit Judge, and ALDRICH and BROWN, District Judges.

PER CURIAM. On a careful consideration of the complainant's petition for a rehearing, we find nothing which leads us to think that we have in any respect misunderstood the contentions of the complainant as to the invention disclosed in the Fessenden patent, No. 706,736. Neither have we failed to understand or to recognize in the opinion the difference between the mode in which the received energy was used by Lodge and Marconi and the mode of use described in the Fessenden patent.

The elaborate discussion by the petitioner of the propriety of the use of the terms "voltage" and "current" is largely a question of terms, and of the propriety or sufficiency of certain expressions to mark a difference, which is sufficiently stated in the opinion. The petition for a rehearing discloses nothing which indicates any mistake of fact or any misunderstanding of complainant's contentions that at all affects our principal finding that the complainant's various descriptions of Fessenden's invention are unsound abstractions, in this: That they omit Fessenden's principle of operation.

The principal tests of infringements which the complainant proposes are not fair descriptions of Fessenden's invention as described in the patent. Fessenden is not entitled to a patent upon abstractions which do not conform to the invention which is set forth in the specification.

The contention that Fessenden, upon any showing made by the complainant in this case, should be entitled to cover the principle of using the received energy itself to produce motion that may be observed in any way whatever is contrary to that long line of decisions which hold that an inventor cannot block the path of improvement merely by ingenuity in framing claims which, in the broadest abstract terms, cover all foreseen possibilities of improvement, but do not fairly represent an invention already made.

As no judge who concurred in this opinion desires a rehearing, the petition for rehearing is denied.

MACBETH-EVANS GLASS CO. v. ROSENBAUM CO. et al.<sup>1</sup>

(District Court, W. D. Pennsylvania. August 5, 1912.)

No. 127.

## 1. PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—DESIGN FOR LAMP SHADE.

The Evans design patent, No. 41,785, for a design for a lamp shade, discloses patentable invention when compared with the prior art; also held valid as against the claim that the patentee was not the true inventor, and infringed.

## 2. PATENTS (§ 252\*)—INVENTION—DESIGNS.

Whether two designs are identical is to be determined by examining the drawings and the manufactured article.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 540-543; Dec. Dig. § 252.\*]

## 3. PATENTS (§ 252\*)—INFRINGEMENT—DESIGNS.

The test of infringement of a design patent is whether the two designs are so like as to appear to be identical to the eyes of an ordinary observer, and not whether differences can be observed by an expert.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 540-543; Dec. Dig. § 252.\*]

## 4. PATENTS (§ 252\*)—INFRINGEMENT—DESIGNS—EVIDENCE.

In determining the question of infringement of a design patent, the two articles may properly be compared as they appear when in use.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 540-543; Dec. Dig. § 252.\*]

In Equity. Suit by the Macbeth-Evans Glass Company against Rosenbaum Company and the Jefferson Glass Company. On final hearing. Decree for complainant.

Paul Synnestvedt and James I. Kay, both of Pittsburgh, Pa., for plaintiff.

Weil & Thorp and A. M. Neeper, all of Pittsburgh, Pa., for defendants.

YOUNG, District Judge. This is a bill filed by the Macbeth-Evans Glass Company for infringement of design patent for lamp shades No. 41,785, granted to H. S. Evans September 19, 1911, and which it is alleged the defendant, the Rosenbaum Company, has infringed. The other defendant, the Jefferson Glass Company, was allowed to intervene and become a party defendant; it having alleged that it was the manufacturer of the lamp shades used by the Rosenbaum Company and which had been sold to that company through Stinson, Kennedy & Co., who had contracted with the Rosenbaum Company for the furnishing of the lamp shades. It is admitted that the patent in controversy was assigned to the Macbeth-Evans Glass Company by H. S. Evans on August 16, 1911, before its issue. We gather from Fig. 1 of the drawings accompanying the application for the patent that the design consisted of a bell-shaped glass shade having a slightly concave curve from the neck for a short distance, and then a gradual reverse convex curve to the bottom of the shade. Upon this is formed panels and

<sup>1</sup>For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

ribs. The whole outward surface is formed into panels by narrow ribs. The ribs are triangular with the body of the shade as a base, and reaching an apex above the surface of the shade and the adjacent panel. The rib, having a pointed end, begins on the bottom rim of the shade below the adjacent panel, and gradually narrows and retreats from the adjacent panels on either side until it disappears in a narrowing groove at the neck of the shade. Fig. 2 of the drawings shows that the pointed rib is triangular, having for its base a segment of the circle passing through the different points of the rim where the panels and ribs have a common meeting point. The articles manufactured under this patent offered as exhibits by both complainant and defendant, "complainant's patent shade" and "Defendant's Exhibit of Complainant's Shade, January 19, 1912," both show that some of the ribs are triangular, reaching an apex above the adjacent panels, and some are slightly rounded or flattened. The shades are manufactured in moulds, and have a uniform surface on the entire inside, and the panels and ribs gradually increase in thickness from the top of the convex curve near the neck to the bottom of the shade. The defenses are, first, noninfringement; second, invalidity of the patent over prior art; and, third, invalidity of the patent on account of the claim that the patentee, Evans, was not the true and original inventor of the subject-matter, but that the same was invented by one Lorin W. Young. For the sake of logical consideration we shall take these up in the following order: First, the invalidity of the patent; second, whether Young was the inventor; and, third, infringement.

[1] First, as to the defense that the patent is invalid because of the prior art. Patent No. 41,785, having been issued to Evans and by him assigned to complainant without more, would be a valid patent, and the burden was therefore on the defendants to show its invalidity in the light of the prior art. Defendants undertook to do this by offering in evidence, as showing the bell-shaped contour, the narrow ribs alternating with the broad panels, and the scallops at the lower edge, the following patents: Design patent No. 26,647, issued February 16, 1897, to E. F. Caldwell; design patent No. 37,812, issued July 15, 1905, to O. A. Mygatt; design patent No. 37,424, issued May 2, 1905, to K. Booth; design patent No. 40,607, issued April 5, 1910, to O. A. Mygatt; patent No. 790,026, issued May 16, 1905, to K. Booth—and the following exhibits: Fig. 8,715, p. 31, Pettingell-Andrews Company catalogue, filed in the Patent Office February 8, 1909; plate 6, cut P 804, and plate 7, cut 800, Pettingell-Andrews Company catalogue, 1904; page 138, cut 4,229, and page 148, cut 4,715, in the Morreau catalogue 4, copyrighted 1903; page 30, cut 3,107, in Bauer catalogue, 1904; plate 4, cut 6,514½, and plate 4, cut 6,517½, in Phoenix catalogue 16; pages 589, 595, 597, 626, and 664 of the Electrical Merchandise Catalogue No. 12 of Pettingell-Andrews Company—and exhibits of manufactured shades as follows: Defendants' Exhibit narrow Sheffield design, Defendants' Exhibit wide Sheffield design, and

Defendants' Exhibit "Opallux" and "Pheno," designed by Howard E. Watkins.

The question, then, is whether there is identity of design in the patent of Evans viewed in the light of the state of the art as shown by the prior patents and by the preceding exhibits. We find the true test of identity of design laid down in *Gorham Co. v. White*, 14 Wall. 511, 20 L. Ed. 731, where Mr. Justice Strong says, on page 525:

"And the thing invented or produced, for which a patent is given, is that which gives a peculiar or distinctive appearance to the manufacture, or article to which it may be applied, or to which it gives form. The law manifestly contemplates that giving certain new and original appearances to a manufactured article may enhance its salable value, may enlarge the demand for it, and may be a meritorious service to the public."

An examination of the patents, figures, and manufactured shades in evidence shows that there is a great and substantial difference between the shades patented, pictured, and made under prior patents and in the prior art and the design of the Evans patent. True, they are all more or less bell-shaped, in that they are narrower at the top than at the bottom; they are all traversed or cut up by ribs narrow or broad; they are all more or less scalloped at the lower edge, and among those that are moulded or pressed the inside surface is uniform and not broken up or fluted, but the most casual and superficial examination of the exhibits in the prior art shows that there is in the patent in suit, not only a striking difference in the design of the contour of the shade arising from the convex and concave curve between the lower edge and the top of the shade, but also in the conformation of the ribs and panels, where we find the narrow rib alternating with the broad panel. The above differences are very apparent to an ordinary observer, but these differences in construction would not determine the question of identity of the Evans design with those shown by the evidence as to the prior state of the art if those differences did not produce a different effect. As is said in *Gorham Co. v. White*, supra, 14 Wall. 525, 20 L. Ed. 731:

"Manifestly the mode in which those appearances are produced has very little, if anything, to do with giving increased salableness to the article. It is the appearance itself which attracts attention and calls out favor or dislike."

And again on page 526 of 14 Wall. (20 L. Ed. 731):

"We do not say that in determining whether two designs are substantially the same, differences in the lines, the configuration, or the modes by which the aspects they exhibit are not to be considered; but we think the controlling consideration is the resultant effect."

[2] Giving proper consideration then to the differences above pointed out, we inquire next whether or not the effect produced upon the eye of an ordinary observer is the same. Unmistakably, if we look at the Evans design, and those other designs offered in evidence, we at once see that an entirely different effect is produced. In the Evans design, we have a new and pleasurable sensa-



tion of symmetrical beauty in contour and configuration entirely different from the sensation of beauty produced by looking at the prior designs, and this apart from the impression of beauty produced when viewing them in use with electric or other light showing through them, because we are of opinion that, in determining the validity of a patent, whether two designs are identical is to be determined by examining the drawings and the manufactured article, and that it is only in determining the question of infringement that we may resort to and consider the design in use. A comparison of the drawings in the different patents with the drawings in the Evans patent shows this manifest difference in effect. A comparison of the engravings in the catalogues offered in evidence with the drawings in the Evans patent shows the same apparent difference in effect. A comparison of the shade manufactured under the Evans patent with the manufactured shades, "narrow Sheffield," "wide Sheffield," "Opallux," and "Pheno" shows the same unmistakable difference in effect. So that from a comparison from all points of view we arrive at the conclusion that the Evans design is different from all those preceding it. We therefore hold that the patent is valid.

Second, as to the invalidity of the patent on the ground that the design was invented by Lorin W. Young, and not by Evans, the patentee. Patent No. 41,785 for the invention in controversy, having been issued to Howard S. Evans and the same having been offered in evidence, was *prima facie* evidence of invention and of the regularity of the issuance of the patent. *Railroad v. Stimpson*, 14 Pet. 448, 10 L. Ed. 535; *Corning v. Burden*, 15 How. 252, 14 L. Ed. 683; *Blanchard v. Putnam*, 8 Wall. 420, 19 L. Ed. 433; *Marsh v. Seymour*, 97 U. S. 348, 24 L. Ed. 963. The burden is therefore upon the defendant to overcome the presumption. *Mitchell v. Tilghman*, 19 Wall. 287, 22 L. Ed. 125; *Singer Mfg. Co. v. Brill*, 54 Fed. 380, 4 C. C. A. 374. And this must be established, not only by the weight of the evidence, but the evidence must be free from doubt. *Forgie v. Oil-Well Supply Co.*, 58 Fed. 871, 7 C. C. A. 551; *Stonemetz v. Brown* (C. C.) 57 Fed. 601. Let us examine the evidence in the light of these principles to determine whether or not Young was the inventor of the patent in question.

Lorin W. Young at the time the patent was applied for and for some years prior thereto was employed by the Macbeth-Evans Glass Company as salesman. His service with them covered a period of nine years. That company was experimenting for the purpose of producing the "Alba" glass. It being desirable to provide a design which in a lamp shade would bring out the beauties of the "Alba" glass, the design of the lamp shade in controversy was made and patented by Evans. He testifies that in the fall of 1908 he was requested by Evans to get up a design for a shade which would bring out the beauties of the "Alba" glass, and that he, Young, in a short time produced a sketch showing the shape which was afterwards known as Macbeth-Evans No. 3424, and

this he handed to Evans, and has not seen it since to his recollection; that at the time he started to make the design Evans suggested that, if possible, there should be embodied in the elaboration the ribs and grooves of the "Sheffield" line of goods, at that time very popular; and that both he and Evans were very familiar with that line. He testifies that in forming this design he tried to embody the general "Sheffield" idea without exactly copying any one particular quality or shade then being manufactured by competitors, although carrying out the general line of the "Sheffield." He testifies that Fig. 1 as shown in the design to the best of his belief is the exact reproduction of his sketch. He swears positively that Evans was not the sole and original inventor of the design shown in patent No. 41,785, issued to Evans, and that he, Young, is, and that the invention of the design shown in Fig. 1 of the drawings forming part of design patent No. 41,785 was his exclusive invention. He further testifies that he had a conversation with Evans about the time the application for a patent for the shade was made, and that Evans told him that he would apply for the shade patent, and that Young should apply for the patent design for lamp shade, for which patent No. 41,680 was issued, and called in the evidence the "Hemisphere" patent. Young testifies he was the inventor of the design of that patent also. The applications for both these patents were made on December 19, 1910.

The only witness called by the defendants to testify in support of Young being the inventor of the design in controversy was Robert C. Kay, an employé of Macbeth-Evans Glass Company, who came into the employ of that company in September, 1909. He testifies that during September, 1909, Evans pointed out to him the line of reflectors manufactured by Macbeth-Evans Glass Company, and in explaining this line of reflectors he showed him No. 3,424, and said:

"This reflector was designed by our Mr. Young, whom I want you to meet, and I hope you will become as thoroughly 'Albaized' as Mr. Young and myself are."

He further testifies that the shade shown him being Complainant's Exhibit "Complainant's Patented Shade," is an exact duplicate of the shade known as No. 3,424, exhibited to him by Mr. Evans. He testifies that it was understood and granted more than once in conversation in which Evans, Young, and the witness took part that Young was the designer of No. 3,424, this in the office of the company in Pittsburgh and at the Electrical Show in Chicago. It is admitted that 3,424 is the number by which the shades manufactured under the Evans patent are known by the complainant company.

The substance, then, of Young's evidence is that in the fall of 1908, while he was in the employ of the complainant company, he was requested to make a design for a lamp shade; that alone and unassisted he made a drawing or sketch of which Fig. 1 of the patent is an exact reproduction; that he gave this sketch to Evans, and has not seen it since; and that when the patent was applied for by Evans, although Young was the inventor, he allowed Evans, upon Evans' re-

quest, to take out the patent, he, Young, to take out the other patent, known as the "Hemisphere," No. 41,680; Young being also the inventor of that design.

The inferences we are asked to draw from this evidence are that Young is the sole inventor of the patent in dispute, and that the sketch was made by Young, given by him to Evans, used by Evans in having the drawing, Fig. 1 of the patent, made, and that Evans knew at the time the patent was applied for that Young was the inventor, and that Evans was not, and that it was only because Young was an employé of the complainant company that he had no objection at that time to the application being made by Evans, as requested by Evans.

Howard S. Evans was called to rebut the evidence of Young, and he testified that in the fall of 1908 the "Alba" glass, which theretofore had been sold in blown goods, he thought would make a very good reflector when properly designed and pressed; that, to get an idea of how it looked in pressed form, he gave instructions to the factory at Charleroi to use a gas shade mould, a mould which the complainant company had made to meet the requirements of the Cuban market; that, when he received the shade thus made, he was convinced that a good line of reflectors could be made for "Alba" for "Tungsten," and other incandescent lamps; that he may have shown this to Young; that his recollection is that he, Evans, then sketched a shade, which he gave to Miss Lafferty, and from which developed No. 3,424, Complainant's Exhibit "Complainant's Patented Shade"; that the sketch he gave to Miss Lafferty was rather crude, and, as he did not profess to be an artist or designer, she drew the design properly, carrying out the shape and ornaments of the rough sketch, and then two models were made; that, when the models were made, he changed the ornamentation and altered the ribs; that he had no recollection of asking Young to get up a design for a shade, and no recollection of Young handing him a sketch of the shade of the patent or anything like it; that Young had no part whatever in the origination of the patent in suit that he could recollect; that Young never claimed he had any part in the origination of the design of the patent in suit. There is here, then, a denial that Young had anything to do with inventing the design, or that he made a sketch or gave a sketch to Evans, or ever claimed to have any part in the designing of the patent, but that, on the contrary, he, Evans, was the inventor of the design, based upon a moulded shade which he caused to be made, of which he made a rough sketch, and which rough sketch, under his direction, was put in more artistic form by Miss Lafferty, and from which two models were made, they being subsequently altered by Evans and the "Alba" shade, No. 3,424, being the shade of the Evans patent, was finally produced.

We have on the one side the evidence of Young asserting that he is the inventor, with the attending circumstances, and on the other side the evidence of Evans asserting that he is the inventor, with the attending circumstances. We must, therefore, look for corroboration both in the attending circumstances and in the other evidence. It is argued that this corroboration is found in favor of Young by the fact that the two patents, No. 41,785, the Evans patent, and No. 41,680,

the Young patent, for the same shade, were applied for on the same day; that Fig. 1 of the Evans patent is a reproduction of the sketch made by Young. But these are not corroborative, for, as to the application being on the same day, that might well be if Evans designed the shade of his patent and Young the shade of the "Hemisphere," his patent, both working at the same time, but for different results. The argument that there is corroboration of Young in the evidence of Young that Fig. 1 of Evans' patent is a reproduction of his sketch is not sound, because the statement that it is a reproduction depends alone upon his own evidence and rises no higher and is no more convincing than his evidence that he is the inventor; and it is in no sense corroborative evidence. More than that, we do not have his sketch, and cannot compare Fig. 1 with it, and therefore there is no corroboration. But we are required to infer from his evidence that the sketch given by Evans to Miss Lafferty was the Young sketch, and, as that resembles Fig. 1, we are asked to conclude that Young is corroborated. We cannot infer that the Lafferty exhibit was made from the Young sketch because there is no evidence that it was, but, on the contrary, the evidence is both by Evans and Miss Lafferty that the Lafferty sketch was made from a rough drawing which Evans testifies he made, and which Miss Lafferty says she used under Evans' direction. So we find nothing in the attending circumstances to corroborate Young.

Do we find in the attending circumstances anything to corroborate Evans? We think we do in the evidence of Miss Lafferty. As has been said, she testifies that Evans gave her, she being the designer for the complainant company, a rough sketch shortly after October 1, 1908; that she used this sketch under the direction of Evans, and she produces the sketch which she made at the time, showing the design as afterwards reproduced in Fig. 1 of the Evans patent. We have here Evans corroborated partly by the circumstance of the sketch and by the evidence of Miss Lafferty. Were we to decide upon the evidence of Young and Evans alone, bearing in mind that the burden of proof is upon the defendant and that no doubt must be in the mind of the court upon the evidence, and taking into consideration that Evans is corroborated by the attending circumstances and Young is not, we would be driven to the conclusion that the defendants have not overcome the presumption arising from the issuance of the patent. But let us look further for corroboration of Young and Evans in the evidence given by other witnesses. It is argued that Young is corroborated by the evidence of Robert C. Kay, who testifies that when he came into the employ of the complainant company in September, 1909, Evans pointed out to him shade No. 3,424, the Evans patent, and said that Young had designed it; that on numerous occasions he talked with Evans and Young, and that whenever "Alba," No. 3,424, was mentioned, it was understood and granted that Young was the designer of that shade; that at the office of the complainant company in the Wabash Building, Pittsburgh, the subject was discussed, and also at the Electrical Show in Chicago, and that at that time it

was understood that Young was the designer of the shade. This evidence is very weak as corroborative evidence. The evidence of pointing out the shade 3,424 among the samples is weak because there were many samples, as many as 250 different styles in the room, and among them some of Young's, who is admitted to have made designs, and the witness may easily have been mistaken. His evidence of conversation is weak, also, because he fails to give the conversation or any part of it, but gives only his conclusions, as that it was "granted" or "understood." So we do not find any persuasive corroboration of Young in the only evidence given by the only witness offered in corroboration. On the other side, we have Evans corroborated by the evidence of Miss Lafferty as to the sketch, the sketch itself, and that she never heard while in the employ of the complainant company that Young claimed to be the inventor of the design in question; by the evidence of Lissfelt, an employé of complainant company, who corroborates Miss Lafferty, testifying that he heard Evans giving instructions to Miss Lafferty in making the final drawings of the shade, and who also testifies he never heard anybody else, aside from Evans, referred to as the originator of the design, never heard Young claim it, nor ever heard anybody intimate that Young was the inventor of the shade; by the evidence of Macbeth of the complainant company, who testifies he kept in touch with the business, and that no shape or design could progress towards the making without coming under his supervision; that he never knew of Young asserting that he was the originator of the design shown in Complainant's Exhibit "Complainant's Patented Shade."

We have, then, on the one side only the evidence of Young uncorroborated by the attending circumstances, and but weakly corroborated in but one particular, namely, by the pointing out in the sample room of the shade in question by the witness Kay, and on the other side the evidence of Evans corroborated partly by the attending circumstances, by the evidence of Miss Lafferty, Lissfelt, and Macbeth. Not only have defendants not overcome the presumption arising from the issuance of the patent to Evans, but the weight of the evidence is so greatly in favor of the claim that Evans is the original inventor of the shade in suit that we arrive without hesitation at the conclusion, and therefore find that Evans is the original and first inventor of the design for which patent No. 41,785 was granted to him. Let us now pass to the last question, that of infringement.

The complainant produced and offered in evidence its manufactured shade made under the Evans patent, and marked "Complainant's Exhibit Complainant's Patented Shade," and also the manufactured shade which it is alleged defendants are manufacturing and selling, and marked "Complainant's Exhibit, Defendant's Construction," and the testimony of many witnesses was based upon a comparison of the Complainant's Exhibit with the exhibit produced as the infringing article. Objection is made by defend-

ants to all this evidence upon the ground that Complainant's Exhibit "Complainant's Patented Shade," does not embody the design described and shown in complainant's patent No. 41,785, and therefore a comparison between it and defendant's construction is improper, and the testimony based upon such comparison should be suppressed. This question should be determined in limine, because it is an important one, and, if the premises are true, the conclusion must follow that the testimony be suppressed, which would remove from the case much testimony that is necessary to a decision. It is alleged that Complainant's Exhibit "Complainant's Patented Shade," offered in evidence, does not embody the design for the lamp shade described and claimed in complainant's design patent No. 41,785, in that:

"(a) The narrow ribs of said exhibit are not of the form and design shown in Figures 1 and 2 of said design patent because '(1) they are not in the form of prisms having an angular cross-section, having the lines of their apexes or ridges prolonged and divided at their ends so as to define the terminals of the broad ribs of said exhibit as shown and defined in Figure 1 of the drawing of said patent; on the contrary, said narrow ribs are rounded in cross-section, their upper surfaces being curved instead of angular, and said narrow ribs disappear and vanish in the bowl of said exhibit without the lines of their apexes being continued to the shoulder of said exhibit to define the terminations of the broad ribs thereof as indicated above.'"

An inspection of the exhibit shows that some of the narrow ribs are angular in cross-section and some are slightly rounded, but this difference is so slight and so probably the result of careless moulding that it deserves no consideration. The narrow ribs do disappear in the bowl of the shade at the bottom of the concave groove, but an inspection of Fig. 1 of the drawing shows the same. There is nothing in the first reason.

"(2) The terminations of the narrow ribs of said exhibit and the bottom edge thereof are not in accordance with the design shown in Figures 1 and 2 of the patent No. 41,785. The terminations of the narrow ribs of the exhibit are formed in V-shaped points, with the lines at the apexes of the V's extending radially entirely across the bottom edge of the exhibit, while Figure 2 of the drawing of said patent shows the apexes and ridges of the narrow ribs or prisms stopping short of the bottom edge of the exhibit and terminating in a half pyramid with no radial line extending across the bottom edge of said exhibit. But the points of said narrow ribs in the drawings of said patent in Figure 2 thereof terminate in the side of said exhibit opposite rectangles which occur in the bottom edge of said exhibit opposite each of said narrow ribs or prisms. The rectangles just referred to are entirely absent from said exhibit."

These differences are only discoverable by the closest and most minute inspection, and in our opinion will afford no ground for excluding the exhibits.

"(b) The broad ribs of said exhibit do not reach the shoulder thereof by considerable distance, but disappear and vanish in the bowl of said exhibit without any definition by lines formed by the prolongation of the apexes or ridges of the narrow ribs or prisms such as are shown in Figure 1 of the drawing."

An inspection and comparison of the exhibit with the drawing Figure 1 of the Evans patent does not reveal to us the differences claimed. Altogether we are clearly of opinion the exhibit was properly received in evidence, and that the testimony founded on a comparison of that exhibit with Complainant's Exhibit "Defendant's Construction," the infringing article, was properly received, and should not be suppressed.

The evidence shows that complainant began the manufacture and sale of lamp shades under the Evans patent in the spring of 1909, and that they became immediately popular, so much so that the sales the first year amounted to \$100,000, and that they were much more so in February, 1912, at the time of the taking of the testimony, and that their popularity was not attributable to the fact that they were manufactured of "Alba" glass, because the evidence shows that other lamp shades, seven different designs, manufactured out of "Alba" glass by complainant and offered for sale, some of them for one year and some for three years, were not together 1 per cent. of the sales under the Evans patent. The evidence also shows that in the spring of 1910 the Jefferson Glass Company, one of the defendants, manufactured and put upon the market a similar glass called "Luceo," and which is shown by the evidence to be manufactured by that company through a secret formula and process belonging to the complainant company, and from which it manufactured the "Alba" glass, the use of which formula and the disclosing of which has been prohibited by the courts of Allegheny county in this district; both the Jefferson Glass Company and Harry Schnelbach, who possessed the secret process as an employé of complainant's, and carried and disclosed it to the Jefferson Glass Company and who were using it, being restrained by an injunction of that court. The evidence also shows that the Jefferson Glass Company manufactured, put upon the market, and sold lamp shades made of the "Luceo" glass and called "Luceo," under a patent granted to Harry A. Schnelbach February 6, 1912, applied for September 23, 1911, and numbered 42,151, and that these lamp shades were installed in some places for demonstration and in other different places, stores, and buildings for lighting, and that the defendant, the Rosenbaum Company, entered into a contract for the installation of electric lights with Stinson, Kennedy & Co., and that on September 12, 1911, that company ordered from the Jefferson Glass Company for that contract a large number of their lamp shades, and that on September 14, 1911, the Jefferson Glass Company shipped to Stinson, Kennedy & Co., for the Rosenbaum Company contract, many dozens of their "Luceo" lamp shades of the value of \$362.92, which were received by Stinson, Kennedy & Co. and installed in the store of the Rosenbaum

Company; the lamp shades of complainant being removed as they at that time were installed there. The evidence thus clearly shows the fact of infringement if the lamp shades manufactured and sold by the Jefferson Glass Company, one of the defendants, and bought and used by the Rosenbaum Company, the other defendant, are an infringement of the Evans patent.

[3] The principles upon which we may determine this controversy as to infringement are the same as those we have referred to for the purpose of determining the validity of the patent, except perhaps as to the use of expert testimony and observation of the manufactured article in use. The leading case upon this question and which clearly establishes the principles which must apply in this case is that of *Gorham Co. v. White*, 14 Wall. 526, 20 L. Ed. 731, *supra*, where Mr. Justice Strong says:

"We are now prepared to inquire what is the true test of identity of design. Plainly it must be sameness of appearance; and mere difference of lines in the drawing or sketch, a greater or smaller number of lines, or slight variances in configuration, if sufficient to change the effect upon the eye, will not destroy the substantial identity. An engraving which has many lines may present to the eye the same picture and to the mind the same idea or conception as another with much fewer lines. The design, however, would be the same. So a pattern for a carpet or a print may be made up of wreaths of flowers arranged in a particular manner. Another carpet may have similar wreaths, arranged in a like manner, so that none but very acute observers could detect a difference. Yet in the wreaths upon one there may be fewer flowers, and the wreaths may be placed at wider distances from each other. Surely in such a case the designs are alike. The same conception was in the mind of the designer, and to that conception he gave expression. If, then, identity of appearance, or (as expressed in *McCrea v. Holdsworth*) sameness of effect upon the eye, is the main test of substantial identity of design, the only remaining question on this part of the case is whether it is essential that the appearance should be the same to the eye of an expert. The court below was of opinion that the test of a patent for a design is not the eye of an ordinary observer. The learned judge thought there could be no infringement unless there was 'substantial identity' 'in view of the observation of a person versed in designs in the particular trade in question—of a person engaged in the manufacture or sale of articles containing such designs—of a person accustomed to compare such designs one with another, and who sees and examines the articles containing them side by side.' There must, he thought, be a comparison of the features which make up the two designs. With this we cannot concur. Such a test would destroy all the protection which the act of Congress intended to give. There never could be piracy of a patented design, for human ingenuity has never yet produced a design, in all its details, exactly like another, so like that an expert could not distinguish them. No counterfeit bank note is so identical in appearance with the true that an experienced artist cannot discern a difference. It is said an engraver distinguishes impressions made by the same plate. Experts, therefore, are not the persons to be deceived. Much less than that which would be substantial identity in their eyes would be undistinguishable in the eyes of men generally, of observers of ordinary acuteness, bringing to the examination of the article upon which the design has been placed that degree of observation which men of ordinary intelligence give. It is persons of the latter class who are the principal purchasers of the articles to which designs have given novel appearances, and if they are misled, and induced to purchase what is not the article they supposed it to be, if, for example, they are led to purchase forks or spoons, deceived by an apparent resemblance into the belief that they bear the 'cottage' design, and therefore are the production of the holders of the *Gorham*, *Thunder*, and *Dexter* patent, when in fact they are not, the patentees are injured, and that advantage of a market



which the patent was granted to secure is destroyed. The purpose of the law must be effected, if possible; but plainly it cannot be if, while the general appearance of the design is preserved, minor differences of detail in the manner in which the appearance is produced, observable by experts, but not noticed by ordinary observers, by those who buy and use, are sufficient to relieve an imitating design from condemnation as an infringement. We hold, therefore, that if, in the eye of an ordinary observer giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other."

This case has been followed from that time to the present and repeatedly cited as authority in many cases. *Ripley v. Elson* (C. C.) 49 Fed. 927. In *Hutter v. Broome* (C. C.) 114 Fed. 655, in this circuit, Judge Gray stated the principles as follows:

"A careful inspection, however, of the design patent and of the exhibits of the defendant's stopper, convinces me that these differences, whether between the drawing of the design in the patent and complainant's actual structure or between either of those and defendant's structure, are too minute and unimportant to overcome the charge of infringement. The design of the patent and the alleged imitation must be viewed as wholes, and judged by the impression made upon the eye of an intelligent observer not unaccustomed to observe the same. If to such an eye, for instance, that of a dealer in the articles in question, or one interested commercially in their use, the appearance of the two articles is so similar as that one could readily be mistaken for the other, ground for alleging infringement may be said to exist. And this is so notwithstanding that real, but minute, differences of outline, not affecting the general contour and form as apparent to the ordinary observer, may have been discovered by expert examiners. The testimony of several witnesses, accustomed to handle such goods, establishes such substantial similarity between the design of complainant's stopper as protected by his patent, and that of defendant's stopper, as to justify and support the charge of infringement."

In *Friedberger-Aaron Mfg. Co. v. Chapin* (C. C.) 151 Fed. 264, in this circuit, Judge Holland said:

"There is an identity of appearance or sameness of effect upon the eye, and this resemblance we think is so close that it would readily deceive the ordinary observer or purchaser, and this is sufficient to establish the claim of the complainant that the defendant has infringed the design patented. It is very easy to distinguish between the two designs when brought together, but they are so near alike in appearance that the ordinary observer, giving such attention as a purchaser usually gives, would undoubtedly be deceived by the resemblance of the defendant's design to that of the complainant's. This resemblance is so close as to deceive such an observer and sufficient to induce him or her to purchase one, supposing it to be the other, a result held to be the test of the question of infringement. *Gorham Co. v. White*, 81 U. S. 511, 20 L. Ed. 731."

In *Scofield v. Browne*, 158 Fed. 305, 85 C. C. A. 556, Judge Dallas, speaking for the Circuit Court of Appeals for this circuit, said:

"It is not for us to say that this 'most delicate monster' does not 'please the eye of the beholder,' for the proofs show that it has enhanced the salable value and enlarged the demand for the trinkets it was intended to adorn. Walker on Patents, § 22. And as to infringement there can be no reasonable doubt. The head of the defendants does not materially differ from that of the patent, being distinguishable from it only by the absence of the ray-like members, 'e'; and we cannot suppose that the removal of these appendages was at all likely to be observed by an ordinary purchaser. *Gorham Co. v.*

White, 14 Wall. 511, 20 L. Ed. 731. The two designs are certainly very much alike in general appearance. Each is 'an ornamental head,' and both, if either, may be regarded as that of 'a carnivorous animal,' and each has the mouth open to expose the teeth, and, 'like the toad, ugly and venomous, wears yet a precious jewel in his head.' The only difference worthy of mention, as has been noted, is in what may be called the whisker portion of the face, and it is not possible to believe that the intention of the defendants in creating this difference was to make a design 'so various that the mind of desultory man, studious of change and pleased with novelty, might be indulged.'"

Graff et al. v. Webster (C. C. A.) 195 Fed. 522, decided March 11, 1912, is the last citation of *Gorham Co. v. White* brought to our notice, and there Judge Coxe, sitting in the Circuit Court of Appeals for the Second Circuit, says:

"The defendants do not contend that the prior art renders the patents totally invalid, but they contend that, in view of that art, the designs show only a slight variation of old compositions or arrangements, and the claims must be construed to cover 'the specific elements there employed and their specific arrangement.' In other words, it is their contention that only a Chinese copy will infringe. We cannot agree with this contention. It is true that a number of dishes made of china, silver, and plated ware are produced, together with drawings and engravings of other dishes, each bearing certain features in common with the designs of the patents, but possessing such marked dissimilarities that even an ignorant or nonobservant purchaser could not mistake the one for the other. There is no reason, therefore, for limiting the patented designs to the identical structures shown and described. If the ordinary observer would purchase the defendants' dishes, believing them to be those of the complainant, it is enough. This is the rule laid down in *Gorham Co. v. White*, 14 Wall. 511, at page 528 (20 L. Ed. 731). The court says: 'The purpose of the law must be effected if possible; but plainly it cannot be if, while the general appearance of the design is preserved, minor differences of detail in the manner in which the appearance is produced, observable by experts, but not noticed by ordinary observers, by those who buy and use, are sufficient to relieve an imitating design from condemnation as an infringement. We hold, therefore, that if, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one, supposing it to be the other, the first one patented is infringed by the other.'"

The principles which we deduce from these cases as applicable to the case at bar are distinctly stated by Judge Blatchford in *Jennings v. Kibbe* (C. C.) 10 Fed. 669, 20 Blatchf. 353, thus:

"In *Gorham v. White*, 14 Wall. 511 [20 L. Ed. 731], the Supreme Court considered directly the question of identity in regard to a patent for a design. It held that the true test of identity of design is sameness of appearance, in other words, sameness of effect upon the eye, that it is not necessary that the appearance should be the same to the eye of an expert, and that the test is the eye of an ordinary observer, the eyes of men generally, of observers of ordinary acuteness, bringing to the examination of the article, upon which the design has been placed, that degree of observation which men of ordinary intelligence give."

[4] The true tests of identity are therefore, first, sameness of appearance; second, the eye of an ordinary observer, an observer of ordinary acuteness, bringing to the examination of the article upon which the design has been placed that degree of observation which men of ordinary intelligence give. As much testimony is

based upon a comparison of defendant's infringing shade with complainant's patented shade, while both were illuminated by electric lights within, and, as objection was made to this evidence, we are required to determine whether such comparison is allowable. This was clearly settled, not only in accordance with sound reason, but authoritatively for this circuit in the case of *Phoenix Knitting Works v. Hygienic Fleeced Underwear Co.* (C. C. A.) 194 Fed. 696, where Judge Gray says, on page 699:

"It seems somewhat absurd to claim such configuration as part of an ornamental design which is only visible when the article to which it pertains is not in use. When in use, it is the surface ornamentation alone that appeals to the eye, and the connecting neck band might be supplied in other ways than by a narrowed portion of the material of which the scarf is made. The design must be ornamental when the scarf is on the neck of the wearer, and not be such as to only fulfill its purpose as an ornamental design when it is lying flat upon a table."

The evidence shows that both the infringing shade and the Evans shade were exhibited for sale while lighted, and it is while lighted that the proposed purchaser will observe them. The evidence, therefore, based upon such a comparison was proper. The evidence in this case was given both by experts and by ordinary observers. We have carefully read all the evidence, have examined Complainant's Exhibit "Complainant's Patented Shade," and Complainant's Exhibit "Defendant's Construction," and have compared the one with the other. There are differences which are easily seen when one's attention is called to them. The narrow ribs of complainant's shade are triangular; those of the defendant, rounded. The narrow ribs of the former disappear in the bowl. Those of the latter continue through the bowl to the neck. The panels of the former are only slightly defined by the narrow ribs from the top of the convex curve to the neck; while those of the latter are well defined from the bottom of the shade to the top. The narrow ribs of the former at the lower terminal extend beyond the scallops of the broad panel, and are pointed; while those of the latter at their bottom terminal all round do not extend beyond, but stop short of the scallop of the broad panel. The concave curve of the former at its junction with the convex curve is more acute than in the latter. These are differences which are easily observable when pointed out.

There are some other points in which the two do not resemble each other pointed out by the expert. But it is not by the eye of the expert that we are to determine, but it is in the eye of the ordinary observer we must look for the resemblance. As pointed out above, we observe the points of difference referred to by a comparison of the two exhibits placed before us, and not in use or lighted up. The evidence in the case shows that these points of difference were observed by the nonexpert witnesses, who testified when their attention was called to them, and they were pointed out by the expert witnesses who testified; such experts being persons engaged in the illuminating business. We are well satisfied not only

by the evidence, but by our own examination, comparison, and observation, that the differences would not be observed by an ordinary observer of ordinary acuteness, giving the attention which such a purchaser usually gives, but the resemblance would be such as to deceive such an observer, inducing him to purchase one supposing it to be the other, all this upon either an inspection of the shades separately or upon a comparison of one with the other. But in use and while lighted up for demonstration or installed for the purpose of illumination the resemblance is most striking. The contour then of the two shades appears the same. The reflection from both is alike. The broad panels diffuse the light exactly the same. The narrow ribs cause the narrow dark band between the lighter broad panels, just alike from the bottom to the top of the shades, in complainant's the darker band being carried to the holder by the groove and in the defendant's by the rib. The evidence shows that, not only did the resemblance appear to ordinary observers, but that those engaged in the business, and therefore looking with expert and trained eyes upon the shades, easily mistook one for the other.

From all the evidence we have no difficulty in arriving at the conclusion that, not only would the ordinary observer proposing to purchase and giving that attention to the article he intended to purchase as such a purchaser usually gives see a resemblance such as to deceive him and induce him to purchase one supposing it to be the other, but that persons were deceived and purchased one believing they had purchased the other. Employees of complainant company, engaged in selling complainant's shades, were deceived, supposing those they saw illuminated were the "Alba," when, in fact, they were the "Luceo." Under the evidence, therefore, the patent granted to Evans, No. 41,785, is infringed by the patent granted to Schnellbach, No. 42,151, and the defendants, the Rosenbaum Company, and the Jefferson Glass Company, have infringed the rights secured to complainant under the Evans patent, and said complainant is entitled to an injunction restraining defendants from further violation of complainant's rights and further infringement of said patent, and is entitled to have such further relief as is prayed for in its bill of complaint, including an accounting.

The defendants have insisted that the complainant has not marked shades in accordance with the requirements of the act of Congress (section 4900). As this only affects the question of damages, it might well be passed until an accounting is under consideration; but, as the evidence establishes that the Rosenbaum Company upon October 10, 1911, were notified of the complainant's patent, and a copy of the patent enclosed with such notice, it would seem that damages may be recovered for infringement, if proof is made that the defendants were duly notified of the infringement, and continued after such notice to use the article so patented.

Let a decree be drawn in accordance with this opinion.

## GENERAL ELECTRIC CO. v. ALLIS-CHALMERS CO.

(District Court, D. New Jersey. July 30, 1912.)

## 1. PATENTS (§ 165\*)—LIMITATION—DESCRIPTION OF INVENTION.

Under Rev. St. § 4888 (U. S. Comp. St. 1901, p. 3383), which requires an applicant for a patent to particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery, the claim is the measure of the patentee's monopoly, and he is entitled only to that which he particularly points out and distinctly claims.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. § 165.\*]

## 2. PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—SYSTEM OF ELECTRICAL DISTRIBUTION.

The Steinmetz patent, No. 559,913, for an alternating current system of electrical distribution, claim 2, which relates to a three-wire, three-phase system having a fourth or equalizing wire, construed, and held not infringed.

In Equity. Suit by the General Electric Company against the Allis-Chalmers Company for infringement of letters patent No. 559,913, for an alternating current system of electrical distribution granted to Charles P. Steinmetz May 12, 1896. On final hearing. Decree for defendant.

Kerr, Page, Cooper & Hayward, for complainant.  
Edwards, Sager & Wooster, for defendant.

RELLSTAB, District Judge. The bill is in the usual form for injunction and accounting. It charges the defendant with contributory infringement of the patent in suit by reason of its manufacture and sale to the United States government of apparatus embodying the improvement of said patent, which were installed at Minodoka, Idaho, in what is known as the "Minodoka Project of the United States Reclamation Service."

The defenses are, first, invalidity by reason of lack of novelty; second, noninfringement.

In the specifications Steinmetz describes the object of his invention as follows:

"My invention relates to the distribution of alternating currents, particularly to polyphase distributions. It has its most important application to three-phase systems, but others are not excluded. It has for its object to provide a means of equalizing the voltages upon the several sides of the system, or of 'balancing the lines,' as it is often called.

"It has been proposed to connect transformers wound for three-phase work with the Y system of connection, and to run a neutral wire from the common junction of the coils back to the generator. Where the secondaries are also connected with the Y system, this neutral wire on the primary side is a necessity, because, although a neutral may also be run from the secondary side, this will not equalize the load, but with an unequal distribution of load the three secondary voltages will become unbalanced and greatly unequal. Nothing holds them at an equality, but, on the contrary, they change and adjust themselves so as to be proportioned to the three secondary

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

currents. The neutralizing wire on the primary side running from the generator to the transformer must necessarily be of sufficient cross-section to equalize the load, and still it is normally an idle wire. This is, of course, objectionable, and deprives the three-phase system, when so installed, of one of its characteristic advantages, to wit, economy in copper cost. The generator also must be specially constructed where this is done, inasmuch as an additional sliding contact must be provided for the neutral wire.

"To obviate the difficulties thus pointed out, I have devised my invention, which consists in winding the primaries of the transformers with delta connection and the secondaries with Y connection and using a neutral or equalizing wire on the secondary side of the system only, and I have found that by this arrangement so long as the primary voltages are constant the secondary potentials also are constant, irrespective of the balance of load upon the secondaries. \* \* \*

"I thus not only obtain the advantage in transmission of current at long distance of confining the equalizing wire to the secondary distribution only, but, inasmuch as this may be connected to fixed terminals upon the motors, I avoid the additional sliding contacts already referred to."

It will be observed that, while the patent deals with systems wherein alternating currents of electricity are generated, transmitted, and distributed for use, it involves the distribution of such currents only in what is called the three-phase system. It deals specifically with transformer connections between the generator and the distribution circuit, in combination with the use of a fourth wire in such distribution circuit, in three-phase systems wherein the problem is how the transformer shall be connected in system so as to obtain the best results in the distribution of energy and avoid the troubles due to overloading one or more of the three-phases.

The improvement is purposed to produce a three-phase system which shall permit unequal loads in the distribution circuit having four wires, without the attendant unbalancing of voltages in the system.

Only a brief description of such system and the devices used therein is necessary for present purposes, which is as follows: The transformer consists of an iron core, a coil of wire wound around the core, called the "primary," which receives the electrical energy to be transformed, and a second coil of wire also wound around such core, called the "secondary," which delivers the transformed energy. This transformed energy may be delivered in any desired voltage; the difference in voltage depending upon the relative convolutions of the primary and secondary coils. In the earlier days the generator delivered current directly to the transformer in the immediate neighborhood of the consumption or translating devices, but in case of long distance transmission, as greater economy resulted by transmitting a higher voltage than it is practical to produce by a mechanical generator, transformers called "step up transformers" are introduced near the generator whereby the low voltage currents developed by such generator are converted into currents of high voltage for transmission, which are reconverted into low voltage suitable for the operation of such consumption or translating devices, by other transformers called "step down transformers" located in the vicinity of such devices.

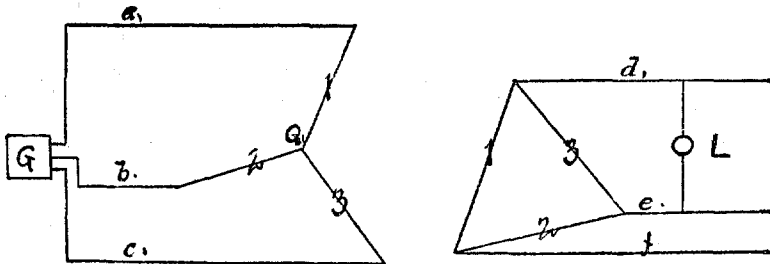
Many alternating current systems involve only a single pair of supply wires, and are known as single-phase systems. Others utilize more than one current, and are known as polyphase systems. The three-phase system uses three transmission wires in which exist three phases of currents. These currents, however, do not attain their maximum value synchronously, but are displaced, or out of phase, so that their maximum values are successively attained. In the three-phase system, the combining of the three wires avoids the necessity of having two separate wires for each circuit, any one being capable of serving as a conductor for the return current in the other two as long as the load carried—current strength—in each circuit is substantially equal.

In combining these wires, two methods of connection are ordinarily used, known as the "delta" and "star" or "Y" windings. In the delta, the coils are connected end to end, forming a closed circuit, a line conductor leading off from the junctions between each two adjacent coils; while in the star, or Y, three ends of the coils are connected to a common point, the opposite or outer ends being connected respectively to the line conductors. The form of the Y connections permitted the use of an additional wire running from the common point referred to. The equalizing of the loads, however, is not always commercially feasible or desirable, and when the demand upon one circuit is greater than upon the others, and an inequality in current strength ensues, the whole system is likely to be upset, unless some special means are used to correct it. This upset is due to the going down of the voltage in the circuit carrying the greater load with a corresponding increase in the voltage in the other circuits, causing a choke effect in that primary or those primaries of the transformer which have the lesser demand for current made upon them, due to the law governing the action of the transformer; for, adopting the summary of Expert Thomas' testimony set forth in complainant's brief—

"the most salient characteristic of the transformer is that current cannot flow in one of its windings unless there is also a flow of current in corresponding quantity in its other winding. Current cannot flow in the primary, for example, unless a corresponding current is flowing in the secondary; nor can current flow in the secondary as for feeding an electric lamp, unless there is also a corresponding flow of current in the primary. Assume, for example, that the secondary circuit is open so that no current flows therein—that is, that no use is being made of the transformer—then no current will flow in the primary except a certain small amount which serves to magnetize the core, because of the existence of a reactive effect known as self-induction which sets up a counter electromotive force or voltage in opposition to that which is impressed upon the circuit through the primary from the generator or other source.

"Suppose, however, that an electric lamp be connected to the secondary circuit, drawing current therefrom. Then a corresponding current must flow through the primary. Thus the primary current withdraws energy from the generator in exact proportion to the energy delivered to the lamp in the secondary. Of course, it will be readily understood that the presence of a current in the primary of a transformer is essential to the existence of a current in the secondary, as the latter results from the inductive action of the former."

Mr. Thomas, in testifying in this behalf, referred to a sketch here reproduced,



Thomas Fig. 1.

concerning which he said:

"In this figure, *G* represents the generator supplying three single-phase currents to the wires *a*, *b*, *c*, connected to the primary coils of a transformer with a Y winding. The secondary coils of the transformer are shown as connected in delta and supplying three single-phase currents to the wires *d*, *e*, *f*. It will be understood that the primary coils 1, 2, 3 are properly associated in intimate inductive relation with the secondary coils designated by corresponding numerals. \* \* \*

"Assuming that the lamp *L* is connected across the circuit *d*, *e*, a corresponding amount of current for operating this lamp should flow through the circuit including it, the wires *d*, *e*, and the secondary coil 3 of the transformer. But this coil cannot supply such current and have its voltage maintained; for the reason that, if current flows in this secondary winding 3, current must also flow in the corresponding primary winding 3. But, while current can pass from the generator *G* through the wire *c* to the primary 3, it cannot return to the generator to complete its circuit, without traversing one or both of the primary windings 1 and 2. But these primary windings 1 and 2 cannot carry current because their corresponding secondaries 1 and 2 are not carrying current, for the reason that under the assumption of the case no lamps or other means of utilizing current are connected to the line wires *d*, *f*, and *e*, *f*, with which said coils are connected. The result is that the voltage of the primary coil 3 is no longer maintained, and that of the secondary coil 3 must correspond with the primary. In short, the current which should reach the primary coil 3 in order to support the flow of current in its secondary winding 3 meets an obstruction in the other primary windings which it must traverse in order to complete its circuit to the generator. It is evident, however, that if an equal number of lamps be placed upon the circuits *d*, *f*, and *e*, *f*, then equal currents will be required in the secondaries 1, 2, and 3, and consequently the primaries 1, 2, and 3, and the blocking effect of the unbalanced condition will be eliminated."

It was this practical requirement of unequal quantities of current in the several distribution circuits that presented the general problem dealt with in the Steinmetz patent; the particular problem being the one that arose when a fourth wire was introduced in the distribution circuits connected to the neutral point of the Y connected secondaries. The system of connection to be improved by the patent in suit as pointed out by it was the one that connected the primaries of the three-phase transformers in Y and ran a neutral wire from the common junction of such connection back to the



generator. The change contemplated by such patent was to wind the primary of the transformer in delta instead of Y, and to run the neutral wire from the common junction of the Y connected secondary, instead of between the Y connected primary transformer and the generator.

Claim 2 alone is involved, which is as follows:

"2. A generator of three-phase currents, lines leading therefrom, a transformer having its primary connected in delta between the lines, a secondary for the transformer having the coils connected in Y, and an equalizing wire extending from the common junction of the secondary coils."

All these elements are admittedly old. The complainant, however, contends that the combination disclosed and claimed and the results obtained are new.

This precise combination is not shown in the cited prior art. This conclusion, however, does not dispose of the question of novelty, as the art prior to the advent of the patent in suit taught that the several elements used by Steinmetz will perform the functions which he utilized in his system. Is the Steinmetz arrangement and combination of these old elements anything more than mere mechanical selection; that is, such adaptation and readjustment as would occur to an ordinarily skilled mechanic having the knowledge taught by this particular art, and seeking to correct the unbalancing likely to take place in using a fourth wire in the distributing circuit of a three-phase system?

Wenstrom's British patent No. 5,423 of the year 1890 shows delta or Y windings of generators, transformers, and motors in a three-phase system; also, that current may be used directly from the generator or stepped up one or more times by transformers before it reaches the place of utilization. It also teaches the use of a fourth conductor or neutral or equalizing wire connected to the neutral points in the generators, transformers, or motors in which the currents are generated or utilized.

In the Lauffen Frankfort system described in the issue of the London Electrician of September 18, 1891, the voltage was stepped up and down by transformers, in both of which the primary and secondary windings were connected in Y. In Dr. Duncan's (defendant's expert) sketch of this system, acquiesced in by complainant's expert, the secondary circuit from the step down transformer shows a fourth or neutral wire running parallel with the three line wires, thus constituting a four-wire Y connected distribution circuit. In this system, however, a fourth or neutral wire is shown running from the common junction of the step up transformer back to the generator, a method of carrying back an unequal loading disclaimed by the patent in suit, and furnishing the very condition sought to be changed by the system pointed out in claim 2.

This disclosure also shows that the neutral points of the Y connections of both windings of both step up and step down transformers and those of the generator and motor are all connected to the earth for reasons of safety. A like secondary circuit is shown by E. Hospitalier in the book "Polyphased Alternating Currents," published as early as 1893, wherein the consumption devices are connected in vari-

ous relations to such four wire distribution. If this, as contended by defendant, is a description of the Lauffen Frankfort system, it falls within said disclaimer, and, if not, it fails as a disclosure, as the exhibit does not trace the current back to the generator.

In the system described in the *Electrotechnische Zeitschrift*, in its issue of May 27, 1892, shown in Dr. Duncan's Fig. 3, reproduced here,

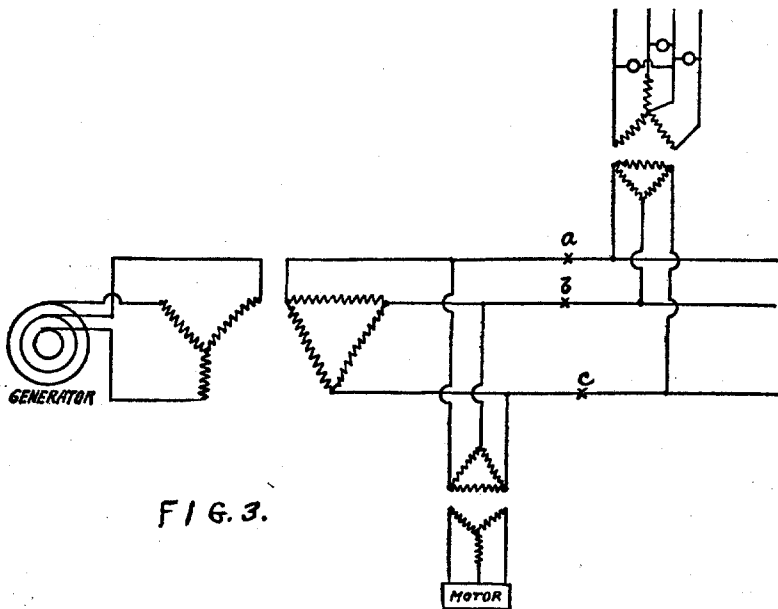


FIG. 3.

while the two step down transformers supplying respectively motor and lamps had their primaries connected in delta and secondaries in Y, with a fourth or neutral wire in the distributing circuit supplying the lamps, extending from the neutral point, between which neutral wire and the other three lines of such circuit the lamps were connected, such neutral being used as the common return conductor, the step up transformer at the generating station had its primaries connected in Y and its secondaries in delta. If this step up transformer were not present, or its delta connections were the equivalent of a generator winding as regards maintaining balanced voltages, a complete anticipation would exist. Its presence cannot be disregarded, however, as regards anticipation, for claim 2 of the patent in suit calls for a generator and lines leading therefrom between which lines the delta primaries of the transformer are connected. This puts complainant's transformer, whose secondaries are connected immediately with the distribution circuit across which the translating or consumption devices are connected, in direct relation with the generator. Nor are such delta connected secondaries of the step up transformer of this *Zeitschrift* disclosure, the equivalent of the generator, as contended by defendant. The function of transformers is not to generate, but to transform energy. They may raise or lower a voltage al-

ready generated, but it is very clear that they cannot of themselves maintain or support any definite voltage, for, adopting Expert Thomas' testimony in this behalf—

"by the law of the transformer, the voltage of a primary winding must always have the same ratio to the voltage of its secondary winding, for example, if this ratio be established as 100, then, if the primary voltage of the transformer is 10,000, the secondary voltage must be 100. If the primary voltage be raised to 20,000, the secondary voltage will become 200. If the primary voltage drops to 5,000, the secondary voltage will then drop to 50. This is true both of the step up and step down transformers. Again, in any transformer the voltage of the primary winding must be the voltage of the circuit to which it is connected and from which it receives its energy. From this it follows that the voltages of the secondary winding of the step up transformers of Duncan's figure 3 depend directly on the voltages of the corresponding primary windings, which, in turn, is the voltage which the winding receives from the circuit. Thus the voltage of the secondary of the step up transformer of Duncan's figure 3 cannot be determined without tracing back the circuits from the primary windings to the generator and finding what voltage is impressed upon these primaries. \* \* \*

"Consider for a moment that only the right-hand lamp of the three shown in the lighting circuit at the upper right-hand portion of the diagram is connected. Current fed thereto by the lower right-hand secondary winding will require current in its corresponding primary winding, which we may take as the lower right-hand primary, which would require current in the wires *b, c*. Now the lower right-hand secondary of the step up transformer at the left cannot supply current to these wires, since its corresponding primary winding, which we may take as the lower winding at the left, must be fed through one or both of the other primary windings. These other primary windings have no currents in their respective secondary windings, and thus cannot transmit the necessary current, leading to the same unbalancing that has been found and fully explained in the other circuits with similar conditions of supply."

That the unbalancing of the distributing circuit shown in Duncan figure 3 was but slight and could affect the voltages but slightly does not change the function or operation of the Y connected primary of this step up transformer. The demand of such unequally loaded circuit upon the supply wires would always tend, more or less, to choke the inducing primaries connected in Y, and prevent the unbalancing from being carried back to the generator. That the unequal loading of the circuit was not always serious enough to produce a serious unbalancing of the voltage does not make such Y delta connected transformer the equivalent of the delta Y connected transformer of the patent in suit; nor is the delta connected secondary of the former transformer, the equivalent of the generator.

Moody patent No. 508,898 issued November 14, 1893, and Rice patents Nos. 508,838 issued November 14, 1893, and 516,836, issued March 20, 1894, show a delta Y connected winding of a step up transformer. These, however, do not show or use a fourth wire.

None of these references, except the Lauffen Frankfort system, discloses any means for carrying an unbalanced load back to the generator or indicate that such a problem or function was considered, and in the excepted citation such carrying back was, as already noted, performed by the method disclaimed by the patent in suit.

At the date of the Steinmetz application, therefore, connecting the coils of either the generator or the transformer, or of either

the primary or secondary of the transformers, whether step up or step down, in either delta or Y, or any or all in both delta or Y, was well known, as was the fact that different results followed from employing delta or Y connections. It was also known that, if the unequal loading of the different circuits of the three-wire system were carried back to the generator, the disturbing effect upon the system would be remedied. Accordingly, when the Y delta connected primary of the transformer was used and the current strength was unequal in the distribution circuits, it was customary to run a neutral wire from the common junction of the Y connected coils of the transformer primary to the common junction of the Y connected coils of the generator. It was also known that the introduction of a fourth wire in the distribution circuit by connecting it to the common junction of a Y connected transformer secondary gave the system greater flexibility, such a four-wire system giving not only an additional return for the current under certain conditions, but two sets of voltages for supplying the translating or consumption devices connected therewith one value between the main lines and another, viz.,  $\frac{58}{100}$  thereof between each of any of such main lines and such fourth wire.

Taking care of an unbalanced load being known in the art, Steinmetz' system, if it be more than merely carrying forward the teachings of the art in that behalf, is, at best, but an improvement, the same elements being used to accomplish the same purpose, but in a different way. Assuming such combination to be invention, it was entitled to only the range of equivalents permitted to secondary invention—a more restricted range than is accorded patents of a primary character. *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122.

The specification of the patent in suit is meager in its description of the apparatus which it claims will overcome the objection to the referred to system and of correcting the injurious effects of carrying an unbalanced load; but, read in the light of the prior art, it is apparent that the alleged invention consists, not in using or placing a fourth wire in the distribution circuit, nor in obtaining two different voltages in such circuit by the use of such wire therein, but in connecting such an arranged distribution circuit directly with the generator through a transformer which has its primary windings connected in delta, by which connection and arrangement an unbalancing of voltages through an unequal loading of such four wire distribution circuit is prevented. I say directly connected to the generator, as it is evident from the patentee's own disclosure of the condition which his arrangement is to improve that he contemplated but one transformer between the generator and the translating or consumption devices. He states at the beginning of his description that his "invention relates to the distribution of alternating current, particularly to polyphase distribution." A distinction is here made between distribution and transmission circuits, which was then recognized in the art. Whether a step up transformer was interposed between the genera-

tor and the distribution circuits was a matter of preference, depending principally upon whether the distributing circuit was far removed from the generator. In either case the lines between the generator and the step down transformer were called "transmission lines," as distinguished from those proceeding from the secondaries of the step down transformers, and with which the translating devices were connected. This distinction conforms to the ordinary understanding of the terms and to the disclosed purpose of the patent, for we note that the patentee further on in his description, in pointing out the plan which prior to his invention had been recognized as a means of overcoming the disturbing effect of unequal loading on the distributing circuit, refers to the system as having a primary side and a secondary side, and in which the transformer is connected directly with the generator by running the neutral wire from the common junction of the Y connected coils.

In the mind of Steinmetz the main objection to this method of correcting the unbalancing is the great copper cost incident to the use of this fourth wire between the generator and transformer.

As step up transformers were usually placed near the generator, this objection of depriving "the three-phase system of one of its characteristic advantages, to wit, economy in copper cost," would have but little force if only the cost of the wire between the generator and the nearby step up transformer were referred to. The saving in the cost of copper here intended was not that which resulted from dispensing with such short wire, but that which resulted from dispensing with the longer one that existed when no step up transformer was interposed, and which ran from the generator to the step down transformer. Again, in his disclosure of the method of overcoming such objection, the patentee states that the "neutral or equalizing wire" is to be used "on the secondary side of the system only," and in summarizing the advantages to be derived from his arrangement he says that they are obtained by "confining the equalizing wire to the secondary distribution only," which can only mean, as far as a saving of copper cost is concerned, that the objectionable longer fourth wire is taken out of the transmission side—i. e., between the generator and the transformer—and a shorter fourth wire placed in the distribution side of the system, where the translating or consumption devices are connected. Furthermore, in the claim in suit but one transformer is made an element. That element on its primary side is directly connected to the three wires leading from the generator; and on its secondary side with the four wire circuit. The only combination claimed in claim 2 has one transformer. This combination, read in the light of the description, plus the state of the art into which it entered, presents a complete operating system, viz., means for transmitting electrical energy of one voltage from the generator directly to a transformer, by which such voltage is lowered and distributed directly to the translating or consumption devices. To hold otherwise would not only be contrary to the terms of the claim but to the disclosures of the patent, and would make the

device incomplete. If an intermediary transformer was to be included, it should have been claimed.

[1] The patent law not only requires a full and clear description of the manner of making and using an invention, but also that the part improved or combination should be particularly pointed out and distinctly claimed. R. S. § 4888 [U. S. Comp. St. 1901, p. 3383]. The claim is the measure of the patentee's monopoly. He is not entitled to all that he invented, but only to that which he particularly points out and distinctly claims. *Greene v. Buckley*, 135 Fed. 520, 68 C. C. A. 70; *Harder v. United States*, 160 Fed. 463, 87 C. C. A. 447.

It is to be read in the light of his disclosure in the specification and tested and construed by the state of the art. *Johnson v. Johnson* (C. C.) 190 Fed. 20-22.

With the art before him disclosing, *inter alia*, a step up transformer, Steinmetz chose to confine his claim to a system excluding such character of transformer and to a particular winding in a step down transformer intermediate to the generator and the utilization circuit containing the fourth or neutral wire. But if this limitation to a single transformer should be disregarded, and such restrictive language be held to embrace a step up transformer on the theory that the art taught the use of such transmission of energy to the distribution or utilization circuit, and that the claim should be construed as having implied reference thereto, the necessary result would still be to confine the fourth wire to the circuit where the energy is to be utilized, for the introduction of such step up transformer simply extends the circuit of transmission, and does not impress upon the lines carrying the higher voltage the character of a distribution circuit. The invention relates to the utilization as distinguished from transmission of currents and the particular connection of the transformer windings which was to combine with the four wire distribution circuit was limited to that transformer which stepped down the impractical high voltage—made high for transmission only—to a voltage capable of immediate utilization.

[2] To include under this claim a step up transformer between the generator and the distribution circuit would be merely to extend the transmission lines, and would in no way permit a placing of the fourth wire in such transmission circuit; so that whether the claim be construed strictly and limited to one transformer to be directly connected with both generator and utilization circuit, as I think it must, or broadly permitting the interposition of a step up transformer between the generator and the step down transformer supplying the current for immediate utilization, before an infringement can be declared, the complained of system, in addition to the use of such a connected transformer, must also use a fourth wire in its distribution or utilization circuit, or so combine its fourth wire with a like connected transformer as to amount to an equivalent.

Turning now to the complained of system (hereinafter called the defendant's system). This comprises a three-phase generator, from which proceeds three wires running to a step up transformer; both

generator and transformer being installed at the power station. This transformer has its primary connected in delta, and its secondary coils in Y. From the free ends of these secondaries run the line wires for a distance of 15 to 20 miles to the center of distribution, where step down transformers are located, of which the primary coils are connected in Y and the secondary coils in delta. From these secondaries proceed three distributing wires supplying current for various purposes. The neutral point of the Y connected coils at both the step up and step down transformers is connected to the earth by a wire, the former at the generating or power station, the latter at the distribution stations.

The similarities in this system and that of the patent in suit are, first, the delta Y connections of the transformer windings, the primaries of which are connected with the generator—a physical similarity; and, second, the ability of carrying an unbalanced load from the distribution circuit back to the generator—a functional similarity. The dissimilarities are, first, the introduction of a step up transformer between the generator and the step down transformers, a long distance high tension system of three wires running between the step up and step down transformers, the use of three instead of four wires on the secondary side of the step down transformer, and the connecting of each of the neutral points of the Y windings of both transformers with separate wires running to ground—physical dissimilarities; second, inability to obtain different voltages in utilizing the current on the secondary side of the step down transformers and safeguarding the entire system by the grounding wires—functional dissimilarities.

Does this system infringe that of the patent in suit? Are the dissimilarities in means and operation substantial, or are they but the equivalents of complainant's?

Steinmetz' system contemplates the four-wire distribution circuit. Its special advantages in giving a set of two voltages has already been referred to. This introduction of the fourth wire, however, according to the testimony of complainant's expert Beam, called to explain the disclosure of the patent in suit (X-Qs 23, 73, 74 and 75), had a tendency to bring about an injurious unbalancing which, however, was corrected by the delta Y windings of the transformer. X-Q. 75 and his answer thereto summarizes his testimony in this behalf, and is as follows:

"X-Q. 75. Do you mean that when motors, lights, transformers, etc., are connected in the distributing circuit of the patent in suit in any arrangement whatever with the conductors *g*, *h*, *i*—that is, some with two of said conductors in different orders, and some with three—that the unbalancing of voltages is prevented? A. I could not assent to that as a general proposition, especially if the fourth wire were present in the system. If the fourth or neutral wire were entirely eliminated, the unbalancing of voltages contemplated by Steinmetz would not be present. As long as the fourth or neutral wire is present, somebody is liable to use it as a conductor, with tendency to produce unbalancing in the system."

In the defendant's system there is no fourth wire in the load carrying circuits; and therefore no provision is required to correct

any injurious effects resulting from the presence of such a wire. Complainant's expert Thomas admits that in the three-wire three-phase system known to the prior art the voltages on the line remained balanced, though the load on the secondary coil was unequal, as appears from the following question and answer:

"X-Q. 28. Now, as I understand you, the art, prior to February 5, 1896, as evidenced by the Moody patent 508,898, Rice patent 508,838, and patent 516,836, and other publications, understood well and knew how to construct and operate a generator of three-phase currents, lines leading therefrom, a transformer having its primary connected in delta between the lines and having its secondary coils connected in Y and arranged to supply low tension voltages by means of three secondary lines for feeding lamps, motors, and the like; and, further, the art understood that in such an arrangement the voltages on the line remained balanced, even though the load on the secondary coils was unequal. Is this correct? A. This is correct, if the question refers to the system shown in the Moody patent altered by the use of a lower voltage in the lines connected to the secondary windings of the transformer *T*, such as may make the supply of lamps and such translating devices practicable."

Assuming, however, as seems to be contended by such expert notwithstanding such admission, that an injurious effect upon the voltages may be had from the unbalancing of the loads on the three wire load carrying currents, and as the connections of the windings of the transformer in combination with the groundings of the neutral points of such connections and the conductivity of the earth in the system complained of, are undoubtedly means of carrying an unbalanced load back to the generator without disturbing the voltage of such system, the question of equivalency arises. The delta Y connected step up transformers and the Y delta connected step down transformers used in such system are shown in the cited Moody and Rice patents, and the grounded connection from the neutral points of such Y connection are shown in the Lauffen Frankfort transmission system. Defendant had a right to use, not only the specific means shown in these systems, but all they taught, and, if the specific combination produced in the complained of system is within the teaching of such references, it is not an infringement. If, however, such system, is not within the teaching of such references, but is new and within the patent in suit, it constitutes infringement.

Assuming that the defendant's system contemplates an unbalancing of the load carried in the distribution circuit, and that the grounding of the wires in such system, in addition to providing safety for the entire system, also operates as a return for the unbalanced load back to the generator and prevented any disturbance of the voltage, how can it be said that this shows such an identity of function and means of performing it with those of the Steinmetz method as to amount to equivalency? The utilization of two sets of voltages is not the object in defendant's system. The correction of any unbalancing due to the use of four wires in any part of its system, or by the presence of a fourth wire in the load carrying circuit, is not sought or accomplished. Avoiding the choke in the windings having the lesser demand made upon them by the loads carried is effected not by connecting neutral points of the Y windings by a neutral wire running from point to



point, and through which the current finds a return outlet, but by using for such purpose the earth in connection with such grounded wires, a well-known means for returning the current. Complainant's contention that the grounding of the neutral points of the high tension lines at the generating and consumption points 15 to 20 miles apart is the equivalent of the Steinmetz equalizing wire in his distribution circuit has no substantial basis.

There is no proof in the record that the defendant's system is intended to carry, or does carry, such unequal loading as might tend to produce any unbalanced voltages. As grounding for safety was admittedly well known before the patent in suit, and as the grounding in the defendant's system is in the long high tension transmission circuit, and serves as a safety device against a breakdown in the system, it will be presumed that such means are for such purpose, until the facts show otherwise. The mere possibility that such grounding can and would under certain conditions of unequal loading also serve to maintain a proper balance of the voltages, or the further possibility of a fourth wire connecting translating devices between one of the main line wires of the high tension transmission circuit and the ground, will not make such grounding the equivalent of the complainant's fourth wire, either as an equalizing wire or the producer of two sets of voltages.

The attempted forcing into the defendant's system of unpurposed and unused functions is no more permissible to constitute infringement than to read undisclosed functions into the teachings of the Moody and Rice patents and the Lauffen and Frankfort system, and Zeitschrift publication, to show lack of novelty in the Steinmetz system. Giving the physical and functional differences between the Steinmetz and defendant's systems their normal purposes, the defendant's system comes within the teaching of the prior art, not that which is novel in the Steinmetz disclosure, and is therefore no infringement. Furthermore, the method of reasoning employed to declare infringement, viz., that the four wire circuit of the defendant's system—between the step up and step down transformers—corresponds to the four-wire circuit of Steinmetz, which is in the distributing circuit leading from the secondaries of the step down transformer, and that the unequal currents or loading on the three-wire distribution circuit of defendant's system is applied from the translating devices connected therein through the step down transformers to such four-wire system, and thence through to the generator by means identical in their mode of operation to those of the patent in suit, if applied to the system shown in the Lauffen and Frankfort transmission system, would make the four-wire circuit between the generator and the step up transformer and the connections intermediary to the four-wire distribution circuit of this system an anticipation of complainant's combination; for, by the Lauffen and Frankfort combination, the unequal currents or loading of the four-wire distribution circuit, corresponding to the like circuit of Steinmetz, is applied from the translating devices connected therewith through the step down and step up transformers and their connection back to

the generator, and, under the "that which infringes if later will anticipate if earlier" rule, would invalidate the claim in suit as lacking patentable novelty.

Each of these several systems, however, are distinct combinations. If that of the defendant is not anticipated by that of Lauffen and Frankfort, it certainly is not by Steinmetz, as the latter's range of equivalents is more restricted than that of Lauffen and Frankfort; he being at most but an improver.

The cited art does not appear to have engaged the attention of the examiner in the Patent Office on the consideration of the Steinmetz application for the patent in suit; the file wrapper containing no reference thereto. The effect of this is to considerably weaken the presumption of patentable novelty that attends the grant of a patent. *Westinghouse Elect. & Mfg. Co. v. Toledo, P. C. & L. Ry. Co.*, 172 Fed. 371, 97 C. C. A. 69. That the Steinmetz method of "equalizing the voltages upon the several sides of the system" is such an advance on the art as amounts to invention is not free from doubt, but, as I have reached the conclusion that the defendant's system does not infringe the combination of the claim in suit, I find it unnecessary to pass upon the validity of such claim.

The bill is dismissed on the ground of noninfringement.

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#### GAMEWELL FIRE ALARM TELEGRAPH CO. v. HACKENSACK IMPROVEMENT COMMISSION.

(District Court, D. New Jersey. May 20, 1912.)

#### 1. PATENTS (§ 314\*)—INFRINGEMENT—PRELIMINARY INJUNCTION—ISSUE.

Where a patent has been held valid in prior litigation, and defendant, in a suit for infringement, relies on a prior use to invalidate the patent, and in doing so pleads a defense which was not presented in the cases wherein the patent was sustained, the only matter which can be considered on an application for a preliminary injunction is the question of infringement and whether the evidence of prior use is such that, had it been before the court in the case in which the patent was sustained, the court would probably have reached a different conclusion.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 550-553; Dec. Dig. § 314.\*]

#### 2. PATENTS (§ 312\*)—INFRINGEMENT—PRELIMINARY INJUNCTION—BURDEN OF PROOF.

Where, in a suit for infringement of a patent, sustained in prior litigation, defendant pleaded prior use not previously presented, the burden was on defendant to show that the prior use was such as, if previously presented, would probably have caused a different decision; every reasonable doubt being resolved against it.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 543-549; Dec. Dig. § 312.\*]

In Equity. Suit by the Gamewell Fire Alarm Telegraph Company against the Hackensack Improvement Commission for patent infringement. On motion for preliminary injunction. Granted.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

Edmonds & Edmonds, for the motion.  
Charles K. Offield and Albert H. Graves, opposed.

CROSS, District Judge. The application for a preliminary injunction in the above-entitled cause is founded upon a bill of complaint which alleges that the defendant is about to install and use, in connection with its fire alarm system, certain fire alarm or signal boxes which infringe complainant's patent to one Ruddick, No. 553,873, recently sustained by this court after an arduous and protracted contest in a cause between the complainant herein and the mayor and common council of the city of Bayonne. 194 Fed. 147. That action was admittedly defended, as is also the present one, by the Star Electric Company, the manufacturer of the alleged infringing boxes. The complainant's patent will expire within a few months. The rule to show cause why a preliminary injunction should not issue, pursuant to the prayer of the bill, was supported by a number of ex parte affidavits, to which opportunity was afforded the defendant to reply. No direct reply thereto was made, but it was agreed by counsel, at the argument of the rule to show cause, that certain affidavits and exhibits used by the defendant in the case above mentioned, wherein the complainant's patent was sustained, on an application by it for a rehearing, might be considered on this application as fully as if the same were made and entitled herein.

[1, 2] The defendant relies upon a prior use to invalidate the patent in suit, and in doing so sets up a defense which was not presented in the case wherein the patent in suit was sustained. The rule applicable to this case in its present situation is that the only matters which can be considered are the question of infringement and whether the evidence of prior use is of such a conclusive character that, had it been before the court in the case in which the patent was sustained, the court would probably have reached a different conclusion. The burden of proof in this respect is upon the defendant, and every reasonable doubt must be resolved against it. *Elite Pottery Co. v. Dececo Co.*, 150 Fed. 581, 80 C. C. A. 567. The rule just referred to is fully stated and confirmed by numerous authorities in *Edison Electric Light Co. v. Beacon Vacuum Pump & Electrical Co.* (C. C.) 54 Fed. 678, wherein Judge Colt says:

"The general rule is that where the validity of a patent has been sustained by prior adjudication, and especially after a long, arduous, and expensive litigation, the only question open on motion for a preliminary injunction in a subsequent suit against another defendant is the question of infringement; the consideration of other defenses being postponed until final hearing. *Brush Electric Co. v. Accumulator Co.* [C. C.] 50 Fed. 833; *Robertson v. Hill*, 6 Fish. Pat. Cas. 465 [Fed. Cas. No. 11,925]; *Cary v. Domestic Co.* [C. C.] 27 Fed. 299; *Coburn v. Clark* [C. C.] 15 Fed. 804; *Mal-lory Manufacturing Co. v. Hickok* [C. C.] 20 Fed. 116; *Green v. French*, 4 Ban. & A. 169; *Blanchard v. Reeves*, 1 Fish. Pat. Cas. 103 [Fed. Cas. No. 1,515]; *Goodyear v. Rust*, 6 Blatchf. 229 [Fed. Cas. No. 5,584]; *Cary v. Manufacturing Co.* [C. C.] 24 Fed. 141; *Sargent Manufacturing Co. v. Wood-ruff*, 5 Biss. 444 [Fed. Cas. No. 12,368]; *Kirby Bung Manufacturing Co. v. White* [C. C.] 1 McCrary, 155, 1 Fed. 604; *Putnam v. Bottle Stopper Co.* [C. C.] 38 Fed. 234; *Consolidated Bunging Apparatus Co. v. Peter Schoen-hofen Brewing Co.* [C. C.] 28 Fed. 428; *Newall v. Wilson*, 2 De Gex, M. &

G. 282; *Davenport v. Jepson*, 4 De Gex, F. & J. 440; *Bovill v. Doodier*, 35 Beav. 427.

"The only exception to this general rule seems to be where the new evidence is of such a conclusive character that, if it had been introduced in the former case, it probably would have led to a different conclusion. The burden is on the defendant to establish this, and every reasonable doubt must be resolved against him. *Ladd v. Cameron* [C. C.] 25 Fed. 37; *Cantrell v. Wallick*, 117 U. S. 689, 6 Sup. Ct. 970 [29 L. Ed. 1017]; *Winans v. Eaton*, 1 Fish. Pat. Cas. 181 [Fed. Cas. No. 17,861]; *Machine Co. v. Adams*, 3 Ban. & A. 96; *Spring Co. v. Hall* [C. C.] 37 Fed. 691; *Lockwood v. Faber* [C. C.] 27 Fed. 63; *Glaenzer v. Wiederer* [C. C.] 33 Fed. 583; *Cary v. Spring Bed Co.* [C. C.] 26 Fed. 38."

The above rule was followed by the Circuit Court of Appeals of this circuit in *Philadelphia Trust Safe Deposit & Insurance Co. v. Edison Electric Light Co.*, 65 Fed. 551, 13 C. C. A. 40. See, also, *Tannage Patent Co. v. Adams* (C. C.) 77 Fed. 191, and *Woodard v. Ellword* (C. C.) 68 Fed. 717. No question has been made herein that the boxes which the defendant proposes to install infringe the patent in suit. The only matter, therefore, requiring careful consideration, and such it has received, is whether the alleged prior use has been sufficiently shown by clear and convincing evidence to make it probable that, had it been introduced into the original case, it would have changed its decision.

Defendant's affidavits may fairly be said to raise a doubt, but that alone is insufficient. *Cohen v. Stephenson & Co.*, 142 Fed. 467, 73 C. C. A. 583. I am satisfied that they do not meet and satisfy the requirements of the rule. I am unable to say that, had the facts disclosed by the defendant's affidavits been introduced in the original case, they would probably have led to a decree invalidating the patent. Reasonable doubt exists as to whether the use referred to was two years prior to Ruddick's filing his application for the patent in suit, and as to whether the box offered in evidence was identically like those which, it is alleged by the defendant, constituted the prior use, and as to whether, if it was, it covered all of the claims now in issue. There is also doubt as to whether the alleged prior use was not experimental. There is some evidence that it was. In the above and other respects, the affidavits are not so conclusive as reasonably to satisfy me that the alleged defense will be maintained at final hearing. It is sufficient to say, and that without prejudging the merits of the defense, that it must be further developed, and the doubts now apparent therein resolved, before it can properly be made the basis of judicial action. It must stand over until final hearing.

As the defendant is a municipal corporation, I shall require the complainant to give a bond of indemnity to it, in the usual form in such cases, in the penal sum of \$1,500, whereupon a preliminary injunction will issue, pursuant to the prayer of the bill of complaint.

## GAMEWELL FIRE ALARM TELEGRAPH CO. v. STAR ELECTRIC CO.

(District Court, N. D. New York. September 25, 1912.)

## 1. PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—FIRE ALARM APPARATUS.

A preliminary injunction against infringement of the Ruddick patent No. 553,873, for a noninterfering signal apparatus, denied, where the validity and scope of the patent and infringement were all in issue, the patent would expire in six months, and the defendant was financially responsible.

## 2. PATENTS (§ 303\*)—SUITS FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

In an infringement suit, the complainant's case should be reasonably free from doubt on every question necessary for him to establish in order to obtain the relief demanded, to entitle him to a preliminary injunction, and should be established other than by *ex parte* affidavits, where their essential allegations are controverted by others of the same character and substantially equal credibility.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 496-498; Dec. Dig. § 303.\*]

In Equity. Suit by the Gamewell Fire Alarm Telegraph Company against the Star Electric Company. On motion for preliminary injunction. Denied.

See, also, 199 Fed. 188.

Edmonds & Edmonds, of New York City (Samuel Owen Edmonds and Dean S. Edmonds, both of New York City, on the brief), for complainant.

Hinman, Howard & Kattell, of Binghamton, N. Y., and Offield, Towle, Graves & Offield, of Chicago, Ill., for defendant.

RAY, District Judge. The complainant in its bill of complaint alleges infringements by the defendant of two patents owned by the complainant for noninterference fire alarm signal boxes, viz., patent No. 553,873, dated February 4, 1896, applied for June 28, 1890, for "noninterfering signal apparatus," issued upon the application of John J. Ruddick, and known as the "Ruddick" or "later Ruddick" patent, and patent No. 553,839, issued upon the application of Frederick W. Cole. The bill of complaint charges, as do the moving papers, that the defendant has made two types of infringing boxes. The defendant's reply papers assert that the defendant has made but one of these two types of boxes. For the purposes of this motion, therefore, the complainant accepts this assertion, and presses the motion for a preliminary injunction with respect to the type of box which the defendant admits it has made and sold. As this type of box is claimed to infringe the Ruddick patent, No. 553,873, only, the complainant now bases its motion upon the validity and alleged infringement of said Ruddick patent only. This Ruddick patent, as well as the Cole patent referred to, were adjudged valid in a suit between the Gamewell Fire Alarm Telegraph Company, the present complainant, and Mayor and Council of City of Bayonne, N. J., defendants, January 25, 1912 (see 194 Fed. 147), and both patents were held infringed. It is not denied that the then existing Star Electric Company, of Binghamton, N. Y.,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

assumed, took part in, and managed the defense of that action; but it is denied, and I think the papers show, that the present Star Electric Company, of Binghamton, N. Y., the defendant here, had no part in the defense of that action, and therefore is in no way bound by the decree in that action.

In another action for infringement of the said Ruddick patent, brought by the same complainant against the Hackensack Improvement Commission (199 Fed. 182), Judge Cross again held the patents valid and infringed, and it is contended on the part of the complainant here that the present defendant assumed the defense in that case, and admitted infringement of the Ruddick patent by making and selling the fire alarm signal box now complained of. The defendant here, the present Star Electric Company, absolutely denies this, and by an amended answer has put this question squarely in issue, as well as the validity of the said Ruddick patent, if construed so broadly as to cover the structure complained of and also denies infringement. The validity of the said Ruddick patent is in issue, as well as the question of infringement, and after carefully considering affidavits presented on both sides I cannot hold that this defendant has ever admitted the validity of the Ruddick patent or infringement, or that there has been any adjudication whatever against this defendant in favor of this complainant to the effect that the Ruddick patent is valid, or that the structure complained of is an infringement thereof, if valid.

[1] The complainant's printed brief on this motion contains 122 printed pages. The defendant's brief filed on this motion after two days' argument contains at least 300 typewritten pages, equivalent to more than that number of printed pages. The affidavits and other papers filed and used on the motion are correspondingly lengthy, and I am not prepared to say that either the moving or answering papers or briefs of counsel contain extraneous matter. There is absolute conflict between the complainant and the defendant both on the questions of the validity of the Ruddick patent in suit and the proper construction thereof and the question of infringement. I am not inclined to decide these questions at issue between the parties on conflicting affidavits. The present defendant, Star Electric Company, is the successor of a former corporation of that name; but its stockholders and officers are wholly different, or substantially so, and it may not be bound by either of the decrees in the former litigations referred to. It is contended, however, by the complainant, that this court should accept and follow the decision of the District Court in the District of New Jersey on both questions, even assuming that the present defendant was not a party or privy in those cases.

In this case the defendant corporation was organized in July, 1910, to purchase, and did purchase, the assets of the old corporation, Star Electric Company, which became a bankrupt, and has been in business ever since. There is no claim or pretense that it is insolvent, or that it is or will be unable to respond to any judgment or decree for damages, or profits, or both, that complainant may secure against it. The Ruddick patent will expire in February, 1913. An injunction is not of paramount importance to the com-

plainant. If granted, it would result in shutting down and closing the defendant's business; and, if it should turn out that the complainant is not entitled thereto, vast and irreparable damage would be done the defendant, while, on the other hand, if refused at this time, and complainant succeeds in the action, it will be fully compensated in damages. The defendant can be compelled to keep an account of all boxes made, and of all made and sold, so that damages and profits will be of easy ascertainment. I entertain the highest respect for Judge Cross and the soundness of his judgment; but the defendant contends that it has presented new facts and new evidence, not presented to or considered by that learned judge in the cases referred to, and also contends that really the question whether the type of box now in controversy infringes was never considered by him. I think this is true, as the complainant avers that in the Hackensack Case the infringement was conceded by this defendant, while this defendant denies that allegation.

Conceding the patent to be valid, we still have the question of its proper construction, and whether or not it covers the device now made and sold by the defendant, and here there is great doubt in any event. In *Scott v. Lazell* (C. C.) 169 Fed. 661, it was held that a preliminary injunction to restrain alleged infringement of a patent should not be granted, when the question of infringement is in serious doubt. And in *Wright Co. v. Herring-Curtiss Co.*, 180 Fed. 110, 103 C. C. A. 31, reversing the order of the Circuit Court, 177 Fed. 257, it was held that a preliminary injunction against an alleged infringer of an unadjudicated patent should not be granted, when the question of infringement is concededly one of fact as to the operation of defendant's device, and the showing is entirely by *ex parte* affidavits, which are conflicting. Here there has been an adjudication as to the validity of the patent in suit in two cases, but both by the same judge, and one of these cases is now pending and undetermined on appeal to the Circuit Court of Appeals. There was no real question presented to the court in either of those cases for its determination whether the device now in question constitutes an infringement.

[2] My opinion is that preliminary injunctions should not be granted, when the validity of the patent is conceded, but there is serious doubt as to the existence of the infringement alleged. A party is not entitled to an injunction for the reason he has a valid patent, but for the reasons he has a valid patent and that the defendant plainly infringes his rights thereunder and protected thereby. When there is serious doubt of the existence of both these facts, or either, a preliminary injunction should not be granted. In short, the complainant's case should be reasonably free from doubt on every question necessary for him to establish, in order to obtain the relief demanded, and the case should be established other than by *ex parte* affidavits, where their essential allegations are controverted by others of the same character and of substantially equal credibility. In *Wright Co. v. Herring-Curtiss Co. et al.* (C. C. A. 2d Circuit, Lacombe, Coxe, and Noyes, JJ.)

180 Fed. 110, 103 C. C. A. 31, the court, in reversing the order for a preliminary injunction, said:

"In this record, upon the question of fact above stated, there is a sharp conflict of evidence; numerous affiants testifying. All their statements are ex parte affidavits, made without an opportunity to test their probative force by cross-examination. Under such circumstances, it seems to us, irrespective of any of the other questions in the case, that infringement was not so clearly established as to justify a preliminary injunction. See decisions of this court in *Westinghouse v. Montgomery*, 139 Fed. 868, 71 C. C. A. 582; *Hall Signal Co. v. General Railway Co.*, 153 Fed. 907, 82 C. C. A. 653. The order is reversed, with costs."

The motion is denied, on condition defendant keeps an accurate account of all signal boxes made, and of all sold, with name of purchaser, and date when sold, and price for which sold.

So ordered.

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GAMEWELL FIRE ALARM TELEGRAPH CO. v. STAR ELECTRIC CO.

(District Court, N. D. New York. September 25, 1912.)

INJUNCTION (§ 26\*)—SUITS FOR INFRINGEMENT—INJUNCTION TO RESTRAIN PROSECUTION.

In view of the right given by statute to the owner of a patent to bring suit against every user of an alleged infringing device, a court should not interfere by injunction with the exercise of that right.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 24-49, 54-61; Dec. Dig. § 26.\*]

In Equity. Suit by the Gamewell Fire Alarm Telegraph Company against the Star Electric Company. On motion by defendant for injunction. Denied.

See, also, 199 Fed. 185.

Edmonds & Edmonds, Samuel Owen Edmonds, and Dean S. Edmonds, all of New York City, for complainant.

Hinman, Howard & Kattell, of Binghamton, N. Y., and Offield, Towle, Graves & Offield, of Chicago, Ill., for defendant.

RAY, District Judge. The defendant, Star Electric Company, is making and selling a fire alarm signal box alleged by the complainant above named to be an infringement of United States letters patent No. 553,873, dated February 4, 1896, and which will expire February 4, 1913. The present Star Electric Company was organized in July, 1910, and purchased the assets, etc., of a corporation of the same name, which became bankrupt shortly before. That company made and put upon the market a fire alarm signal box which was held to be an infringement. The defendant does not make that type of box. In another suit by the above-named complainant against the Hackensack Improvement Commission (199 Fed. 182) the patent was held valid, and an order for an injunction granted, which is now pending on appeal.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



It is claimed that the apparatus sought to be enjoined in that suit is the same as the one involved in the present suit. The papers show that another suit has been brought by the complainant against the city of Pittsburgh, a user of the signal box now made by the defendant here. The only suit against the present Star Electric Company, which is the maker and seller of the alleged infringing device, is the one now pending, and which has not been brought to a final hearing. In this pending suit the plaintiff moved for a preliminary injunction which motion has just been denied; but the defendant is required to keep an account of signal boxes made and sold, with names of purchasers and dates of sale. There is doubt as to the validity of the patent, and doubt whether it covers the structure made by the defendant. The defendant contends that other suits are threatened against users of the device made by the defendant, and that the defendant company will be compelled to spend large sums of money and be to great trouble in defending these suits. The defendant also contends that the determination of the present suit against the Star Electric Company will dispose of the whole matter, and that the prosecution of suits against users of the alleged infringing device ought to be enjoined. Much may be said in favor of this contention; but I am of the opinion, on the whole, that it would be unwise to interfere with the complainant in bringing suits, and that it is safe to leave the question of temporary injunctions with the various judges who will hear applications therefor, if any are made.

So long as the statute gives the right to the complainant to bring suit against every user of the alleged infringing device, it is probably unwise for the court to interfere by injunction with the assertion of that right. Whether preliminary injunctions shall be granted or not must be determined by the judge who hears the application on the papers presented, and I doubt not that, in the condition of the present litigations between the parties, these judges will exercise their discretion wisely, and so as to promote justice so far as possible.

Motion denied.

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#### BROWNING HOOK & EYE CO. v. TRI-EYE HOOK & EYE CO.

(District Court, S. D. New York. September 20, 1912.)

#### PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—HOOK.

The Browning patent, No. 678,093, for a hook to be used with an eye for fastening garments, *held* not anticipated, valid, and infringed on motion for a preliminary injunction.

In Equity. Suit by the Browning Hook & Eye Company against the Tri-Eye Hook & Eye Company. On motion for preliminary injunction. Motion granted.

Frank S. Busser, for complainant.

Redding & Greeley, for defendant.

LACOMBE, Circuit Judge. The patent in suit is No. 678,093 to Tillie J. Browning for a "hook" of the sort that is used in connec-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion with an eye to fasten garments. It has never been adjudicated, but is an old patent, issued July 9, 1901, and apparently has not been infringed until the comparatively recent appearance of defendant's hooks and eyes. The description is very full, the various objects of invention are clearly pointed out, and the objectionable features of earlier hooks are indicated. Hooks of this sort generally are formed of a continuous piece of wire bent to form two attaching eyes at the rear end of the shank, an upward curve, and a rearwardly projecting bill over which the eye slips and usually a tongue lying between the two wires forming the shank with an upward hump to keep the eye in place. The distinguishing feature of Browning's structure is a transverse loop, formed by additional convolutions of the wire, located at the formed end of the hook or immediately forward, or back of it and extending across from one to the other shank wire. Defendant contends that the patent must be restricted to a transverse loop located in the horizontal plane of the bill. This cannot be done. The patentee evidently considered that such location was preferable, but she did not confine herself to it. On page 3, line 10, referring to a modification shown in the drawings she says:

"The hook is also provided with a loop *S*; but, unlike in the preferred form, the loop is on a level with the shank."

The prior art shows hooks arranged to be stitched to the garment at the forward end, in addition to the main fastening at the rear eyes, but not in the way indicated by Browning. In Bates and Collins (489,520), Shearer (552,783), Malyon (562,314), and Macey (Design 30,464) additional attaching eyes similar to those at the rear are provided in front, extending laterally beyond the shank and unsightly in appearance. In Smith (501,303) there is an attaching eye or loop located between the shank wires, but it is not at the forward end of the shank, being located halfway back from the forward end of the bill and in a position where it cannot be sewed to the garment without stitching through both plies of the goods. In Killinger (485,389) there is an attaching eye at the forward end of the tongue. Of this device the patentee testifies:

"This loop (attaching eye) has no direct connection with the shank member, and is entirely unsupported except by the hump member (tongue). \* \* \* The upward strain of the engaging eye would draw up the shank and bill relatively to the hump member and depress the latter relatively below the level of the shank, in which position the hump member would be functionless. Worse than that, the shank and bill would be drawn up at a considerable angle to the garment to which the hook is sewed and would thus produce a wide and unsightly gap between the two garment sections."

Examination of the Killinger patent indicates that this criticism is well-founded.

The device of the patent involves a small improvement, but it seems to be useful, and, so far as is shown, is not anticipated. Infringement is manifest, since, as is indicated above, the patent is not confined to a transverse loop at the level of the bill. It is un-

necessary to refer to any of the patents cited on the argument which were applied for subsequent to Browning's.

Infringement is charged of several claims. As I construe the patent, the first claim covers defendant's device, and it would seem unnecessary on the hearing of a preliminary injunction to go further into the case. It may be however, that the Court of Appeals will reach a different conclusion as to this claim, although they might be satisfied that some other claim or claims are infringed. But appeal would not bring those other claims before them for construction. Therefore, in order that the whole case may go up, infringement is found as to all the claims on which complainant relies. The device is so simple and the record here is so full that possibly a decision of the case upon appeal from the order may terminate the litigation without subjecting parties to the expense of a trial in court, or final hearing on pleadings and proofs.

Complainant may take injunction under claims 1, 2, 3, 4, 5, 6, 14, 15, 17, and 18.

Injunction will be suspended for 30 days to allow defendant to arrange its business in conformity therewith.

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**FISCHER v. AUTOMOBILE SUPPLY MFG. CO., Inc.**

(District Court, E. D. New York. August 29, 1912.)

COURTS (§ 351\*)—DISCOVERY (§ 88\*)—PLEADING (§ 367\*)—ACTION FOR INFRINGEMENT—PROCEDURE.

The defendant, in an action at law for infringement of a patent, held entitled to have the complaint made definite and certain with respect to the article alleged to be an infringement, but not to an examination of the plaintiff before answer, nor to have plaintiff produce for its examination the alleged infringing article.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 924; Dec. Dig. § 351;\* Discovery, Cent. Dig. §§ 113, 114; Dec. Dig. § 88;\* Pleading, Cent. Dig. §§ 64, 1173-1193; Dec. Dig. § 367.\*]

At Law. Action by Charles Fischer against the Automobile Supply Manufacturing Company, Incorporated. On motions by defendant that the complaint be made more definite and certain and for an examination of plaintiff. Former motion sustained, and latter denied.

F. Warren Wright, for plaintiff.

C. A. L. Massie and Ralph L. Scott, for defendant.

CHATFIELD, District Judge. The plaintiff has sued the defendant, alleging infringement of letters patent No. 969,660, granted September 6, 1910, and shown by the record upon this motion to have to do with a flexible metal tubing or shaft. Infringement is alleged in Brooklyn, at the regular place of business of the defendant, at No. 224 Taaffe Place, both since the issuance of said letters patent and prior thereto, with intent to so infringe.

The defendant now makes a motion for a preliminary examination of the plaintiff, or for examination of a specimen of the flexible shaft-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing which the defendant is said to have sold as an infringement, and for other relief, including security for costs. Upon the argument it has asked that the complaint be made definite and certain, and that it be given a bill of particulars, for reasons which will appear hereafter.

The plaintiff has sued at law and expects to try the case before a jury. The procedure, therefore, while based upon jurisdiction in the federal courts over patent causes, will nevertheless conform, as near as may be, to the practice in the state courts, under section 914 of the Revised Statutes (U. S. Comp. St. 1901, p. 684). But in spite of this the defendant would not be entitled to an examination of the parties, unless its application be brought under the sections of the Revised Statutes providing for the taking of testimony. *Hanks Dental Association v. International Dental Association*, 194 U. S. 303, 24 Sup. Ct. 700, 48 L. Ed. 989.

Nor can it have an examination of the device in a case like the present. The defendant is not asking that some physical object be examined, in order that the evidence may be preserved for the purpose of trial, or that it may prepare for trial, under section 803 of the New York Code of Civil Procedure. It is rather attempting to learn what the plaintiff's evidence of infringement against it may be. If it is an infringer by sales in the ordinary course of business, then the knowledge of whether or not it has made these sales is within its own possession, and this motion should not be granted. *Carpenter v. Winn*, 221 U. S. 533, 31 Sup. Ct. 683, 55 L. Ed. 842; *Wilson v. New England Navigation Co.* (D. C.) 197 Fed. 88, decided in this court, June 4, 1912.

But, before answering, the defendant is entitled to a definite and certain complaint, and is entitled to know that with which it is charged, so as to determine whether the information upon which its answer is to be drawn is within its own possession. The plaintiff has alleged infringement both before and after the letters patent referred to were granted. The defendant, in its correspondence and affidavits presented upon this motion, alleges the use and sale of no articles except those made under the Almond patent, No. 434,748, granted August 19, 1890, which has already expired, and the Scognamillo patent, No. 785,523, issued March 21, 1905, and upon the papers it would seem that the defendant has the right to operate under these patents, unless they are the object of attack.

The plaintiff should be required to particularize sufficiently, so that an issue can be raised, and so that the allegations of fact of the complaint can be definitely made out, for the purpose of framing the issue. If the plaintiff herein intends to charge that the general trade output of the defendant (viz., of articles made under the patents referred to) infringes the patent subsequently obtained by the plaintiff, or that the defendant has no right to use those patents, then he should state the acts which are alleged to be infringements, with sufficient definiteness so that the defendant may raise this issue.

On the other hand, if he claims that the defendant has infringed by the sale of articles differing from the patents claimed, or so changed that the defendant is not protected by those patents, and is infringing

the plaintiff's patent thereby, then failure on the part of the defendant to realize or to avoid the consequence of what it has been doing, or a desire to learn the extent of knowledge on the part of the plaintiff, is not sufficient reason to relieve the defendant from the liability of preparing to meet the charge when presented on the trial.

In other words, the court will not compel the plaintiff to disclose its evidence, but the motion will be granted to the extent of directing the plaintiff to make his complaint more definite and certain, as to whether the infringement is charged by the sale of articles admittedly corresponding or equivalent to the devices in the Almond and Scognamillo patents, or whether the devices sold by the defendant are claimed to differ from those patents, and to infringe that sued upon by the plaintiff.

The motion, in so far as it asks for other relief, must be denied.

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In re FRIEDRICH.

(District Court, D. Minnesota, Third Division. September 13, 1912.)

1. BANKRUPTCY (§ 396\*)—CROPS GROWN ON HOMESTEAD.

Under the statutes of exemption of Minnesota, crops and products grown on land which is a bankrupt's homestead are not exempt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 659-668, 670; Dec. Dig. § 396.\*]

2. BANKRUPTCY (§ 407\*)—PREFERENCES.

That a bankrupt made voidable preferences by paying debts to his relatives did not of itself constitute a conveyance of property with intent to delay or defraud creditors, and was therefore not a bar to discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 729-731, 737, 738, 740-751, 758, 760, 761; Dec. Dig. § 407.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of Charles Friedrich. On objections to the bankrupt's petition for discharge. Sustained. Application denied.

C. B. Schmidt, of City of St. Paul, Minn., for bankrupt.

W. L. Converse, of City of South St. Paul, Minn., for creditors.

WILLARD, District Judge. The bankrupt filed his petition for a discharge, and creditors representing more than half of the unsecured debts filed their objections to the petition. The matter was referred to a special master, and a hearing has been had upon his report.

The bankrupt admitted that at the time he filed his petition and swore to his schedules he had in his possession \$185 in cash. This sum was not mentioned in the schedules, and no part of it has ever been turned over to the trustee. Without some explanation from the bankrupt himself or from the surrounding circumstances, this fact alone would be sufficient to sustain the objections to a discharge. An explanation now given by counsel for the bankrupt is that this sum of money was produced from the sale of property which was exempt. The only place where this claim appears in the testimony is the an-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 199 F.—13

swer to the following question: "Q. All of this personal property that you sold you claimed as exempt? A. Yes."

It appears from the evidence that the bankrupt lived on a tract of land about 27 acres in extent, a little south of St. Paul, and that apparently he was engaged in the business of truck farming. He had about 10 or 12 acres in garden, and "raised garden stuff of all kinds, tomatoes, cucumbers, radishes, and all kinds of things, such stuff as is usually raised in a truck garden." He filed his petition on August 4, 1911. About five weeks prior thereto he sold for \$1,200 in cash the crops, horses, and set of harness, horse rake, five acres of corn, and all the garden stuff. The personal property that he had at that time consisted of two horses, one cow, three wagons, one sleigh, one plough, one hoe, one mower, four pigs, and his household furniture. At the filing of his schedules he must have had two horses, one cow, and the household furniture, for he claimed those as exempt.

[1] It is thus apparent that by far the larger part of the \$1,200 was paid for the crops and products grown on the homestead, and the important question in the case is were such products exempt. The question has not apparently been decided in Minnesota. *Erickson v. Paterson*, 47 Minn. 525, 50 N. W. 699; *Sparrow v. Pond*, 49 Minn. 412, 52 N. W. 36, 16 L. R. A. 103, 32 Am. St. Rep. 571. Under these circumstances, the case of *In re Sullivan*, 148 Fed. 815, 78 C. C. A. 505, decided by the Circuit Court of Appeals of this circuit, is controlling upon this court. The court there held that the Supreme Court of Iowa had not decided whether crops raised on a homestead were exempt. It accordingly decided the question for itself, and held that they were not exempt under the Iowa statutes. Those statutes are substantially the same as the Minnesota statutes. Among other things the court said at page 818 of 148 Fed., at page 508 of 78 C. C. A.:

"If all crops growing on an exempt homestead are ipso facto exempt, any one may secure a homestead near a large city, expend much money for seed, in fertilizing the ground, and in growing and harvesting the crops, and in that way secure large returns of vegetables and other products, sell them in a convenient and favorable market, accumulate a fortune, and successfully defraud his creditors."

I hold that the proceeds derived from the sale of the crops raised upon the homestead were not exempt. The \$185 consequently belongs to the creditors, and should have been turned over to them. It is said that the bankrupt is a simple and ignorant person who understands English imperfectly, and that he did not have any fraudulent intent in retaining this money. In the proceedings leading up to his bankruptcy he showed neither great ignorance, nor great simplicity. Having sold all of his nonexempt personal property in the latter part of June for about \$1,200, he paid to his father \$400, to his mother \$50, to his brother \$300, and to his uncle \$200, claiming that he was indebted to them in these amounts. He filed his petition in bankruptcy on the 4th day of August, 1911. He omitted from his schedules a debt due him from a brother for about \$100, for the reason as he now says, that the claim was worthless. So that, when he was ready for bankruptcy, his schedules showed nothing whatever for his cred-

itors. His only assets were his farm, which he valued at \$4,000, subject to a mortgage of \$1,400, his household furniture, two horses, and one cow. His largest unsecured liability, \$360, was for groceries. He owed over \$200 for lumber and about \$45 for seeds. It is claimed by the objecting creditors that these payments to his relatives, assuming that he owed them, were preferences and constituted grounds for refusing his discharge.

[2] That they were preferences is very clear, but I do not understand that a preference alone, even if it be a voidable one, is a bar to a discharge. It does not constitute a conveyance of property with intent to delay or defraud creditors. In *re Maher* (D. C.) 144 Fed. 503.

After due consideration of the evidence in the case and of all the circumstances surrounding it, it is now ordered that the bankrupt's petition for a discharge be and the same hereby is denied.

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AMERICAN CONFECTIONERY CO. v. NORTH BRITISH & MERCANTILE  
INS. CO. et al.

(District Court, M. D. Tennessee. September 13, 1912.)

No. 1,066.

1. PLEADING (§§ 194, 354, 355\*)—PLEAS—INSUFFICIENCY—REMEDY.

Tenn. Code 1858, §§ 2884, 2885 (Shannon's Code, §§ 4605, 4606), provides that, if any pleading in a civil action is defective in showing a substantial cause of action or defense, this shall be ground for demurrer, and section 2882 (Shannon's Code, § 4603) provides that any irrelevant pleading may be stricken out on motion. *Held* that, if a plea is of a character entirely inappropriate to the cause of action alleged or constitutes an entire departure therefrom, it may be stricken out on motion, but, if it is appropriate to the cause of action alleged and is not a departure, but fails to state a substantial defense to the declaration, the remedy is by demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 444-446, 449-452, 1092-1095, 1102-1110; Dec. Dig. §§ 194, 354, 355.\*]

2. PLEADING (§§ 194, 355\*)—PLEAS—APPLICABILITY TO CAUSE OF ACTION—INSUFFICIENCY—REMEDY.

Where plaintiff sued for alleged conspiracy to defraud, pleas of the pendency of a former suit in a state court for the same cause of action, and that plaintiff had elected to maintain a separate suit for the same cause in a state court which was then pending, were not irrelevant or inappropriate to the cause of action alleged, and therefore any deficiency therein must be attacked by demurrer, and not by motion to strike.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 444-446, 449-452, 1102-1110; Dec. Dig. §§ 194, 355.\*]

At Law. Action by the American Confectionery Company against the North British & Mercantile Insurance Company and others. On motion to strike defendants' second and third pleas. Overruled.

The plaintiff sues, in effect, to recover damages alleged to have accrued to it by the acts of the defendants in carrying out an alleged conspiracy to

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

defraud it out of moneys due from the defendants under various fire insurance policies. The defendants, in their second plea, plead the pendency of a former suit pending in the Supreme Court of the State of Tennessee for the same cause of action; and, in their third plea, plead that the plaintiff having elected to maintain a separate suit for the same cause of action in the State court, which is still pending, cannot maintain this suit. The plaintiff moved to strike these two pleas, on the ground that as a matter of law each of these pleas is insufficient, and if true, does not constitute any defense to the case made by the plaintiff's declaration.

H. S. Stokes, Pitts & McConnico, and E. J. Smith, all of Nashville, Tenn., for plaintiff.

Stokes & Stokes, of Nashville, and Trezevant, Bartels & Trezevant, of Memphis, for defendant

SANFORD, District Judge. The ground of the plaintiff's motion to strike is that as a matter of law the second and third pleas of the defendants are insufficient, and if true do not constitute any defense to the plaintiff's declaration.

Sections 2884 and 2885 of the Code of 1858 of Tennessee (Shannon's §§ 4605, 4606) provide that in civil actions if any pleading, by a fair and natural construction, is defective in showing a substantial cause of action or defense, this shall be ground of demurrer. It is well settled that under these code provisions the objection that a pleading does not state a substantial cause of action or defense cannot be made by motion to strike, but must be made by demurrer. *Mynatt v. Mynatt*, 6 Heisk. (Tenn.) 311, 314; *Fry v. Tippet*, 16 Lea (Tenn.) 516, 518.

It is true that section 2882 of the Code of Tennessee (Shannon's § 4603) provides that any "irrelevant" pleading may be stricken out on motion. And in *Sanders v. Young*, 1 Head (Tenn.) 219, 73 Am. Dec. 175, it was implied, at least, without citing this code provision, that a pleading which was entirely inappropriate to the true gravamen of the action as alleged in the declaration might be stricken out as immaterial. Thus, for example, it would seem that if a plea of not guilty were filed in an action on a contract, such plea, being entirely inappropriate to the cause of action alleged, might properly be stricken out. So, in *Iron Co. v. Gaskell*, 2 Lea (Tenn.) 742, 747, it was held, without citing either the code or *Mynatt v. Mynatt*, supra, that where the defendants were sued in their individual capacities alone, pleas filed in denial of their liability as executors were a departure from the declaration and properly stricken out for immateriality.

[1] Construing the provisions of the Code of Tennessee above cited in the light of the foregoing decisions, I conclude that the rule of pleading in Tennessee, which is to be followed in this court in civil actions at law, under the provisions of the conformity statute, (Rev. St. [U. S.] § 914 [U. S. Comp. St. 1901, p. 684]) is this: that although a plea of a character entirely inappropriate to the cause of action alleged or constituting an entire departure therefrom, may be stricken out for immateriality, that is, irrelevancy, under Code section 2882, yet, if a plea be of a character not in-



appropriate to the cause of action alleged and not a departure therefrom, but merely fails to show a substantial cause of defense to the declaration, the proper remedy is by demurrer for insufficiency, under Code sections 2884 and 2885, and a motion to strike for such insufficiency will not lie.

[2] Applying this principle to the present case, as the defendants' pleas are not of a character inappropriate to the cause of action alleged and are not a departure therefrom, it follows that they cannot be stricken out upon motion for insufficiency; but if they fail to show a substantial cause of defense the plaintiff's proper remedy is by demurrer.

An order will accordingly be entered overruling the motion to strike.

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In re CONEY ISLAND LUMBER CO.

(District Court, E. D. New York. August 29, 1912.)

**BANKRUPTCY (§ 482\*)—ADMINISTRATION OF ESTATE—ATTORNEYS FOR PETITIONING CREDITORS—ALLOWANCE.**

Bankr. Act July 1, 1898, c. 541, § 64b, 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), providing that one allowance shall be made to the attorneys for petitioning creditors for professional services actually rendered, irrespective of the number of attorneys employed, means that one allowance, based on actual value, may be made for all services rendered under the statute to the parties whose rights are embodied and depend on the application of the petitioning creditors, so that, if more than one attorney or set of attorneys render such services, there must be a division of the fee, rather than a duplication or multiplication thereof.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874-876, 897; Dec. Dig. § 482.\*]

In the matter of bankruptcy proceedings against the Coney Island Lumber Company. On application for an allowance to counsel for the petitioning and intervening creditors.

Williams, Folsom & Strouse, for petitioning creditors.

Conway, Williams & Kelly, for intervening creditors.

CHATFIELD, District Judge. The petitioning creditors have applied for an allowance. Creditors, subsequently intervening, have objected to the giving of the entire allowance for services rendered on behalf of "the petitioning creditors" to the attorneys who filed the petition. The attorneys for these intervening creditors thereupon applied for an allowance to themselves, and questioned the amount first allowed by the special commissioner as unnecessarily large.

A number of questions have arisen, and the matter has been referred back to the special commissioner twice, in order that he might hear the various parties interested and report upon the matters as a whole, with the result that his first allowance to the attorneys for the petitioning creditors of \$350 was reduced to \$275, after due consideration, but without hearing the parties, and then further re-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

duced to \$175, upon consideration of the size of the estate. The allowance to the intervening creditors was first fixed at \$150, and subsequently, and in contemplation of the size of the estate, reduced to \$100. The attorneys for the petitioning creditors have filed exceptions to this report. They contend that no benefit accrued by reason of the services of the intervening creditors, that the special commissioner did not make his report conform to the exact order of reference, that he has made his allowance different in amount than his statement in open court, that no notice was ever given of the hearing upon the application by intervening creditors and no hearing actually held, and, finally, that the court has no jurisdiction to grant an allowance to the intervening creditors in any event.

It is apparent that the special commissioner has finally accomplished, by the means of several hearings and reports, what the court intended in the first place, namely, that the various parties interested should be heard, and that their claims should be considered in the light of each other and of the size of the estate. His last report can be used for the guidance of the court, and no irregularity, which is now of consequence, has resulted from his method of procedure.

The statute provides that one allowance shall be made to the attorneys for petitioning creditors (section 64b) for "the professional services actually rendered, irrespective of the number of attorneys employed." This court has frequently ruled (and it has been so construed generally) this provision to mean that but one allowance, based upon actual value, can be made for all services rendered, under the authority of the statute, to the parties whose rights are embodied in and depend upon the application of the petitioning creditors. If more than one attorney or set of attorneys render these services, there shall be a division of the fee, rather than duplication or multiplication. Hence, if one set of attorneys act for the petitioning creditors and are succeeded by others, or if the court sees fit or deems it necessary to allow some of the services on behalf of the petitioning creditors to be rendered by other attorneys, this will result in a division of the allowance, and not increase its amount. The provisions of the law must be complied with and the estate protected, and the statute is clearly broad enough to justify the court in protecting the estate, and in not allowing maladministration, through willful neglect, or through unintentional failure on the part of one set of attorneys to do what is necessary.

The services "to petitioning creditors" are prior in time to the election of a trustee. They are for the benefit of the estate, in the same way in which the services of the trustee and his attorneys are for the benefit of the creditors generally; and no attorney should be allowed to receive compensation for work not done by him, but by some one else in his place, under a too strict interpretation of the statute; nor should the amount of the allowance be increased to satisfy all the parties at the expense of the estate.

The first report was brought to the court's attention at a time when a motion, participated in by the trustee, indicated that the work of the various sets of attorneys had produced little result and that there was but a small estate in bankruptcy. The fact that the

attorneys for the intervening creditors had appeared before the court, in connection with the examination of witnesses, caused the court to investigate as to how many sets of attorneys had participated, and a review of the petitions for allowance would indicate that the services rendered by none of the attorneys were difficult or great in amount.

The allowances by the special commissioner are much larger than this court has been in the custom of granting. A total of \$200 for all the services rendered to the petitioning creditors, irrespective of the number of attorneys employed in that work, would be all that the court could allow. Of this allowance it would seem that \$150 to the attorneys filing the petition, and \$50 to the attorneys appearing for the intervening creditors and conducting the examinations, would be proper in amount, and the allowance will be fixed at that sum, with disbursements as approved by the commissioner.

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In re R. F. DUKE & SON.

(District Court, N. D. Georgia. July 10, 1912.)

No. 3,109.

**BANKRUPTCY (§ 69\*)—ADJUDICATION—INDIVIDUAL PROPERTY OF PARTNER NOT ADJUDICATED.**

Where a partnership committed an act of bankruptcy, and the firm and all its members were insolvent, the estates of all the members were drawn into the proceeding for administration, though one of the partners was not subject to adjudication, because principally engaged in farming.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 51-53; Dec. Dig. § 69.\*]

In the matter of bankruptcy proceedings of R. F. Duke & Son. A report of a special master advising an adjudication in bankruptcy was filed, and the bankrupts bring exceptions. Report affirmed.

James J. Ragan, of Atlanta, Ga., and S. Holderness, of Carrollton, Ga., for petitioning creditors.

James Beall and Buford F. Boykin, both of Carrollton, Ga., for bankrupt.

NEWMAN, District Judge. This is an involuntary proceeding in bankruptcy. The alleged bankrupts first filed an answer and demanded a jury trial, according to section 19a of the bankruptcy law of 1898 (Act July 1, 1898, c. 540, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]). Subsequently they and counsel for petitioning creditors agreed on an order submitting the issues raised by their answer to Edgar Watkins, Esq., as special master; counsel for both parties consenting in writing to the order of reference. The special master heard the case and has made his report, finding that the bankrupts committed the acts of bankruptcy as alleged in the involuntary petition, and also that they were insolvent at the time

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the filing of the petition. The special master closes his report as follows:

"From the whole case I conclude and find that the acts of bankruptcy alleged in the petition were committed, the first act being joined in by the firm and each of the members thereof; the fraudulent conveyance being the act of R. F. Duke alone. I further find that R. F. Duke & Son, J. H. Duke, and R. F. Duke are insolvent. I further find that the firm of R. F. Duke & Son and J. H. Duke should be adjudged bankrupts; but I find that R. F. Duke cannot, because he is principally engaged in farming, be adjudicated an involuntary bankrupt, and that as to him the petition should be dismissed."

Just before this conclusion the special master, having found that R. F. Duke was principally engaged in farming and that he could not be adjudicated, in his individual capacity, as a bankrupt for that reason, proceeds as follows:

"This does not, however, prevent the firm and J. H. Duke from being adjudicated bankrupts. *Francis v. McNeal*, 186 Fed. 481, 485, 108 C. C. A. 459. Nor does it prevent the administration of the assets of the nonadjudicated partner. *Francis v. McNeal*, *supra*; *Dickas v. Barnes*, 140 Fed. 849, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654; *In re Bertenshaw*, 157 Fed. 363-378, 85 C. C. A. 61, 17 L. R. A. (N. S.) 886, 13 Ann. Cas. 986; *In re Lattimer* [D. C.] 174 Fed. 824."

The special master served a draft of his report upon counsel on May 29, 1912, and gave notice that the report would be settled before him on June 3d. No exceptions were filed by the petitioning creditors, and it seems that counsel for the bankrupt gave notice that, if he desired to file any exceptions, he would file them later. Exceptions were filed by counsel for the bankrupt in the clerk's office on June 28, 1912.

The rule which has been followed in this district, requiring the master to certify a draft of his report and give counsel an opportunity to except before him, has been complied with, and counsel for petitioning creditors move to dismiss the exceptions filed in the clerk's office, because of failure to file the exceptions before the special master.

Without determining this, I have examined the report and the evidence, and am thoroughly satisfied that the report of the special master is sustained by the evidence, and that it is correct so far as legal questions are involved. The only doubt I had was as to bringing into the bankruptcy court for administration the property of R. F. Duke, who is not adjudicated. Notwithstanding there is some difference of opinion in the courts on the subject, I consider the case of *Francis v. McNeal*, cited above, decided by the Circuit Court of Appeals for the Third Circuit (186 Fed. 481-485, 108 C. C. A. 459), and reviewing all the previous cases, as an authority which should be followed. The conclusion of the court in that case, quoting the second headnote, is:

"Under Bankr. Act July 1, 1898, c. 541, § 5, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3424), a partnership is a legal entity, which may be adjudged a bankrupt irrespective of an adjudication against any of its members; but in an involuntary proceeding, where the act of bankruptcy charged is one that involves insolvency of the partnership, there can be no adjudication against it,

unless it and all its members are insolvent, and in such a case, though the adjudication be against the partnership only, or against the partnership and some, but not all, of its members, the estates of all the members are drawn into the proceeding for administration."

The attorneys in this case, with the approval of the court, selected a special master satisfactory to both, and by their consent in writing the case was referred to him. The written order of the court in the record shows the consent in writing of counsel for both the petitioning creditors and the bankrupt. The effect of the report of a master so selected by the parties on the facts is well understood. Any error in the report must be clear and manifest, at least, and I do not find it so here.

The report is affirmed, and the clerk is directed to enter an adjudication as to R. F. Duke & Son and J. H. Duke, but not as to R. F. Duke.

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UNITED STATES v. TRIPOD PAINT CO.

(District Court, N. D. Georgia. August 21, 1912.)

No. 2,265.

ESTOPPEL (§ 72\*)—PERSONS EQUALLY BLAMELESS—WRONGFUL PAYMENT—LIABILITY OF PAYOR.

Where defendant paid over money in its hands belonging to the United States, without legal authority, to a third person having no right to receive the same, defendant was liable therefor to the government, under the rule that, where one of two innocent persons must suffer by the act of a third, he who puts it in the power of the third person to inflict the injury must bear the loss.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 188; Dec. Dig. § 72.\*]

Action by the United States against the Tripod Paint Company. On defendant's motion for a new trial. Denied.

John W. Henley, Asst. U. S. Atty.

Westmoreland Bros., of Atlanta, Ga., for defendant.

NEWMAN, District Judge. In this case a verdict was rendered in favor of the plaintiff for the sum of \$209.11. After hearing the evidence and the argument of counsel, the matter was presented by the court in the instructions to the jury in two ways.

In the instructions of the court to the jury, the first question presented was whether they believed, under the evidence, that the Tripod Paint Company, having paid over money in their hands belonging to the United States, without legal authority, to a third party having no right to receive the same, afterwards tried, as charged in the declaration, to cover the same up by false vouchers, made with intent to deceive the quartermaster, and thereby receive payment of the same. Believing the affirmative of that, they were instructed that the defendant would be liable; and, believing the negative, it (the Tripod Paint Company) would not be liable.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The jury was then instructed that, if they did not believe the defendant to be liable to the United States under the foregoing instructions, they would have the right to apply to the case the law as embodied in section 4537 of the Code of Georgia of 1910, which provides that, when one of two innocent persons must suffer by the act of the third person, he who puts it in the power of the third person to inflict the injury must bear the loss.

It was the opinion of counsel for both parties, on the trial, as I understood it, and it was the opinion of the court, that this latter was a proper principle of law to present to the jury. Being so regarded, the jury was instructed accordingly.

It is perfectly clear to my mind that the jury found against the defendant on the latter view of the case; that is to say, that it (the Tripod Paint Company) placed it in the power of White and Lehnard to perpetrate the wrong which they did on the government. I do not believe that the jury found against the defendant upon the idea that it had done anything fraudulent or willfully wrong. They found a verdict against the defendant, in my opinion, because they did not believe it had exercised that degree of care in dealing with the matters in controversy, required under the law and under the instructions of the court, in connection with its dealings with White and Lehnard. I do not believe, after a full consideration of the evidence, that it justified a finding that the Tripod Paint Company, or its officers or agents, were guilty of any moral or willful wrong, and from the papers put in evidence, and used on the trial, it seems that the army officers who examined into this transaction did not so regard it. Indeed, the Assistant United States Attorney, who represented the government in this case, stated several times that he did not charge and did not believe that to be true.

The other question, as to who was responsible for the wrong done the government by White and Lehnard, was purely a question of fact for the jury, and with their finding upon that question I do not think the court has any right to interfere.

The motion for a new trial must be overruled.

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In re HIRSHOWITZ.

(District Court, M. D. Pennsylvania. September 14, 1912.)

No. 1,543.

**BANKRUPTCY (§ 311\*)—PREFERENCES—MORTGAGE.**

Claimant Trust Company loaned a bankrupt \$1,500 on his own indorsement, the note being renewed several times, until it finally fell due November 3, 1909; and five days thereafter the bankrupt executed a bond and mortgage to the Trust Company for a like amount, which was recorded on the following day. An officer of the Trust Company testified that the consideration for the mortgage was delivered and paid in money to the bankrupt November 20th, as indicated by a notation on a teller's slip from an adding machine; but how or when the note was paid, if at all, was not satisfactorily explained. At the time the mortgage was

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date; & Rep'r Indexes

made, it was quite generally known that the bankrupt was in financial straits. *Held*, that the giving of the mortgage constituted a preference, obtained by the Trust Company with at least constructive knowledge of the debtor's insolvency; and that it was therefore not entitled to an allowance of the mortgage debt as a secured claim.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 497-500; Dec. Dig. § 311.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of Louis Hirshowitz. On certificate of review of the decision of the referee rejecting the claim of the Wyoming Valley Trust Company. Affirmed.

Henry W. Dunning, of Wilkes-Barre, for claimant.  
Abram Salsburg, of Wilkes-Barre, for trustee.

WITMER, District Judge. This matter is here on review of the decision of the referee rejecting the claim on mortgage of the Wyoming Valley Trust Company to share, on distribution of the fund arising from the sale of real estate, as a preferred claim.

It appears that on January 2, 1909, the bankrupt obtained a loan from the Trust Company for \$1,500 on his own indorsement. The note given as security was several times renewed, until finally it fell due November 3, 1909. Five days thereafter, on November 8th, the bankrupt executed a bond and mortgage to the Trust Company for a like amount, to wit, \$1,500, which was duly recorded the following day. It is contended that the mortgage was obtained as security or in payment of the loan, thereby intending to secure a preference when it was known that the bankrupt was financially embarrassed and insolvent. It is indeed rarely possible to prove by positive testimony the intent of the parties to a transaction of this character. Such must usually be inferred from the attending circumstances. The trust officer says that the consideration for the mortgage was actually delivered and paid in money to the bankrupt on November 20th, 12 days after the date of the mortgage, an inference which he draws from a notation on a teller's slip from an adding machine, the words being written in lead pencil opposite an item of \$1,500, "Hirshowitz Mortgage." How and when the note was paid, if at all, has not been satisfactorily explained.

That a matter of this character should be permitted by a large banking house to remain shrouded in mystery does not commend itself to this court. If the old note was paid by the bankrupt and a new loan effected, for which the mortgage was given as security, it was at the command of the Trust Company to explain clearly, and in a satisfactory manner, from their records. The conclusion reached by the referee, that the mortgage was given in consideration of the note, is amply justified by the evidence. The referee, furthermore, found that the bankrupt, at the date of the mortgage, was in financial distress, which was then quite generally known, and, bearing in mind that a mortgage was obtained as security for

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a loan theretofore secured by the bankrupt's own note, indicates a knowledge on the part of the Trust Company of the financial uncertainty of the subsequent bankrupt. The transaction itself, as gathered from the testimony, leads to the irresistible conclusion that the Trust Company were endeavoring to secure a preference at a time when their debtor was regarded insolvent.

The conclusions reached by the referee, and the order made, is affirmed.

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DES MOINES GAS CO. v. CITY OF DES MOINES et al.

(District Court, S. D. Iowa, C. D. August 21, 1912.)

No. 71—M.

1. EQUITY (§ 409\*)—REFERENCE—FINDINGS AND CONCLUSIONS OF MASTER.

Where an equity cause is referred generally to a master, his findings and conclusions have every reasonable presumption in their favor, and are not to be set aside or modified, unless there clearly appears to have been error or mistake on his part.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 904, 920-923; Dec. Dig. § 409.\*]

2. GAS (§ 14\*)—MUNICIPAL REGULATION OF RATES—VALUATION OF PLANT.

In estimating the value of a gas plant, for the purpose of determining the reasonableness of rates established by a city ordinance, the cost of reproduction, while it may be taken into consideration, does not in itself furnish a reliable measure of value, as, for instance, where in computing such cost the experts have included many thousands of dollars for the expense of tearing up and replacing of pavement, a large part of which has been put down since the pipes were laid, and when there is no present need of their renewal, it would be inequitable to capitalize such sum and permit the company to earn dividends thereon.

[Ed. Note.—For other cases, see Gas, Cent. Dig. §§ 10-11; Dec. Dig. § 14.\*]

3. GAS (§ 14\*)—MUNICIPAL REGULATION OF RATES—VALUATION OF PROPERTY.

The good will of a gas company, by reason of the monopoly given by its franchise, is not an item to be included in estimating the value of its property, for the purpose of determining the reasonableness of rates established by a city ordinance; but the value of the plant as a "going concern" is proper to be considered as an element of the present physical value of the plant.

[Ed. Note.—For other cases, see Gas, Cent. Dig. §§ 10-11; Dec. Dig. § 14.\*]

In Equity. Suit by the Des Moines Gas Company against the City of Des Moines and others. On exceptions to master's report. Report confirmed, and decree for defendants.

Geo. H. Carr, W. L. Read, and N. T. Guernsey, for complainant.  
Robert Brennan, H. W. Byers, and E. C. Carlson, for defendants.

SMITH McPHERSON, District Judge. A gas plant for lighting purposes was established in Des Moines a number of years ago, and now and for several years has been owned by complainant. At one time the rates were \$1.30 per thousand, then \$1.25, then \$1.20, \$1.15,

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



\$1.10, and finally \$1. The city council, by ordinance of December 27, 1910, fixed the rate at 90 cents. Then this action was brought to enjoin the enforcement of the ordinance, for the reason, as is alleged, that a 90-cent rate will not be remunerative.

The case was referred to Robert E. Sloan as special master, to take the evidence, reduce it to writing, and report the same to the court, together with his findings of fact and conclusions of law. It is most gratifying to the court to learn that counsel on both sides agree that learning, patience, fairness, and all those qualifications a master in chancery should possess are evidenced by nearly one year of work by Judge Sloan in this case. And the report of the master now pending on exceptions fully warrants the correctness of the compliments of counsel as respects the work and report of the master. The court deems it appropriate to make of record the statement that the administration of justice has been furthered by the untiring industry of the master, whose record in this case is in keeping with his long-time service as an Iowa judge.

While counsel on both sides and the court unite on the foregoing, no one means to say that the report of the master is not subject to criticism and exceptions. Neither party is satisfied with all of his findings. But the real test of judicial action is not in the fact that a litigant is not satisfied, nor in the fact that a tribunal in proceedings to review may otherwise conclude.

I deem it appropriate to call attention to another phase of this litigation. The ordinance was adopted within a few minutes from its introduction. Quite likely it had been considered by the members in their individual capacities. But in open session it received but little consideration, and without the presence of any one for the gas company. And every member voting to reduce the earnings had a direct personal and moneyed interest in thus reducing the rates. If a judge were to so act, his acts would be absolutely void, because of the long-time maxim, "No man can be judge in his own cause." And this ought to apply to those who act in an administrative or legislative capacity. This litigation has cost both the gas company and city extravagantly large sums, most of which cannot be taxed as costs, nor recovered back by the party successful in the end. Much of this kind of litigation, and practically all of the expense, would be avoided if Iowa, like so many of the other, including some neighboring, states, had an impartial and city nonresident commission or tribunal, with power to fix these rates at a public hearing, all interested parties present, with the tribunal selecting its own engineers, auditors, and accountants. Too often we have selfish, partisan, prejudiced, and unreliable experts engaged for weeks at a time, at \$100 or more and expenses per day, exaggerating their importance, and making the successful party in fact a loser. With all of our boasted advancement, Iowa is a laggard in this matter, and will continue as such until these rate makings are taken from the power of city councils. Appeals to the courts will seldom be taken from the findings of such a tribunal.

But at present the city councils have the duty and power to fix rates; and when rates are thus fixed by them, there is a presumption,

greater or less, according to the character and methods of their work, that such rates are remunerative. And in any event the corporation whose rates are reduced has the burden to show that the rates thus fixed are not remunerative, failing in which the rates must be observed and enforced. And this was the matter referred to the master. He reports that a 90-cent rate is sufficiently high for a sufficient return to the gas company. The order appointing Judge Sloan required him to take all the testimony, including exhibits, return the same to the court, and make findings of fact with his conclusions of law. All these he has done. Both the city and the gas company have filed exceptions to the report.

In many cases courts themselves have heard the rate cases under rule 67 of the General Equity Rules as amended (29 Sup. Ct. xxxiii). But in districts like this, with but a single judge, the time would all be devoted to such cases, with other litigation at a standstill. And the Supreme Court has said that it is a seemly and orderly and commendable course to refer such cases to a master. *Railroad v. Tompkins*, 176 U. S. 167, 20 Sup. Ct. 336, 44 L. Ed. 417; *Lincoln Gas Co. v. Lincoln*, 223 U. S. 349, 32 Sup. Ct. 271, 56 L. Ed. 466.

[1] And in case of such a reference the report of the master stands for something substantial, and something besides recommendations. His conclusions have every reasonable presumption in their favor, and are not to be set aside or modified, unless there clearly appears to have been error or mistake on his part. *Camden v. Stuart*, 144 U. S. 104, 119, 12 Sup. Ct. 585, 36 L. Ed. 363, and cases therein cited. So that it is incumbent on such party to make it clearly appear that the report of the master is erroneous as respects the matters covered by exceptions. The city has filed several exceptions to the report, largely on questions of fact. But they were not argued orally, nor by brief, and the alleged errors are not made clearly to appear. Every of said exceptions of the city is denied.

There are some propositions now so firmly established by the courts as not to be longer within the limits of debate. The net earnings, according to the duration of the franchise, the earning power of money in that vicinity, and the hazards, moral and physical and otherwise, should vary from 4 to 8 per cent., besides that set aside for depreciation and maintenance. But there is and can be no rigid or inflexible rule as to the per cent. to be thus earned. *Stanislaus County v. San Joaquin Company*, 192 U. S. 201, 216, 24 Sup. Ct. 241, 48 L. Ed. 406; *Knoxville v. Knoxville Water Company*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034; *Railway Commission v. Cumberland Telephone Company*, 212 U. S. 414, 29 Sup. Ct. 357, 53 L. Ed. 577; *San Diego Sand Company v. National City*, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. Ed. 1154; *Lincoln Gas Co. v. City of Lincoln*, 223 U. S. 349, 32 Sup. Ct. 271, 56 L. Ed. 466; *Cedar Rapids Gas Co. v. Cedar Rapids*, 223 U. S. 655, 32 Sup. Ct. 389, 56 L. Ed. 594.

The "good will" and that which the corporation enjoys as being the only source from which gas can be obtained is not an element of

value on which profits should be earned in estimating whether the rates are remunerative or confiscatory. *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 52, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034. All concede that the present value is the basis on which returns are to be estimated. And with the findings of the master on that matter there are but two matters which merit consideration. And on these two questions the great weight of the argument by counsel has been made.

[2] One of these is what is called the "reproduction theory" as determining the present value. When the gas mains were laid, many of the streets were unpaved, but which are now paved streets (21 per cent.). To reproduce the system at this time it would be necessary to take up something like a yard in width and for the length of 21 per cent. of the streets, place the mains the proper depth, fill in with earth, and replace the paving. The extra cost on account of the paving would amount to \$140,000. The master declined to allow this sum as forming part of the value of the plant.

It is claimed the true value of any building, structure, or plant is that sum which it takes to reproduce it, less the depreciation of the one to be replaced. But little assistance is obtained from the authorities, although it is claimed the case of *Willcox v. Consolidated Gas Company*, *supra*, is in point. The opinion does not show this to be so. Something of a showing is made in favor of that contention, by going to the original record and the assignments of error. But it is not easily understood how the Supreme Court in that great case, so ably argued, with so much involved, meant to be so understood without expressly so declaring in the opinion. No one doubts but that the cost of reproduction may in many cases be considered, and in some cases is a solution of the controversy.

What makes value, and what is the evidence thereof? Metaphysical distinctions as to terms as used with reference to value by political economists aid but little. Exchange value, selling value, cost value, value for use as an utility, value as to incomes, and so on, are too often used loosely. But the question is as to its value today with reference to income. What it may have cost is pertinent. What it will sell for is to be considered. And if destroyed by any agency, such as rust, crystallization, or other forces, what must be paid to reproduce it is a subject of inquiry. All of these may be considered. In my opinion, those who maintain that what it will cost to reproduce the plant, less depreciation, is the true value, in many instances confound the real question with one of many evidences of the real value. Reproducing cost is an evidence of what the real value is after subtracting the depreciation. But what is to be done with the value of stocks and bonds on the reproductive theory? And what becomes of the original cost on the reproduction theory? And what becomes of the question of the increase or falling off in numbers of consumers? And the same as to increased or diminished expenses?

The theory at first thought in all cases is plausible and attractive, but in the end oftentimes utterly illogical and unreliable, originally

adopted as a mere time-saver by mere theorists, and sought to be enforced as against substantial and unbending facts. If the plant is to be reproduced, when is it to be done? If, when reproduced, will the streets then be paved, and, if paved, paved with what? Must it all be reproduced at once, or the same covered by a number of years? If but gradually reproduced, why should not such cost go into either the operating or maintenance accounts? No one can state when it must be reproduced, and a material question arises: What, then, as compared with the present, will be the price of labor, material, and freight? But finally and to my mind the conclusive reason against the soundness of the reproduction under paved streets is that to allow that theory to prevail, and to increase the capitalization now to the extent of \$140,000, is to allow such gas rates as will pay a dividend on such sum from and after this date. But the sum of \$140,000 is not put in the capital or value account until the plant is reproduced. As of course, streets paved or unpaved make no difference in the earning power of the gas plant, and but little, if anything, goes more directly and accurately to the question of value of any structure or plant than its rental, earnings, or as a dividend producer.

There are many instances in which the reproduction theory is the best of all methods for getting at the present value, and in other instances the most misleading. And it is deceptive, in my opinion, to now add the cost of taking up and replacing pipe under paved streets at an estimated cost of \$140,000 extra, and does not warrant an increased dividend of \$8,400 or some greater sum. Such a dividend is a mere paper dividend, and is arrived at, not because of increased earnings, not because of increased capital or investments, not because of increased operating or maintenance expenses, but solely by reason of a supposed necessity of at some time, in some manner, under a then some kind of street, on a mere guess of what labor and material would then cost. Many of the principles with relation to railway rates are applicable to gas rates. And perhaps the latest analysis of the reproduction theory is found in the recent case of *Louisville R. R. v. Railway Commission* (D. C.) 196 Fed. 800, in an opinion of Judge Jones of the Alabama district. He shows the value of this theory, but likewise shows that it is not a hard and fast rule covering all phases. Finally, pipes under a paved street are of very long life, many times longer than if the streets were not paved. The theory applied to paved streets is but a theory, is illogical and against facts, and was properly denied by the master.

[3] The master finds that the "going concern" value of the plant is \$300,000; but the gas company, by its exceptions, contends that this sum is not in the total of items making \$2,240,928, the value placed on the entire plant. A "good will" value and a "going concern" value are often confused and used interchangeably, and I am inclined to believe that in some instances the master's report is subject to this criticism. But whether this is so or not is not of much importance, and it is more of a verbal criticism than a practical one. Under the authorities cited, as well as others easily found from

those cited, a "good will" value, by reason of being a monopoly, such as a gas company has under an ordinance, is not to be reckoned. The item of \$300,000 for "going value" is quite important in this case. It is contended that if this \$300,000 must be added, and the consumption of gas remains the same, and the percentage of dividends allowed by the master should stand, there will then be a shortage. The authorities already cited, and which in my opinion are in accord with good sense, favor the allowance of a "going value." Every kind of business, with no exception, has a value known as "going value," and such "going value" is in no way connected with the monopoly or "good will" value. The gas company contends that this "going value" of \$300,000 was erroneously omitted by the master in his totals, while the city contends that the sum of \$300,000 has already been considered in making up the grand total of \$2,240,928. I am of the opinion that the contention of the city is a correct one. This matter has received from me most earnest attention and consideration, and I will briefly present the reasons for my conclusion.

The master fixes the physical value at \$2,240,928. He means thereby, and to my mind clearly states that as, the value of the *gas plant*. There are but five items making this grand total. Counsel on both sides and I agree that "going value" is a part of the present value. The master so held. It would be strange that the master would hold that the "going value" of \$300,000 entered into the actual value, and then by inadvertence omit it. And it would be the more strange after considering the items set forth in the report. By the report he lists the following:

1. Working capital.....	\$ 140,000 00
2. Real estate.....	150,000 00
3. Organization expenses.....	6,923 00
4. Meters in stock.....	6,603 00
5. Present value of physical property, aside from above items..	1,937,402 00

Evidently, because the master used the word *physical*, counsel seem to conclude that he did not include "going value." If he had omitted the word "physical" as an identification, then no one would doubt but that he did include "going value." But why would the master include five items, and omit one that he meant to include? But the criticism is too refined and technical to stand as against his entire report. After enumerating the four items, he adds, "Present value of physical property *aside from* above items, \$1,937,402.00." This is as though he had said, "All other items of value to be considered." How can it be said that he meant "junk value"? Or "bare-bones" value, as used in some of the cases? It is not fair to say that he meant junk value, or bare-bones value. He meant that was the value coupled with the preceding items of the gas plant—a plant making and selling gas. He meant that, and neither more nor less than that.

If the question were now for decision, I would have much doubt as to the item of working capital, \$140,000. The master was liberal with the gas company by allowing that item. I fail to find sat-

isfactory evidence in this tremendous record as to that item, although there is evidence bearing thereon. But every business man knows that the gas company daily makes deposits, and daily checks out for expenses, and at stated periods for interest on its bonds and for dividends. Whether it receives interest on its daily balances does not appear, nor does it appear whether it must pay interest on its overdrafts, if it has such. And if it has on hand \$140,000 as working capital, why such sum would not earn interest is not made to appear. I only mention this to show that the master has not borne down on the gas company.

When the restraining order was issued herein, to be in force pending litigation, it was done with full consideration. An actual test is the highest degree of proof as to some phases, and some phases only, of litigation like this. But it was made to appear that a very large number of gas consumers paid cash without waiting for the presentation of bills. This was made easy to do by the meters having annexed thereto a mechanism so adjusted that by dropping any sum of metal money through a slot, the requisite amount of gas could be used on the basis of \$1 per thousand. And the mechanism would correctly measure the gas on that basis. As of course, to allow the consumer to have 1,000 feet of gas at 90 cents, the wheels and appliances must be changed. To do this persons familiar with such mechanism must be employed. And it was made to appear that it would take more than a month of time to do this, and at much expense.

Every one of the exceptions of the gas company is overruled. The bill of complaint is dismissed, with prejudice, and the interlocutory writ of injunction and restraining order vacated. But the vacation of such writs will not be effective for 60 days from the decrees this day entered, to the end that such mechanisms may be adjusted to the 90-cent rate. And to the further end that if said decree by actual test may prove that a 90-cent rate is not remunerative, the decree, will provide that, after three years of such actual test, this case may be reinstated, and the pleadings and evidence now on file, used as of full probative force supplemented by such additional pleadings and evidence as may be deemed by either party advisable. This will so materially reduce the expense as to make it almost nominal. In the event of an appeal, a supersedeas bond in the penalty of \$5,000 will be approved. But such a bond will only supersede the payment of the costs. Any other supersedeas must be applied for to the appellate court.

Such will be the decree.

## CAIN v. SOUTHERN RY. CO.

(Circuit Court, E. D. Tennessee, N. D. March 10, 1911.)†

No. 1,604.

**1. COMMERCE (§ 58\*)—EMPLOYERS' LIABILITY ACT—CONSTITUTIONALITY.**

Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), being expressly limited by its terms to common carriers while engaged in interstate or foreign commerce and to injuries received by their employes while "employed by such carriers in such commerce," is within the constitutional powers of Congress and valid.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 77-86; Dec. Dig. § 58.\*]

**2. DEATH (§ 10\*)—EMPLOYERS' LIABILITY ACT—ACTION FOR DEATH OF EMPLOYÉ—DAMAGES.**

The right of action for injury to an employé given by the federal Employers' Liability Act April 22, 1908, c. 149, § 1, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), prior to its amendment by Act April 5, 1910, c. 143, § 2, 36 Stat. 291 (U. S. Comp. St. Supp. 1911, p. 1325), did not survive the death of such employé, and in an action for his death recovery is limited to the pecuniary injury or loss sustained by the beneficiaries, excluding all consideration of punitive elements, loss of society, wounded feelings of the survivors, and suffering of the deceased, although the value of a father's services in attention to and care and superintendence of his children and family, in the education of his children, of which they are deprived by his death, may be considered as an element of pecuniary damages.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 10.\*]

**3. DEATH (§ 99\*)—EMPLOYERS' LIABILITY ACT—ACTION FOR DEATH OF EMPLOYÉ—DAMAGES.**

A verdict for damages returned in an action against a railroad company for the death of an employé, brought under Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), held excessive under the evidence.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125-130; Dec. Dig. § 99.\*]

At Law. Action by Laura Cain, administratrix, against the Southern Railway Company. On motion for new trial. Overruled, on condition that plaintiff file remittitur.

Pickle, Turner & Kennerly, of Knoxville, Tenn., for plaintiff.

Jourolmon, Welcker & Smith, of Knoxville, Tenn., for defendant.

SANFORD, District Judge. [1] 1. The first ground of the motion for new trial must be overruled. I am of the opinion that the Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), upon which the first count of the declaration is based, is not subject to the broad construction placed upon it by the defendant, but on the contrary is limited by the express terms of section 1 to common carriers while engaged in interstate or foreign commerce, and to injuries received by their employes while "employed by such carriers in such commerce," and that being so limited it is not subject to the constitutional objections which rendered

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Memorandum opinion, published by request.

void the original Act of June 11, 1906 (34 Stat. 232, c. 3073 [U. S. Comp. St. Supp. 1911, p. 1316]), as held in *The Employers' Liability Cases*, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297, but is, on the contrary, a constitutional and valid regulation of such commerce within the doctrine of those cases. The constitutionality of the Act of 1908 has been upheld by the Federal Courts in well-considered opinions in *Watson v. Railway Co.* (C. C.) 169 Fed. 942, and *Walsh v. Railroad Co.* (C. C.) 173 Fed. 494, and by the Supreme Court of Iowa in *Bradbury v. Railway Co.*, 149 Iowa, 51, 128 N. W. 1. I cannot regard as sound the contrary view expressed by the Supreme Court of Connecticut in *Hoxie v. Railway*, 82 Conn. 352, 73 Atl. 754, 17 Ann. Cas. 324.

[2] 2. I have carefully considered the second ground of the motion in reference to the amount of the verdict.

It is clear that under the Act of 1908, which was in force at the time this accident occurred in 1909, in case of an injury resulting in the death of an employé, no provision was made for the survival of the right of action of the injured employé himself. *Fulgham v. Railroad Co.* (C. C.) 167 Fed. 660; *Walsh v. Railroad Co.*, *supra*. And see, by analogy, *Chesapeake & O. Ry. Co. v. Dixon*, 179 U. S. 131, 135, 21 Sup. Ct. 67, 45 L. Ed. 121; *North. Pac. Ry. Co. v. Adams* (C. C. A., 9) 116 Fed. 324, 54 C. C. A. 196. Such survival of the injured employé's right of action was expressly provided for by section 2 of the later amendatory Act of April 5, 1910 (36 Stat. 291, c. 143 [U. S. Comp. St. Supp. 1911, p. 1325]). This, however, cannot enlarge the measure of recovery in the present case, which must be controlled entirely by the provisions of the Act of 1908.

I also think it clear that under the Act of 1908, before the amendment of 1910, in an action brought for the statutory beneficiaries to recover damages for the death of an employé, the recovery is limited to the pecuniary injury or loss sustained by the beneficiaries from the death of the deceased, and that the measure of damages is compensation for the loss of such pecuniary benefit as could have been reasonably expected to the beneficiaries, as of legal right or otherwise, from the continued life of the deceased, excluding all consideration of punitive elements, loss of society, wounded feelings of the survivors and suffering of the deceased. See, in part, *Fulgham v. Railroad Co.*, *supra*; and by analogy, *Baltimore & P. R. Co. v. Mackey*, 157 U. S. 72, 92, 15 Sup. Ct. 491, 39 L. Ed. 624; *In re Humboldt Lbr. Mfrs. Ass'n* (D. C.) 60 Fed. 428; *The Dauntless* (D. C.) 121 Fed. 420; *Hirchkovitz v. Railroad Co.* (C. C.) 138 Fed. 438; *Swift & Co. v. Johnson* (C. C. A., 8) 138 Fed. 867, 71 C. C. A. 619, 1 L. R. A. (N. S.) 1161; *Chicago, P. & S. L. R. Co. v. Wooldridge*, 174 Ill. 330, 51 N. E. 701; 8 Am. & Eng. Enc. Law (2d Ed.) 914; 13 Cyc. 362.

Thus, in *Baltimore & P. R. Co. v. Mackey*, *supra*, it was held that under a statute of the District of Columbia providing that one causing the wrongful or negligent death of another should be liable to an action of damages for such death, to be assessed "with reference to the injury \* \* \* resulting to the widow and next of kin of such deceased person," it was not error to charge the jury that in estimat-



ing the damages they might take into consideration the age of the deceased, his health, strength and capacity to earn money, as disclosed by the evidence, who his family were and of what they consisted, and from all the facts and circumstances make up their minds how much the family probably lost by his death, that is, how much they had a reasonable expectation of receiving if he had not been killed.

However, it would seem under the weight of authority, that the value of a father's services in attention to and care and superintendence of his children and family and in the education of his children, of which they are deprived by his death, is also to be considered as an element of pecuniary damages. 8 Am. & Eng. Enc. Law (2d Ed.) 915, 916, and cases cited.

It is, however, expressly provided by section 3 of the Act of 1908, that if the deceased employé was guilty of contributory negligence, the damages otherwise recoverable for the beneficiaries are to be diminished by the jury in proportion to the amount of negligence attributable to him.

[3] After careful consideration of the facts in this case in the light of the foregoing principles, without reciting the evidence in detail, I cannot avoid the conclusion that the jury in returning a verdict of \$10,000 have assessed the damages at a sum which, in the light of all the proof fairly represents full compensation to the beneficiaries for the loss of such pecuniary benefit as they could have reasonably expected from the continued life of the deceased—as distinguished from the damages which might have been recovered if his own right of action had survived—and without adequate deduction for the contributory negligence of the deceased himself, which, under the undisputed facts, was of such character as would, at common law, have entirely barred recovery, under the rule stated in *Elliott v. Railroad*, 150 U. S. 245, 248, 14 Sup. Ct. 85, 37 L. Ed. 1068, and that under all the circumstances of this case, just compensation to the beneficiaries, under the limited measure of recovery permitted by the Act of 1908, should not exceed the sum of \$7,500; the verdict, in so far as it exceeds this sum, being, in my opinion, against the plain weight of the evidence and excessive.

3. An order will accordingly be entered providing that if the plaintiff shall, within ten days from the filing of this opinion, remit \$2,500 of the amount of the verdict, the defendant's motion for a new trial will be overruled and judgment entered for the remaining \$7,500 assessed by the verdict, with interest from the date of the verdict; but if the plaintiff shall not make such remission within such time the verdict will be set aside and the motion for new trial granted on the ground that to such extent the verdict is excessive and against the clear weight of the evidence. *North. Pac. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755; *Arkansas Cattle Co. v. Mann*, 130 U. S. 69, 73, 9 Sup. Ct. 458, 32 L. Ed. 854; *Koenigsberger v. Min. Co.*, 158 U. S. 41, 52, 15 Sup. Ct. 751, 39 L. Ed. 889; *Buston v. R. R. Co. (C. C.)* 116 Fed. 235.

The Clerk will at once notify counsel for both parties of the filing of this opinion.

## In re THOMAS.

(District Court, N. D. New York. August 5, 1912.)

## 1. HUSBAND AND WIFE (§ 22\*)—WIFE AS AGENT.

A wife whose husband conducted a livery and sale stable, and who during his temporary absence at different times acted for him, had no implied authority after he had absconded to sell his property, unless in the usual course of business.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 140, 141; Dec. Dig. § 22.\*]

## 2. PRINCIPAL AND AGENT (§ 22\*)—EVIDENCE OF AUTHORITY—DECLARATIONS OF AGENT.

The authority of an agent cannot be proved by his own declarations.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 40; Dec. Dig. § 22.\*]

## 3. BANKRUPTCY (§ 145\*)—RIGHTS OF TRUSTEE—CONVERSION OF PROPERTY.

After a debtor absconded a number of his creditors appointed a committee, who, in connection with his wife, who had no authority thereto, sold a large part of his property, paid certain lien claims, and retained the remainder of the proceeds for future disposition. It did not appear that the debtor ratified the sale, or knew of it until after his adjudication as a bankrupt. *Held*, that the action of the committee constituted a conversion, and the bankrupt's trustee had the right to follow the property, or sue the committee for its value.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 205, 230-232, 234; Dec. Dig. § 145.\*]

## 4. BANKRUPTCY (§ 145\*)—RIGHTS OF TRUSTEE—CONVERSION OF PROPERTY.

Such committee surrendered certain carriages to a carriage company from which the bankrupt purchased them, and which claimed the right to reclaim them, but such claim was not sustained by the evidence. *Held*, that the committee were accountable for the value of the carriages, but that the trustee was entitled only to such proportion of the value as would pay its share of the expense of administration and dividends to such creditors as did not join in the appointment of the committee, the others being bound by its action; also, that the committee was accountable to the same extent for a sum paid from the proceeds of the property to one claiming a chattel mortgage thereon, which was invalid as to creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 205, 230-232, 234; Dec. Dig. § 145.\*]

## 5. BANKRUPTCY (§ 188\*)—LIENS—CHATTEL MORTGAGE—RIGHT OF TRUSTEE TO AVOID—FAILURE TO COMPLY WITH RECORDING STATUTE.

Under Lien Law N. Y. (Consol. Laws 1909, c. 33) § 235, which provides that a chattel mortgage, although filed, shall be invalid "as against creditors of the mortgagor" after the expiration of the first or any succeeding term of one year, unless within 30 days preceding the expiration of any such term a statement is filed showing, *inter alia*, the interest of the mortgagee or his successor in the property, as construed by the Court of Appeals of the state, the failure to file a renewal statement complying with such requirement renders the mortgage invalid as against the general creditors of the mortgagor, and as against his trustee in bankruptcy, who for the purposes of the statute represents such creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 270, 286-295; Dec. Dig. § 188.\*]

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. BANKRUPTCY (§ 188\*)—VALIDITY—CONSIDERATION PAID BY OTHER THAN MORTGAGEE.

The fact that a chattel mortgage made by a bankrupt, reciting that it was given to secure a loan from the mortgagee, was, in fact, made to secure a present loan from a bank to which it was assigned on the day it was made and recorded, or that the assignment was not recorded for some time afterward, *held* not to invalidate the mortgage, in the absence of any statute requiring the assignment to be filed, or any evidence that creditors of the mortgagor were misled to their prejudice.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 270, 286-295; Dec. Dig. § 188.\*]

7. BANKRUPTCY (§ 188\*)—TITLE OF TRUSTEE—LIENS.

A trustee in bankruptcy does not take the estate subject to liens which are invalid as against general creditors, although they may be valid as to the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 270, 286-295; Dec. Dig. § 188.\*]

8. BANKRUPTCY (§ 180\*)—VOIDABLE TRANSFERS—MORTGAGE MADE TO HINDER AND DELAY CREDITORS.

Under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), which makes void as against creditors transfers made by a bankrupt within four months prior to his bankruptcy "with the intent and purpose on his part to hinder, delay or defraud his creditors \* \* \* except as to purchasers in good faith and for a present fair consideration," a mortgage given by a bankrupt within four months, when he knew himself to be insolvent and was preparing to abscond without paying his debts, to secure money previously advanced him by the mortgagee, a bank, was not given for a present consideration, and is void as against his trustee, although given pursuant to an oral agreement made before or at the time the money was advanced.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 252; Dec. Dig. § 180.\*]

9. BANKRUPTCY (§ 166\*)—VOIDABLE PREFERENCE—REASONABLE CAUSE TO BELIEVE INSOLVENCY.

Said mortgage also held voidable as a preference under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445) as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1911, p. 1506) the bank having had knowledge that nearly all of the property of the mortgagor, including that mortgaged, was previously heavily incumbered, and having refused him further credit except on receiving both such mortgage and a chattel mortgage.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-258; Dec. Dig. § 166.\*]

In the matter of John B. Thomas, bankrupt. Review of order and decision of referee directing and refusing to direct certain payments. Order modified.

Dunmore & Ferris, of Utica, N. Y., for Taber and others.  
Martin & Jones, of Utica, N. Y., for the trustee.

RAY, District Judge. This review involves four distinct matters which for brevity may be spoken of as the Ames-Dean claim, Marshall mortgage claim, Addy mortgage claim, and Citizens' Trust Company mortgage. The Marshall and Addy claims involve chattel mortgages, and the other is a real estate mortgage.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

### General Facts.

Prior to the month of March, 1910, the bankrupt, John B. Thomas, a married man, had conducted the business of running a livery and sales stable in the city of Utica, N. Y. During his temporary absences his wife had acted for him, presumably with his authority, but there is no proof that she had a general power of attorney or authority to act for him. If agent at all, her agency was special. It does not appear that Thomas ever objected to or repudiated any of her acts done in his absence.

At some time in February, or early in March, 1910, said Thomas left the city of Utica, and for some considerable time his whereabouts were unknown to his creditors and the general public. It does not appear that he has returned, and his evidence in the bankruptcy proceedings was taken at some place in Ohio. He left his wife and a considerable part of his property behind. Shortly before leaving Utica, Thomas purchased a car load of horses in Canada, and gave his check for the purchase price drawn on a bank in Utica, but same was not paid when presented; there being no funds to his credit. He took these horses with him to New York City, where he disposed of them, and then spent the money in ways which he has refused to disclose.

After the departure of Thomas from Utica and on his failure to return or disclose his whereabouts, it being known that he was heavily in debt, and some time in the latter part of March, 1910, quite a large number of his creditors, representing probably about 80 or 90 per cent. of same in amount, held a meeting and discussed the situation, and in writing appointed a committee, the purpose of which is shown thereby, in part at least. It reads as follows:

"The subscribers, creditors of John B. Thomas, of Utica, New York, hereby designate and appoint William I. Taber, Charles D. Thomas, Arthur W. McLaughlin, Patrick T. Fitzgerald, and Joseph T. White as a committee to represent and act for us, and for us with the assistance of Katharine R. Thomas, wife of said John B. Thomas, to take such course with reference to converting the assets of said John B. Thomas into cash, as in their judgment shall be for the best interests of all the creditors and to divide and distribute the proceeds among all the creditors of said Thomas ratably after payment of liens, upon the amount of their respective claims.

"Dated, Utica, N. Y., March 21st, 1910.

"Creditors

Amount of Claim."

A large number of these appointments were signed, and I assume some were sent to and signed by various creditors who were not present at the meeting, and some are signed by one, some by two, and others by several of the creditors. However, they were duly signed. Something like 10 or 15 per cent. of the creditors never signed or assented thereto. This committee consented to act, and did act. William I. Taber, one of the number, acted as treasurer of such committee. Some one had prepared an inventory of the property belonging to Mr. Thomas. After the appointment of the committee, and I am taking these facts from the testimony of Mr. Taber, the members thereof, except Mr. White, went to the stables, conferred with creditors as to how the matter should be

handled, and considered the question of feeding and caring for the horses, and, in fact, purchased feed for them until sold. The committee had talks and conferences with Mrs. Thomas, the wife of the bankrupt, and she exhibited the books. This committee later made an auction sale of the property, and sold most of same. During the sale Mrs. Thomas billed out and receipted for the larger articles such as horses. Taber says:

"The committee acted in the course of disposing of property selling at private sale or auction sale as they could get best prices."

Thomas acted as auctioneer. This auction sale commenced March 24th, and continued about a week and until enjoined by the court. At the beginning of the sale, Mr. McLaughlin resigned from the committee. Mrs. Thomas was present, and assisted at the sale. The money received for the sale of certain of the property, something like \$7,374.59, was deposited in bank by this committee subject to its order. There was other property sold by the committee to which special attention will be called, and the committee made certain disbursements as expenses, which expenses are not in question here. Something like \$6,000 seems to have been turned over to the trustee in bankruptcy after his appointment. April 25, 1910, said John B. Thomas was duly adjudicated a bankrupt, and May 10, 1910, Abram G. Senior was duly appointed trustee of his estate, and he duly qualified May 12, 1910.

#### Ames-Dean Claim.

May 3, 1909, said John B. Thomas by written order directed the shipment to himself of certain property, including four carriages. The property was shipped and delivered, and the four carriages were in the possession of Thomas at the time of the appointment of such committee, and came into their possession. They were then worth the sum of \$255. The Ames-Dean Carriage Company claimed to own same under and by virtue of the terms of such order, and the committee delivered same to said "The Ames-Dean Carriage Company." The said order for such property, including said carriages, omitting the description of such property, reads as follows:

"The Ames-Dean Carriage Co., Jackson, Michigan:

"Please ship the following goods on or about *soon as ready* of the value as herein specified, and for which we agree to give our notes, on your usual terms, on receipt of invoice. Notes payable as per terms stated below. This order is not subject to countermand.

\* \* \* \* \*

"Terms 5% 30 days or 4 months note. Will reship balance of car.

"Said vehicles to be made and furnished according to description in your illustrated catalogue, when not otherwise specified herein, warranted to be well made and of good material; any breakage from defect of material or workmanship to be replaced free of charge for one year when not otherwise specified.

"It is agreed that all goods at any time on hand manufactured by you, and the proceeds of sales of goods received under this contract, or prior and similar contracts, also future orders, whether in cash, notes, book accounts or other proceeds, are to be held in trust by me for you and subject to your

order until I have paid in full all my obligations due or to become due to you, whether for goods sold under this contract or under prior and similar contracts or future orders.

"The title to and ownership of all goods shipped under this contract, or prior and similar contracts, also future orders, shall remain vested in you until the prices thereof shall be paid and until I have paid in full for all goods shipped me, in cash or until all notes given under this contract, or under prior and similar contracts or future orders are paid and nothing in this contract shall be deemed as releasing me from my obligations to pay for said goods as per the notes hereby contemplated.

"No agreements, verbal or otherwise, are binding on you unless embodied in this order which is given subject to your acceptance.

"[Signed] J. B. Thomas."

This was never filed as a chattel mortgage or conditional sale contract. It may be fairly inferred from the evidence that Thomas purchased buggies, etc., not only for use in his livery stable, but for sale. He says some were on hand not sold. The vehicles here in question had not been sold, and there is no evidence they had been used. Thomas testified he did not purchase them on consignment, had paid part of the debt in cash, and settled and paid the balance by giving his note; also that he purchased the carriages outright, on credit. The referee finds the committee liable to the trustee for the value of said carriages \$255. The justice and correctness of this ruling is challenged.

#### Marshall Mortgage Claim.

April 3, 1908, said John B. Thomas signed, acknowledged, and delivered to James Marshall a certain chattel mortgage covering certain horses and other personal property therein described. It recites that:

"I, John Thomas, of Utica, N. Y., being indebted to James Marshall of Utica, N. Y., for certain sums of money, which indebtedness is secured by a certain note or notes bearing date of April 1, 1908, payable to the said James Marshall and signed by me, now," etc.

This mortgage does not disclose the amount of the indebtedness. The note is not in evidence, nor is there any evidence or proof that there was a debt or note owing by Thomas to Marshall, when the money, the proceeds of certain of the property covered by the mortgage, was paid over to Marshall by the committee. In regard to this Taber testified as follows:

"Q. On page 6 of your record (Exhibit B) I note a statement of giving of check to Marshall April 6, 1910, for \$927. Please state what occurred for the payment of \$927 to J. Marshall. A. The Marshall mortgage covered several horses, sleigh, wagons, carriages, and harnesses about the place. As horses were sold, the money was turned over to Marshall, and, instead of covering separate list of these items, they were credited on regular sales slips and check drawn to him for \$217 which made up the amount, the horses having sold for \$390, \$155, \$165 which made \$710, check for \$217 given for the balance; the other articles having sold for more than that.

"Q. In what method did Marshall receive the \$710? A. As I remember, Mrs. Thomas handled that in the same way as the other horse sales.

"Q. That is to say, that when those four horses, Honey, Dandy, Bony, and Manie, were sold and brought \$710, Mrs. Thomas handed that \$710 to J. Mar-

shall? A. They were billed out to Marshall in the regular way. I held that money until April 5th.

"Q. You received it, and April 5th handed it to Marshall? A. Yes.

"Q. So that besides \$710 you also gave to Marshall \$217, making total of \$927? A. Yes.

"Q. (Witness shown paper, a certified copy of the J. Marshall mortgage.) That is on what you paid the \$927 to Marshall? A. Yes. (Paper offered in evidence and received as Exhibit E of to-day. Also offered in evidence a certified copy of a purported renewal of said chattel mortgage to J. Marshall. Received as Exhibit F of to-day.)"

The chattel mortgage (Exhibit E) was duly filed in Oneida county clerk's office on the 3d day of April, 1908, at 4:55 p. m. On the 11th day of March, 1909, at 1:55 p. m., "a statement of renewal of chattel mortgage" dated that day and signed by James Marshall was filed in said clerk's office. This renewal reads as follows:

"I, James Marshall, of the city of Utica, state of New York, the mortgagee named in a certain chattel mortgage, bearing date the 3 day of April, 1908,

"Made and executed by John Thomas now residing in the city of Utica, state of New York, to James Marshall, and filed in the office of the clerk of Oneida county, state of New York, on the 3 day of April, 1908, at 4:55 o'clock p. m. for certain sums of money which indebtedness is secured by a certain note or notes bearing date of April 1, 1908, payable to the said James Marshall and signed by me upon certain property then being and situate in the city of Utica, state of New York, do hereby, pursuant to statute, certify and state that there remains unpaid of the amount secured by said mortgage, the sum of ——— dollars and ——— cents (\$———), and interest thereon from the ——— day of ———, 19——, which sum is the amount of ——— interest in the property described in said mortgage claimed by ——— by virtue thereof.

\* \* \* \* \*  
 "Dated the 11 day of March, 1909. James Marshall, Mortgagee."

Neither the amount to secure which the mortgage was given nor the amount then remaining due and unpaid or due or unpaid is stated in this renewal. It appears that Marshall was present at the sale made by the committee and assented to the sale. Taber took the money and kept it until April 5th, when \$710, the proceeds of three horses, and a check of Taber's for \$217 drawn on the fund, was given to Marshall. It may be assumed this is the amount he claimed. The referee finds and holds that the said committee should pay this sum, in all \$927, to the trustee. This is challenged on this review.

#### Addy Mortgage Claim.

On the 14th day of February, 1910, said John B. Thomas signed, acknowledged, and delivered to one Frank P. Addy a chattel mortgage on 21 horses, which mortgage was that day duly filed in the Oneida county clerk's office. It recited:

"Know ye, that I, John B. Thomas, of Utica, N. Y., am indebted unto Frank P. Addy in the sum of 5,200 dollars (\$5,200), being for money advanced for a car load of horses, now for securing the payment of said debt, \* \* \* do sell, transfer and assign to the said Frank P. Addy all," etc.

Then follows a description of the property, power of sale, etc.

On the said 14th day of February, 1910, said Addy executed, acknowledged, and delivered to the Citizens' Trust Company of Uti-

ca, N. Y., an assignment of said chattel mortgage which was filed in Oneida county clerk's office March 24, 1910, at 2:25 p. m.

William I. Taber, one of said committee, and hereinbefore referred to, was and is the president of said Citizens' Trust Company. Further facts will be stated in connection with the real estate mortgage.

#### Citizens' Trust Company Mortgage.

March 1, 1910, said John B. Thomas and Katharine R., his wife, executed, acknowledged, and delivered to the said Citizens' Trust Company a mortgage on his real estate, bearing date February 19, 1910, which recites a consideration of \$1 and "other good and valuable consideration," and which, also, after describing the real estate mortgaged, contains the following:

"This grant is intended as and for collateral security for the payment of any and all sums of money which the said parties of the first part or either of them owes or which they or either of them may become hereafter indebted to the said party of the second part, and as and for collateral security for the payment of any and all indebtedness of said parties of the first part or either of them to the said party of the second part now existing or which may hereafter arise, and especially as and for collateral security for the payment of any and all notes signed or endorsed by the said parties of the first part or either of them and owned or discounted by the said party of the second part, and for the purpose of securing and indemnifying the said party of the second part of and from any and all loss, costs, charges, damages or expenses by reason of any indebtedness which now exists or which may hereafter exist in its favor against the parties of the first part or either of them."

The real property covered by the said real estate mortgage came to the possession of the trustee, and was sold by him, subject to all prior mortgages and liens, but free and clear of the lien of the above mortgage to said Citizens' Trust Company, for the sum of \$250, which money he has subject to the lien of such mortgage, if any; the lien by stipulation being transferred to the fund. The referee finds that this sum should be paid to the said Trust Company. This is challenged on this review.

The property covered by said Addy chattel mortgage was sold by the said committee in the manner described for the sum of \$2,025, it is claimed. This money is in the hands of the said committee held as a special deposit because of the claim of the Utica Trust Company thereto. The referee finds that this sum should be paid over by the committee to Abram G. Senior, the trustee, but also finds that the trustee should at once pay same over to the Citizens' Trust Company of Utica, N. Y., on such mortgage. This is challenged on this review.

The referee makes no finding of fact whatever as to the real consideration for such Addy chattel mortgage and real estate mortgage, and when paid, except as recited in such instruments, leaving it to be inferred that both the Addy chattel mortgage and the real estate mortgage were for a present valuable consideration.

#### Consideration.

The evidence shows that Thomas was never indebted to Addy; that Addy did not advance any money, but that the Citizens' Trust



Company did on an agreement that the advances should be secured by a real estate mortgage and a chattel mortgage or mortgages.

Said William I. Taber, the president of the said Citizens' Trust Company, testifies on this subject of these mortgages and the consideration therefor that on or about the 14th day of February (1910) he had a talk with J. B. Thomas relative to receiving the mortgages. He says:

"Think it was day before chattel mortgage that J. B. Thomas came with a note for \$5,000, stating that he had an order from some New York parties to furnish them horses, and, in answer to questions that I raised to advance the money because of the fact that he had promised to sell his stables, he said this was an order of horses for buying and selling and making on the market, and, after a good deal of talking, we decided to furnish that money, but would require security, security not only in form of chattel mortgage, but real estate mortgage, and it was agreed that real estate mortgage should cover all his property subject to prior liens, and chattel mortgage should cover articles mentioned therein. Q. Did you thereupon take list of chattels and prepare papers? A. Yes. Q. Is Exhibit C and real mortgage those papers? A. Yes."

(Exhibit C is the chattel mortgage and Exhibit G is the real estate mortgage.) He then states that Mrs. Thomas signed the real estate mortgage. Mr. Taber's evidence then continues:

"Q. Did you as matter of fact before the day of the execution of those two mortgages advance any money to Thomas, and, if so, how much? A. It covered for checks and drafts prior to this.

"Q. Before they were executed? A. Yes.

"Q. How much money did you take care of in that way? A. \$5,000.

"Q. How much money did you advance him from the 10th to 20th of February, prior to this talk? A. I can't recall exactly, it was several thousand.

"Q. Over \$3,000? A. Yes; over \$4,000.

"Q. Can you get it [the amount.]? A. Yes.

"Q. Between \$4,000 and \$5,000? A. Yes.

"Q. That money was advanced before securing of these chattel mortgage and real estate mortgage after this conversation and prior to making of the papers? A. Yes.

"Q. Thomas left Utica soon after the execution of the papers? A. Yes."

Later returning to the same subject, the following questions were asked by counsel for the Citizens' Trust Company and Mr. Taber, and the following answers given, viz.:

"Q. On or about the 14th of February you had a talk with J. B. Thomas, relative to real estate mortgage? A. Yes.

"Q. Between that day and the 20th of February you advanced him certain moneys? A. About the 10th of February that we made arrangements.

"Q. You had instructed our office to prepare those papers? A. I borrowed the searches and asked them to prepare the papers.

"Q. Mr. Garlock took the matter in hand? A. Yes.

"Q. Papers were signed on the 19th? A. The chattel mortgage on the 14th and real estate mortgage on the 19th."

He then testified as follows as to the financial transactions between the Citizens' Trust Company and Thomas between the 10th and 20th days of February, 1910:

"Q. Between the 10th of February after this talk and the 20th of February will you state how much new money the Citizens' Trust Company advanced

to J. B. Thomas between these two days. (Objected to by Mr. Martin as incompetent, immaterial. Objection sustained.)

"Q. Will you state how much the Citizens' Trust Company advanced to J. B. Thomas between the 10th and 20th day of February? A. Five thousand dollars given in form of checks for various amounts which will total even \$5,000.

"Q. Pending the receipt of these papers did J. B. Thomas overdraw his account? A. Yes.

"Q. Give them. A. The 14th \$159.65, \$10, \$99.50, \$31.41, \$500, \$210, \$7.50, \$25.13, \$50.75, \$465, \$2,460, \$50, on the 16th.

"Q. Go ahead and state what was the total amount of his check you carried for him each day from the 10th to the 20th. A. February 10th \$370.35, 11th \$808.56, 16th \$3,268.38, 17th \$749.26, 18th \$133.05 and \$88.07, 19th \$515.

"Q. On the 16th you credited item of \$5,000 to his account? A. I did.

"Q. That was the proceeds of the note which the chattel mortgage and real estate mortgage was given to secure? A. Yes.

"Q. Subsequently all of that \$5,000 which was credited to his account was paid out? A. Yes.

"Q. At the time of the credit of the \$5,000 note on the 16th, what was the amount of checks you had paid for him which there was no credit in the bank? A. Four thousand eight hundred nineteen dollars and forty-two cents.

"Q. So after credit of \$5,000 note it made a balance to his credit upon which he could check of \$180.58? A. Yes."

Cross-examined by Mr. Martin.

"Q. On the tenth day of Feb. 1910, you had a conversation with J. B. Thomas about further accommodation? A. That is as I recall it.

"Q. He had been a customer of the bank? A. Yes.

"Q. He was there to see about further accommodation? A. Yes.

"Q. What did you tell him would be required as you recall it? A. I think I have testified as to that. We should require chattel mortgage and real estate mortgage as security.

"Q. Real estate mortgage subject to prior mortgages? A. Yes.

"Q. Chattel mortgage on such property as not covered by other chattel mortgages? A. Yes.

"Q. You knew some of his property was covered by chattel mortgage? A. Yes.

"Q. That day by paying checks the bank let him have \$370? A. There were deposits along during those days, but we paid some checks that day amounting to \$370.75.

"Q. Are you able to state how much the checks you paid that day exceeded the balance to his credit? A. They did not exceed that day. The first day that the account was overdrawn was on the 14th.

"Q. What were the total of the checks paid out for him on the 14th? A. Three thousand two hundred sixty-eight dollars and thirty-eight cents and the 11th was the first overdraft.

"Q. Can you state how much was overdrawn on the 11th? A. Sixty-two dollars and two cents.

"Q. Then there were no more checks paid until the 14th? A. Yes.

"Q. Can you state how much was overdrawn on the 14th? A. Two thousand nine hundred forty-seven dollars and forty-five cents.

"Q. On February 15th the checks paid out were \$2,887.58, and overdrew how much? A. Four thousand five hundred thirty-five dollars and eight cents.

"Q. On the 16th? A. Checks \$749.26, overdraft left balance of \$224.76, 17th check of \$133.05 left balance of \$91.71.

"Q. On the 16th J. B. Thomas account was credited on the ledger with the amount of the \$5,000 note? A. Yes.

"Q. That note bears date the day previous? A. Some days previous.

"Q. These checks that were paid and made up this overdraft were miscellaneous checks that he attempted to draw on his account? A. What do you mean?

"Q. Checks to the order of different people? A. Yes."

It is evident from the testimony of Mr. Taber that on the 10th day of February, 1910, Thomas wanted more credit with the Trust Company; that the Trust Company agreed to extend it on having security by way of real estate and chattel mortgage which Thomas agreed to give; that neither party waited for the preparation and execution of the papers, but Thomas commenced drawing checks which overdrawed his account and these were paid by the Trust Company. On the 10th Thomas drew on his account, but did not overdraw, \$370.35. On the 11th he overdrawed \$62.02. On the 14th he overdrawed \$2,947.45. On the 14th the chattel mortgage was given to Addy, and the same day assigned to the Citizens' Trust Company. On the 16th the note of \$5,000 was given by Thomas, and it was credited to his account. On that day, prior to this credit, his account was overdrawn \$4,819.42. It is evident that the giving of the chattel mortgage to Addy and his assignment thereof to the Citizens' Trust Company was a mode of securing the overdrafts which at that time seem to have amounted to \$2,947.45, for Mr. Taber says:

"Q. On the 16th you credited item of \$5,000 to his account? A. I did.

"Q. That was the proceeds of the note which the chattel mortgage and real estate mortgage was given to secure? A. Yes.

"Q. Subsequently all of that \$5,000 which was credited to his account was paid out? A. Yes."

February 19, 1910, Thomas drew from the Trust Company \$515, and on that day the real estate mortgage is dated, but it was not executed or recorded until March 1, 1910, or some 10 days later. Therefore this mortgage was given March 1, 1910, to secure a past indebtedness, but pursuant to an agreement to give it, and on the faith of which agreement the credit was extended.

From the evidence of Thomas we would conclude that notes were given from time to time up to the 16th, when the \$5,000 note was made, and that on that day the old notes were surrendered and the large note given in their place as well as for an additional sum. This evidence was read into the record, and the Trust Company did not dispute it except in the way stated.

[1] 1. There is no evidence before the court to justify a finding that Mrs. Thomas was the agent of John B. Thomas with any power to sell or dispose of his property in the mode it was sold and disposed of, or to authorize such disposition. If she had any apparent authority, it was simply to let horses and carriages, collect pay for the use, and sell goods in the usual course of business, and collect and pay accounts in the usual course of business. This was the full extent of her apparent authority so far as anything she had ever done or been permitted to do is concerned. And as said in 31 Cyc. 1218:

"It will not be inferred from the fact that third persons thought the agency existed, nor because the alleged agent assumed to act as such, nor because the conditions and circumstances were such, as to make such an agency seem natural and probable, and to the advantage of the supposed principal. Finally, an implied agency must be based upon facts, and facts for which the principal is responsible, and upon a natural and reasonable and not a strained construction of those facts. And if, in view of the facts, an implied agency is apparent, its extent is limited to acts of a like kind with those

from which it is implied, and is to be restricted to the purpose for which the facts show that it was granted."

Therefore the acquiescence of Mrs. Thomas and the assistance rendered by her in the sales made afford no protection to this committee. "An estoppel cannot be invoked in favor of one who has relied upon the alleged agent's declaration of his authority, and made no further inquiry." *Buskirk v. Talcott*, 96 N. Y. Supp. 714; *Morris v. Joyce*, 63 N. J. Eq. 549, 53 Atl. 139; 31 Cyc. 1244; *Quay v. Presidio*, 82 Cal. 1, 22 Pac. 925. Hence what she said to them is immaterial.

[2] 2. Power or authority in Mrs. Thomas to consent to such sales or authorize them could not be proved by her declaration or statements to the committee. It is settled that agency cannot be established by the proof of the declarations of the alleged agent, even if made in connection with the doing of the acts in question. See authorities cited.

[3] 3. The title to all this property, the horses, carriages, etc., was in John B. Thomas at the time the committee acted and sold and disposed of same, and remained in him down to the time of the adjudication in bankruptcy. Even the filing of a petition in bankruptcy does not divert the title of the bankrupt. *Johnson et al. v. Collier*, 222 U. S. 538, 32 Sup. Ct. 104, 56 L. Ed. 306, decided January 9, 1912. Title to the proceeds of the sales made vested in the said John B. Thomas and remained in him down to the time of the adjudication subject to his right, on being advised of the truth as to what had been done, all the facts, to repudiate the transactions, and sue the members of the committee. The acts of the committee constituted a conversion of his property. There is no evidence that Thomas ever ratified the transactions, or that he was informed thereof prior to the adjudication in bankruptcy. Therefore the trustee, when duly qualified, had the right to repudiate and follow the property, or sue the committee for the value waiving the tort.

#### Ames-Dean Claim.

[4] If, therefore, the three carriages passed over to the Ames-Dean Carriage Company by this committee actually belonged to John B. Thomas, were his property, the members of the committee who acted in the matter are liable for the value thereof to the trustee in bankruptcy. As a chattel mortgage the order referred to and recited was void as to the trustee because not filed. *Skilton v. Coddington*, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885. But was it void as between the Ames-Dean Company and Thomas, so that such company had no right to take possession?

Assuming that Thomas himself is in error in testifying that he purchased all the carriages outright and paid for same by giving his note which was accepted, and assuming that this order covered the transaction, but that a settlement was made as to all of the property described therein, a large number of articles and carriages besides the three in question, there was only a balance of account, and, if that account was settled and the Carriage Company took a note for such balance (and all this is not disputed), then the Ames-Dean Car-

riage Company only had a lien good as against Thomas at best, but not as against his creditors, as the order in the nature of a chattel mortgage had not been filed as required by law. *Skilton v. Coddington*, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885. There is no proof that the note or debt was due. If the situation was such that the Carriage Company had the right to demand of and take from Thomas the possession of these carriages, it had the same right as against the committee, otherwise not. It is contended that this committee did not take possession of this property, but I think the evidence of Mr. Taber, who was very fair and candid in his testimony, together with the authorization signed by the creditors, or about 90 per cent. of them, shows that they did. I think this referee was right in finding that this committee should account for the value of these carriages. However, this does not mean that they must necessarily pay over the whole value thereof to the trustee, unless they elect so to do, and then receive back the part they are not in fact and equity liable for. This committee had authority from (it is stated, I have not sufficient facts in this record to base the statement on) about 90 per cent. of the creditors in amount, and some 38 in number, to do what they did, and all of such creditors are bound by their acts. It would be most unfair and unjust to have the value of these carriages paid to the trustee and distributed to all the creditors. That fund is, of course, subject to its share of the expenses of administration, including commissions and to be counted in figuring the distributive shares of creditors so as to ascertain the just shares therein of non-assenting creditors, but so much and so much only can be retained by the trustee, and such proportions and such only need be paid over to the trustee as will pay its part of the expenses, commissions, and distributive shares of nonassenting creditors.

#### Marshall Mortgage Claim.

[5] I do not see that this committee had any justification whatever for paying over this \$927 to Marshall. As to creditors, his chattel mortgage was and is "invalid," for the reason that the statute of the state of New York as to refileing or filing a statement had not been complied with. True, the transaction took place shortly prior to the filing of the petition in bankruptcy. However, the owner of this property, later adjudicated a bankrupt, and actually a bankrupt at the time, had left, whereabouts unknown, and these creditors, not all, assumed to sell, through this committee, all his property, and apply it to the payment of his debts. True, they were volunteers, but acting without authority, and they were wrongdoers as to nonassenting creditors and Thomas himself. It is immaterial that Mrs. Thomas, the wife, joined in and assented and aided. And it is immaterial that Marshall himself took part in and assented to this mode of disposing of the property. If his chattel mortgage was invalid as to creditors, he had no right to the property, and as mortgagee he could confer none. And it is immaterial that this transaction took place shortly before the filing of the petition in bankruptcy, and that the creditors had no judgments or executions re-

turned unsatisfied. Their rights were the same as though they had obtained judgments, etc., but their remedy was to obtain judgment, execution, etc. The bankruptcy proceedings interfered with this, interposed, and thereupon the trustee had the right in the interest of all these nonassenting creditors to recover the property or its value. *Skilton v. Coddington*, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885. This case followed by the Supreme Court of the United States and now by the Circuit Court of Appeals in this circuit, and which overrules the dicta in *Re N. Y. Economical Printing Co.*, 49 C. C. A. 133, 110 Fed. 514, is in line with *Stephens v. Perrinc*, 143 N. Y. 476, 39 N. E. 11, and *Karst v. Gane*, 136 N. Y. 316, 323, 32 N. E. 1073, and holds that a chattel mortgage not filed as required by statute is void as to general creditors who became such prior to actual filing, and that the trustee in bankruptcy can, in behalf of all creditors, avail himself of such nonfiling notwithstanding the fact that such creditors had not obtained judgments and execution returned unsatisfied, such preliminaries being a matter of procedure merely, and not going to the right. Prior to bankruptcy, general creditors with judgment and execution can seize the mortgaged property from the mortgagee, even if the mortgagee has taken possession, but not from a bona fide purchaser from such mortgagee, but, after bankruptcy, the trustee may seize the property in the hands of the mortgagor or mortgagee, or recover its proceeds from such mortgagee who took possession before bankruptcy. See *Stephens v. Perrinc*, supra; *Skilton v. Coddington*, supra; *Russell v. St. Mart.*, 180 N. Y. 355, 73 N. E. 31; *Karst v. Gane*, 136 N. Y. 316, 323, 32 N. E. 1073. If, therefore, Marshall was not entitled to the property mortgaged for the reason his renewal statement was insufficient, he was not entitled to the proceeds of such property, and, if he was not entitled to the property or its proceeds, this committee which made the sale had no right or authority to pay such proceeds, or the proceeds of other property of Thomas to Marshall in satisfaction of his alleged lien. As against general creditors, Marshall had no lien on the property. These gentlemen composing this committee had no legal right to sell any of the property of Thomas and apply the proceeds to the payment of the debt due and owing to Marshall from Thomas, if any. Article 10 of the Lien Law of the state of New York, relating to chattel mortgages (3 Consolidated Laws of the State of New York, pp. 2170, 2173), in section 230, provides that a chattel mortgage, if not accompanied by an immediate delivery and continued change of possession of the mortgaged chattels, "is absolutely void as against the creditors of the mortgagor," unless the mortgage or a true copy is filed as prescribed in subsequent sections, and by section 235 it is provided:

"Mortgage invalid after one year, unless statement filed. A chattel mortgage, except as otherwise provided in this article, shall be invalid as against creditors of the mortgagor, and against subsequent purchasers or mortgagees in good faith, after the expiration of the first or any succeeding term of one year; reckoning from the time of the first filing, unless, (1) within thirty days next preceding the expiration of each such term, a statement containing a description of such mortgage, the names of the parties, the time when and place where filed, the interest of the mortgagee or any person who has suc-

ceeded to his interest in the property claimed by virtue thereof, or (2) a copy of such mortgage and its indorsements, together with a statement attached thereto or indorsed thereon, showing the interest of the mortgagee or of any person who has succeeded to his interest in the mortgage, is filed in the proper office," etc.

There was no effort to comply with this provision of the statute so far as stating the interest of the mortgagee in the property was concerned, although there were blank spaces to be filled. As no sum was inserted as unpaid, we might assume nothing was unpaid but for the mere fact that the paper was filed as a "Statement Renewal Chattel Mortgage" (Exhibit F), from which we would infer a purpose to renew, and we would also infer a want of purpose to renew a paid chattel mortgage. In any event, it is not a substantial compliance with the statute, and hence the mortgage from April 3, 1909 (it having been filed April 3, 1908), was "invalid" as against all creditors of John B. Thomas, and was invalid when the committee sold the property and turned over the proceeds to Marshall, and the trustee in bankruptcy can follow the proceeds in the hands of Marshall, or hold the parties who took the possession of the property from Thomas and converted it into money, and paid the proceeds over to Marshall even with his assent and concurrence. As against creditors, now represented by this trustee, the mortgage was "invalid." It matters not that this committee was acting in good faith. They acted without authority from Thomas and certain of his creditors, and as to them their acts were wrongful. It is, of course, true, as stated with reference to the proceeds of the carriages, that the assenting creditors cannot share in the recovery. If their committee, their agents, paid something they should not have paid or applied money derived from the sale to the payment of illegal claims, that is a matter between the committee and such assenting creditors for whom they acted.

It is contended by counsel for the committee that the word "invalid" in the statute does not have the effect to make the mortgage absolutely void as to the trustee and these nonassenting creditors. But the word is used in its ordinary sense and meaning, which is:

"Not valid; of no force, weight or cogency, weak. \* \* \* In law, having no validity or binding force; wanting efficacy; null; void, as an invalid contract or agreement." Century Dictionary.

There is nothing in the context of this statute to limit or modify the meaning of the word. The statement required as to the interest of the mortgagee in the property was and is an essential statement, and its omission made the statement of renewal ineffective to preserve the lien of the mortgage. *Marsden v. Cornell*, 62 N. Y. 215, 218, 219; *Fish v. Humphrey*, 1 Denio (N. Y.) 163; *Ely v. Carnley*, 19 N. Y. 496. This court is without power to repeal a plain statutory provision of the state of New York. Really we come to the proposition whether or not a number, but not all, of the creditors of an absconding insolvent debtor can get together and appoint an agent to take possession of, sell, or dispose of the property of such debtor, and after paying liens thereon, if any, dis-

tribute the proceeds amongst the general creditors, and whether or not such agent can escape liability and accountability to the trustee in bankruptcy when appointed in proceedings duly instituted for his errors, mistakes, and for payments from the insolvent's estate on alleged but in fact invalid liens; whether or not in such a case the trustee is relegated to an action for the dissipation and misapplication of the absconding debtor's property, made in his absence and without his authority, against the party or parties receiving the property or its proceeds? The question is an important one in the administration of the affairs of insolvent debtors. If this can be done, then a minority of the creditors of an insolvent absconding debtor can appoint a committee to act as court, marshal, referee, and trustee, and from its acts, however mistaken and contrary to law, there will be no appeal, and for wrongs done not willful there will be no remedy except for the trustee when duly appointed and authorized by a duly constituted court to follow the property and the recipients thereof into possibly far distant states (here, in one case, Ohio), and there contest title in the state courts. The time may come when such tribunals will act as a sort of appellate court to right the alleged wrongs done by the courts, but they should not, at present, be recognized as courts of first instance. I have no doubt that these creditors and this committee appointed by them acted in the utmost good faith and purposed to conserve the estate and save expense. However, they acted at their peril, and are answerable to the law. There is a duly organized constitutional court known as the court in bankruptcy, authorized by an act of the Congress of the United States, and which has full and plenary power in such cases as this was, and there is a course of procedure, the best Congress was able to agree upon, which ought to be followed. I am of the opinion that those who do not follow it are answerable to the courts and its duly constituted and chosen officers for any loss the estate of the insolvent sustains by reason of their unauthorized acts. It can be, and is, argued that, if Thomas had returned, he could not have recovered the proceeds of the property mortgaged to Marshall and paid over to him by this committee (as he was present and in point of fact and in effect took possession) from Marshall or the members of this committee, inasmuch as the mortgage was valid, whether properly refiled or not, as between Thomas and Marshall, and that the rights of the trustee in bankruptcy are no greater than those of Thomas would have been had he returned. This line of reasoning ignores the fact that the trustee represents the creditors and their rights and interests, and that the unauthorized acts of this committee placed this property and its proceeds out of the possession of the bankrupt, and where it was impossible for the trustee to take actual possession as he otherwise could have done. In *1 Loveland on Bankruptcy*, 958, § 474, it is said.

"It may be observed that a trustee is expressly authorized to avoid a mortgage, as a preference, which is valid as between the bankrupt and the mortgagee, or one given within the four months' period to hinder, delay, or defraud creditors, which could not be set aside by the bankrupt, or one which



for want of record or other reason is not valid as a lien as against the claims of creditors, although it is valid as between the mortgagor and mortgagee. In these cases the trustee is vested with the rights of creditors in addition to the title of the bankrupt."

It is, of course, unnecessary to say, but, to avoid confusion, may be proper to state, that many cases may be found both in the decisions of the Circuit Courts of Appeal and the Supreme Court of the United States where unfiled and not properly refiled chattel mortgages have been held valid as against creditors and the trustee in bankruptcy. Whether valid or invalid as against creditors and the trustee depends on the statute of the particular state where the transaction arose. In New York (*Skilton v. Coddington*, supra) they are invalid; in Kentucky valid as to creditors, unless their claims are reduced to judgments prior to bankruptcy. *Holt, Trustee in Bankruptcy, v. Crucible Steel Co. of America*, decided by the Supreme Court of the United States April 1, 1912, 224 U. S. 262, 32 Sup. Ct. 414, 56 L. Ed. 756, and where the whole subject is considered and the cases are referred to. See, also, *York Mfg. Co. v. Cassell*, 201 U. S. 344, 352, 26 Sup. Ct. 481, 50 L. Ed. 782. It follows that this committee must account for and pay over so much of the value of this property—that is, so much of the \$927—as may be required to pay to the nonassenting creditors their proportional share thereof, and also so much as may be required to pay its proportional part of the expenses of administration and commissions. The trustee cannot take advantage of the situation for the benefit of the assenting creditors.

#### Addy Chattel Mortgage Claim.

[6] The parties handled this matter gingerly in giving the evidence regarding it. Who Addy was does not appear. There is no proof that he personally advanced any money or took or held any note, except as we refer to the recitation in the mortgage. On the other hand, Taber says this chattel mortgage was given to secure the advances made and to be made by the Trust Company and some of which were made on the 14th day of February. This mortgage was at once assigned to the Citizens' Trust Company, but the assignment was not recorded until March 24, 1910, some 40 days subsequent to the giving and filing of the mortgage. If the testimony of Mr. Taber, the president of the Citizens' Trust Company, is true that Thomas agreed to give this mortgage to secure money to be furnished by the said Trust Company, and that the Trust Company did furnish it, and that this mortgage was given to secure that money so furnished, then it was not given to secure any note given to Addy for money advanced by Addy to pay for a car load of horses, and the mortgage itself was misleading and would operate to deceive and mislead creditors of Thomas who, by this circumlocution, would be kept in ignorance of the fact that Thomas had no credit with the Trust Company and no account there of any amount except as created by a loan secured by this chattel mortgage on his livery stock of horses, and of which

fact the creditors were kept in ignorance. As to creditors, it would leave them to suppose that, while Thomas owed Addy for money advanced to pay for a car load of horses, he had a large account with the Trust Company, and was doing a fair business to say the least. If the real transaction was that the Trust Company furnished the money on an oral agreement that payment should be secured by a chattel mortgage, and this mortgage was given in fulfillment of that agreement, and Addy was to take it for the benefit of the Trust Company and assign it to such company and did, and this was a legal and proper way to give a chattel mortgage to the Citizens' Trust Company to secure the payment of such debt, then the Citizens' Trust Company was the real mortgagee, and the mortgage and the assignment of same, both together, constituted the mortgage to the Citizens' Trust Company. If the object or purpose of filing a chattel mortgage is to give notice and information to creditors and subsequent lienors that the mortgagor owes the real mortgagee a certain sum of money the payment of which is secured by a lien on the mortgagor's goods and chattels so that inquiry can be made of the mortgagee from time to time as to the actual amount of the indebtedness, then this transaction failed to comply with the spirit and true intent of the statute relating to the filing of chattel mortgages as a material part of the chattel mortgage contract was not filed until March 24, 1910, three days after the committee was appointed and had taken possession of the property. The statute requires a chattel mortgage and the whole of it to be filed, but there is no statute in New York requiring the filing of the assignment of a chattel mortgage. Inquiry could have been made of Addy and then of his assignee as to the amount due on the mortgage. On the trial no inquiry was made of Mr. Taber as to the connection of Addy with the transaction, or the reason why the mortgage was given to him. He may have been an officer of the Trust Company. The true consideration was open to full inquiry, and it seems to me that this court should not assume or infer from this evidence that the connection of Addy with the transaction was anything but legal and proper. It may be that in some way the Trust Company loaned the money through him, and that he became responsible therefor as surety or indorser. The transaction, as shown by the proof, creates some suspicion, but does not establish fraud as matter of fact, and I know of no rule that makes such a transaction fraudulent or invalid as a matter of law. I do not approve of such a mode of doing business, and possibly it ought to be discountenanced and made invalid by legislative enactment, but that is not a matter for this court to decide. In *Hincks v. Field*, 60 Hun, 576, 14 N. Y. Supp. 247, affirmed 129 N. Y. 633, 29 N. E. 1030, it was held that a debt owing by one person may be secured by a mortgage given by another on his individual property, and that the creditors of such person giving the mortgage cannot complain; that is, it is not necessary that the consideration for a mortgage move from the mortgagee to the mortgagor. In *Chafey v. Mathews*, 104 Mich. 103,

62 N. W. 141, 27 L. R. A. 558, a mortgage securing an indebtedness due to the bank ran to the cashier of the bank in his individual name only, but other creditors of the mortgagor knew the purpose of the mortgage, and were not prejudiced by the form of the transaction. In *Russell v. Longmoor*, 29 Neb. 209, 45 N. W. 624, the actual ownership of the money advanced as the consideration for the giving of the mortgage was held to be immaterial. In *Craft v. Barndow*, 61 App. Div. 247, 70 N. Y. Supp. 364, the name "James B. Stead" was inserted as mortgagee in place of "Sylvester B. Sage." Stead made no claim. The court held that no reformation of the instrument was necessary, and that the mortgage was good and valid as between the mortgagor and the person whose name should have been inserted as mortgagee; he having received and filed it.

These cases do not really cover the proposition here. However, there is no evidence that other creditors of Thomas were misled or prejudiced. In the absence of some decision to the contrary, and I am not pointed to any, I will hold that as the Trust Company concededly advanced or paid the consideration for this mortgage, some \$2,947.45 of it, on the day the mortgage was actually executed and delivered to Addy and filed and assigned by Addy to the Citizens' Trust Company, that it was a valid instrument as between Thomas and said Trust Company, and created a valid lien on the property described therein to that extent, viz., \$2,947.45, as against Thomas and his creditors and the trustee in bankruptcy. There is no evidence that the property mortgaged was worth more than that sum, and hence the decision of the referee that the Citizens' Trust Company is entitled to such sum of \$2,025 from the trustee when received by him was correct, and is affirmed. Of course, the committee having it in possession or custody must pay same to trustee in bankruptcy as he is entitled thereto as against such committee.

#### Citizens' Trust Company Mortgage.

As we have seen, there was an agreement to give a real estate mortgage made on the 10th day of February, 1910, to secure the payment of money to be advanced by the Trust Company to Thomas. Thomas was thereupon allowed to overdraw his account, and on the 16th his note for \$5,000 was given and accepted, and the amount thereof credited to his account, and he proceeded to draw the balance of the money and all of it prior to March 1, 1910. On the 1st day of March, 1910, Thomas and his wife executed and delivered the mortgage. There was no new indebtedness or indebtedness arising on that day, and no present consideration for the mortgage. This was within four months of the filing of the petition in bankruptcy against Thomas and the adjudication which follows. It was the giving of a security for the payment of a pre-existing debt pursuant to an oral agreement to give it and on the faith of which agreement this money was advanced or loaned several days before the security was exacted or actually given. No

indebtedness arose at the time of or subsequent to the giving of such mortgage, and nothing was parted with at that time. An agreement to give security followed at a subsequent time, date, by giving it pursuant to such agreement, is not the giving or execution of such security on the day or at the time the agreement is made. The actual giving of such security at such subsequent date does not relate back to the date or day of the agreement, even if the consideration is paid at the date of such agreement or intermediate the agreement and the execution and delivery of the mortgage.

[7, 8] "The rule that the trustee takes the estate of the bankrupt in the same plight as the bankrupt held it is not applicable to liens which, although valid as to the bankrupt, are invalid as to creditors." *First National Bank of Baltimore v. Staake*, 202 U. S. 141, 149, 26 Sup. Ct. 580, 50 L. Ed. 967. In short, the trustee does not take the estate subject to liens which are invalid as to creditors. This court has already asserted this in *Re Cramond* (D. C.) 145 Fed. 966, 971. Section 67d of the Bankruptcy Act provides as follows:

"Liens given or accepted in good faith and not in contemplation of or in fraud upon this act and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this act."

Section 67e provides as follows:

"That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors."

Section 1 of said act, "Definitions," provides (25):

"Transfer shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security."

This mortgage to the Citizens' Trust Company was a "transfer" made by the (now) bankrupt "within four months prior to filing the petition" and if made by Thomas with intent and purpose on the part of Thomas, "his part," to hinder, delay, or defraud his creditors, or any of them, was and is null and void. If given with such intent and purpose on the part of Thomas, it is immaterial what the intent and purpose of the Citizens' Trust Company was; for, unless it paid or gave a "present fair consideration," the mortgage is void. Good faith alone on the part of the Trust Company

does not protect the Trust Company. The consideration must have been a "present" one. The words "to the extent of such present consideration only" have been inserted in section 67d since this proceeding was instituted, and those words do not affect the rights of these parties. The subsequent part of section 67e makes transfers of property void if invalid by the laws of the state where the transaction took place, but this has nothing to do with the real question presented here. If Thomas made this real estate mortgage with intent and purpose to hinder, delay, or defraud his creditors, or any of them, it is null and void, unless the Trust Company took it in good faith and for a "present" fair consideration.

It cannot be doubted from the evidence that Thomas intended and purposed to hinder, delay, and defraud his other unsecured creditors. (1) He was hopelessly in debt and insolvent and knew it. (2) He had even then run in debt for a car load of horses which he took to New York and disposed of, and used the proceeds in ways which he refused to disclose on the ground it would incriminate him to answer. He drew and delivered a check in payment which was never paid as he had no funds. He had exhausted in other ways all the money advanced and credited by the Citizens' Trust Company. On the 14th of February, he gave the chattel mortgage on his livery stock which with other valid mortgages was for a sum greater than its value, and he almost immediately used all the proceeds not used up before. He had no credit with the Trust Company where he did his business. His real estate was then incumbered to an amount within \$250 of its full value. Taking all the evidence and his own admissions, it is plain that he had determined to abscond and leave his creditors unpaid except as secured days before he gave this mortgage. The only effect and the natural and known effect of giving these mortgages, and this real estate mortgage on the 1st day of March, 1910, was to hinder, delay, and defraud his other creditors. It could have no other effect. Thomas, under the circumstances disclosed, is presumed to have intended the natural, inevitable, and known consequences of his own acts, which were to hinder, delay, and defraud his other, or unsecured creditors. He was insolvent, and very soon adjudicated a bankrupt. If this section of the Bankruptcy Act has any validity and is to be given effect in any case, it should be given effect in this, where all the facts are undisputed and show conclusively that there was no "present" consideration for the mortgage, and that it was given by the mortgagor, within a short time adjudicated a bankrupt, when insolvent and with the intent and purpose on his part to hinder, delay, and defraud his other creditors, or some of them.

To bring this case within section 67e above quoted, it is, of course, necessary that the evidence establish a fraudulent intent and purpose on the part of Thomas, something more than the mere giving of a preference which will avoid the transfer if at the time of the transfer the person making it was insolvent, and the transfer would then operate as a preference and the person receiving it

then had reasonable cause to believe that the enforcement of such transfer, mortgage, would effect a preference; that is, enable the Citizens' Trust Company to obtain a greater percentage of its debt than any other of the creditors of Thomas of the same class. Sections 60a and 60b as amended. *Coder v. Arts*, 213 U. S. 223, 242, 243, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008. Here the fraudulent intent on the part of Thomas is a question of fact, to be determined on the whole evidence. The mere fact that one creditor is preferred over another or others, or that the transfer might have the effect to secure one creditor and deprive others of the means of obtaining payment is not sufficient. *Coder v. Arts*, supra; *Stewart v. Dunham*, 115 U. S. 61, 5 Sup. Ct. 1163, 29 L. Ed. 329; *Huntley v. Kingman*, 152 U. S. 527, 14 Sup. Ct. 688, 38 L. Ed. 540. There is no actual fraud in merely securing one creditor and not others if there be an honest purpose to pay all, but here we have decisive proof that Thomas was getting all the money and property he could into his hands with the intent and purpose to abscond, use same for his own purposes, not pay his other creditors at any time. His acts involved actual wrong, a bad intent, and moral turpitude. It must be remembered, also, that since *Coder v. Arts*, supra, was decided, section 67d has been amended so that liens "given and accepted in good faith, and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law if record thereof was necessary in order to impart notice," are not affected by the Bankruptcy Act "to the extent of such present consideration only." The last quoted words were inserted by the amendments of June 25, 1910, after the institution of this bankruptcy proceeding so the insertion of the words of the amendment does not affect this case.

[9] Is this real estate mortgage voidable by the trustee as a preference? Clearly so, I think. So far as Thomas is concerned, he knew that he was hopelessly insolvent. The facts proved and within his knowledge show this. He had lost credit and obtained it with the Trust Company only by mortgaging all he had. The Trust Company is charged with notice that all his real estate was covered by mortgages to nearly its full value, and it insisted on a mortgage on substantially all his personal property not already covered by mortgage. He had offered his property and business for sale, and the president of the Trust Company knew this. Other chattel mortgages were on file, and Thomas drew the main part of the \$5,000 loaned after February 10, 1910, by overdrafts and before the chattel mortgage and note were actually given, and all of it prior to March 1st. It is inconceivable that Mr. Taber did not have reasonable cause to believe March 1, 1910, and before, not only that Thomas was actually insolvent, but that he intended to give a preference, and it is perfectly plain that the Trust Company intended to get a lien in preference to all other creditors of Thomas. It was put on inquiry, and under the circumstances of this case is charged with knowledge of all it might have learned by inquiry. The statement of Mr. Taber shows he was put on

inquiry and declined to extend credit without the security promised. The transactions between February 10th, and March 1st, inclusive, cannot be regarded as one continuing transaction, so as to make, in the eye of the law, the money put to the credit of Thomas February 16th, the little that was put to his credit, a present consideration of March 1, 1910. If transactions are to be upheld on mere oral agreements to give mortgages, which are not given until a subsequent date, on the ground that they are for a present consideration, the door is wide open for the grossest frauds, and the words of the statute, "for a present fair consideration," are judicially legislated out of same. *In re Great Western Mfg. Co.*, 152 Fed. 123, 127, 81 C. C. A. 341; *In re Dismal Swamp Contracting Co.* (D. C.) 135 Fed. 415, 417; *In re Ronk* (D. C.) 111 Fed. 154; *Pollock v. Jones*, 124 Fed. 163, 61 C. C. A. 555; *In re Sheridan* (D. C.) 98 Fed. 406; *Wilson v. Nelson*, 183 U. S. 191, 22 Sup. Ct. 74, 46 L. Ed. 147.

*In Re Ronk*, supra, Judge Baker said:

"It cannot be successfully maintained that the verbal agreement created a valid lien as against the claims of the creditors; and if it did not create a valid lien, then, by the terms of the Bankruptcy Act, it cannot be enforced as a lien entitled to priority over other claims. It created no lien—nothing but a secret equity, possibly good as between mother and son, but certainly not valid and enforceable to the prejudice of the claims of creditors. The Bankruptcy Act embraces payments for the purpose of giving preferences, as well as the giving of securities for such purposes; and it would hardly be contended that a preference by way of payment, otherwise invalid, would be valid because the debtor had agreed at the time it was contracted to pay the debt without defalcation on a specified day. The doctrine contended for by the mortgagee would necessarily invite and inevitably lead to the defeat of the Bankruptcy Act. It would be easy, in every case where it was desired to thwart the operation of the law and to give a preference to a relative or a friend, to make an agreement at the time the money was loaned or the credit given for a mortgage to be executed in the future. If the law can be thus evaded, it would be an open invitation to every person loaning money or giving credit to the bankrupt to enter into such a verbal agreement with him. Such agreements, if held valid, would create secret liens upon the bankrupt's property, and would enable him in every case to effect the very objects which it was the purpose of the bankruptcy act to prevent. Such agreements would undoubtedly be made, in every case where the debtor wished to secure relatives and friends, to the detriment of his other creditors. It would be a standing invitation to perjury, and would defeat the declared policy and purpose of the bankruptcy act."

This is quoted with approval in *Re Dismal Swamp Contracting Co.* (D. C.) 135 Fed. 417. The same proposition is held in *Tilt v. Citizens' Trust Co.* (D. C.) 191 Fed. 441, 449, and Judge Cross quotes with approval from *In re Great Western Mfg. Co.*, 152 Fed. 123, 127, 81 C. C. A. 341, 345. In this case of *Tilt v. Citizens' Trust Co.* the familiar rule to which I have referred is also declared:

"A creditor of a bankrupt who took security within four months prior to the bankruptcy with notice of facts which would incite a man of ordinary prudence to inquiry as to the solvency of the debtor is chargeable with notice of all facts which a reasonably diligent inquiry would have disclosed."

#### General.

That the acts of the committee in intermeddling with the property of Thomas after he had absconded, and when they knew he

was insolvent, constituted a wrong and injury to his property, and that the right to recover therefor passed to the trustee on his qualification does not seem to demand the citation of authorities, but it may be well to do so.

When a person who has no right to meddle with the goods of another takes them and removes them from one place to another, he is guilty of a trespass; but, if he exercises dominion or control over them for the benefit of himself or of some other person or persons, he is guilty of a conversion. Addison on Torts (4th Eng. Ed.) American notes, 393, 394. And all such rights of action for injury to property or property rights pass to the trustee in bankruptcy. 1 Loveland on Bankruptcy (4th Ed.) § 403; *In re Gay*, 182 Fed. 260, 25 Am. Bankr. Rep. 111; *Hansen Co. v. Wyman*, etc., 105 Minn. 491, 117 N. W. 926, 21 L. R. A. 727; *Williams v. Heard*, 140 U. S. 529, 11 Sup. Ct. 885, 35 L. Ed. 550. But a right of action for personal injuries does not. *Sibley v. Nason*, 196 Mass. 125, 81 N. E. 887, 12 L. R. A. (N. S.) 1173, 124 Am. St. Rep. 520, 12 Ann. Cas. 938. Says Loveland (volume 1, section 403):

"A right of action *ex delicto* for the recovery of damages arising from the unlawful taking or detention of, or injury to, the bankrupt's property, is expressly vested in the trustee. Whether the right of action to recover damages for a tort passes to the trustee in bankruptcy of the injured party depends upon whether the tort is a property tort or a personal tort. If injury resulted to the property of the bankrupt before bankruptcy, the right of action to recover damages passes to the trustee. Thus, claims for an unlawful seizure of property by a foreign government, claims against the United States by a citizen, or a resident alien, pass to the trustee. The trustee, and not the bankrupt, is the proper party to institute a suit to recover for improvement made on government lands, or for money obtained by deceit and fraud, or against a sheriff for not collecting the contents of an execution, or a suit for the infringement of a patent, or copyright, or trade-mark, or for malicious attachment of property."

And in section 402 the author says:

"The Bankrupt Act transfers and vests in the trustee all rights of action arising upon contracts, or for the unlawful taking or detention of, or injury to, the bankrupt's property."

The result is that so much of the order of the referee as is under review and which directs the payment of the \$2,025 to the trustee and by him to the Citizens' Trust Company is affirmed; so much of said order as directs the payment by the trustee to the Citizens' Trust Company of the sum of \$250 proceeds of the real estate is reversed; and so much of said order as directs said William I. Taber, P. T. Fitzgerald, J. T. White, and Charles D. Thomas to pay to said trustee the said sum of \$925, the value or proceeds of certain property, paid over to said Marshall and the sum of \$255, the value of the four carriages delivered to the Ames-Dean Carriage Company, is so far modified as to require them to pay over to such trustee so much of such sums as will be necessary to pay the proportional parts thereof applicable to the payment of costs and expenses of administration, including commissions of referee and trustee, and the distributive shares therein of the nonassenting creditors on the basis that such sums of \$925 and \$255 belong to



the estate for all purposes, but not such parts of said sums as would go to the assenting creditors as dividends in distribution. Such order will also provide that all creditors who signed the said appointment of such committee are not to share in such sum of \$925 and \$255.

There will be an order accordingly.

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CENTRAL R. CO. OF NEW JERSEY v. MAYOR AND ALDERMEN OF  
JERSEY CITY et al.

(District Court, D. New Jersey. August 16, 1912.)

1. CONSTITUTIONAL LAW (§ 229\*)—COURTS (§ 282\*)—JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.

A systematic plan, persistently carried out by the assessing officers of a city, whereby they intentionally grossly undervalued the real estate of other owners, in violation of the Constitution and laws of the state, for the purpose of casting upon a railroad company which was a large owner of real property a greater burden of taxation than its lawful and just share, amounts to a denial of the equal protection of the laws, and gives a federal court jurisdiction of a suit by the railroad company for relief, regardless of the citizenship of the parties or the fact that a state court has concurrent jurisdiction.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 685; Dec. Dig. § 229;\* Courts, Cent. Dig. §§ 820-824; Dec. Dig. § 282.\*]

Jurisdiction in cases involving federal questions, see notes to *Bailey v. Mosher*, 11 C. C. A. 308; *Montana Ore-Purch. Co. v. Boston & M. C. C. & S. Min. Co.*, 35 C. C. A. 7; *Earnhart v. Switzler*, 105 C. C. A. 262.]

2. MUNICIPAL CORPORATIONS (§ 979\*)—TAXATION—INJUNCTION—ADEQUATE REMEDY AT LAW.

Where the statutory tribunal created for the equalization of taxes can exercise its power to correct discriminations in values only after notice to the owners of the alleged undervalued properties to be affected, the remedy of the owner of the property alleged to be discriminated against, by an appeal to such tribunal to increase the assessments of such other properties, running into the 100,000's, is inadequate, and does not exclude the jurisdiction of equity.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2120-2123; Dec. Dig. § 979.\*]

3. MUNICIPAL CORPORATIONS (§ 974\*)—JUDGMENT AS BAR—MATTERS CONCLUDED.

Where, on appeal by a railroad company to the State Board of Equalization from an assessment of its property by the taxing officers of a city on the ground that it was excessive and discriminatory, the only question determined was whether the company's assessment was excessive, the board being without jurisdiction to determine whether other property was undervalued because the owners were not parties to the proceeding, its judgment did not render the question of discrimination *res judicata*.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2083-2086; Dec. Dig. § 974.\*]

4. EQUITY (§ 71\*)—LACHES—GROUNDS AND ESSENTIALS OF BAR.

Mere lapse of time before bringing suit will not constitute laches which will bar relief in equity, but there must be some change of circumstances

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

prejudicial to the defendant which will render the granting of the relief inequitable.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 204-211; Dec. Dig. § 71.\*]

**5. MUNICIPAL CORPORATIONS (§ 979\*)—LACHES—DELAY IN BRINGING SUIT.**

A delay of several years by a railroad company before commencing a suit against a city for unlawful discrimination in the taxing of its property did not constitute laches which barred it from relief, where, during the time, it was litigating the right of the city to tax its property at all, and, pending such litigation, the city did not attempt to enforce collection of the taxes.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2120-2123; Dec. Dig. § 979.\*]

**6. EQUITY (§ 39\*)—JURISDICTION—RETENTION TO GRANT COMPLETE RELIEF.**

When jurisdiction in equity has properly attached, it extends to the whole case and to all the issues involved, and the court will proceed to determine any other equities existing between the parties connected with the main subject of the suit and grant all relief requisite to the entire adjustment of such subject, provided it is authorized by the pleadings.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104-114; Dec. Dig. § 39.\*]

In Equity. Suit by the Central Railroad Company of New Jersey against the Mayor and Aldermen of Jersey City and others. On final hearing. Decree for complainant.

George Holmes and R. V. Lindabury, for complainant.  
Warren Dixon, for defendants.

RELLSTAB, District Judge. In view of the absence of any evidence on the part of the defendants, either in contradiction of the testimony offered by the complainant, or to support their unverified answer, a more extended reference to the pleadings than is usual is necessary for the proper understanding of this case. Complainant, a railroad corporation of the state of New Jersey, in its bill of complaint filed December 21, 1908, charges, in substance: That in the year 1899 and the subsequent years to and including 1906 the defendant, the mayor and aldermen of Jersey City, a municipal corporation of said state, by its taxing officers, intentionally and systematically undervalued for the purposes of taxation the property of individuals and others in said city, except in a few isolated instances of properties owned by railroad companies and other corporations immediately adjoining the large railroad yards in said city, at rates varying from 45 per cent. to 70 per cent. of the true value of the properties assessed, and at the same time overvalued that part of the property of complainant known as "third-class railroad property"—i. e., held for railroad purposes, but not yet so applied—whereby its said lands were taxed largely in excess of the assessment against the property of others contributing to the same common burden of taxation. That the description of lands, the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

valuations thereof for taxation and the taxes assessed against the same as aforesaid are as follows:

Year.	Block.	Lot.	Location.	Valuation.	Total Amount of Tax.
1899	2154	22	Communipaw Avenue	\$1,603,000.00	\$45,525.20
1900	"	"	" "	1,603,000.00	45,204.60
1901	"	"	" "	1,603,000.00	44,884.00
1902	"	"	" "	1,603,000.00	44,563.40
1903	"	"	" "	1,603,000.00	44,082.50
1904	"	"	" "	1,603,000.00	43,922.20
1905	"	"	" "	1,803,000.00	49,221.90
1906	"	"	" "	2,390,000.00	59,511.00
1907	"	"	" "	2,937,000.00	60,189.60
1899	1497	1	New York Bay	771,000.00	21,896.40
1900	"	"	" " "	771,000.00	21,742.20
1901	"	"	" " "	771,000.00	21,588.00
1902	"	"	" " "	500,000.00	13,900.00
1903	"	"	" " "	500,000.00	13,750.00
1904	"	"	" " "	500,000.00	13,700.00
1905	"	"	" " "	550,000.00	15,015.00
1906	"	"	" " "	1,125,000.00	28,012.50
1907	"	"	" " "	1,450,000.00	28,315.00

That from the assessment for the year 1899 complainant appealed to the State Board of Taxation of New Jersey, which board had power to review and ascertain the true value of all property assessed for taxation throughout the state, except that levied against property used for railroad purposes by the State Board of Assessors of said state, and that said board after a hearing confirmed the valuation for such year. That on the application of complainant reviews of the legality of such taxes were successively made by the Supreme Court of the state of New Jersey and the Supreme Court of the United States, on the ground, among others, that said lands were not within the jurisdiction of Jersey City, nor within the jurisdiction of the sovereignty of New Jersey for the purposes of taxation. That in the year 1908 the United States Supreme Court decided that said lands were within the jurisdiction of said state and its taxing authorities for the purpose of taxation, the mandate of said court bearing date the 1st day of June, 1908. That the complainant in each of the years 1900, 1901, and 1902 appealed to said State Board from the said assessments for said years, respectively, on said lot 22, and that said board confirmed said assessments. That in each of the years 1906 and 1907 complainant appealed from the said assessments made on said lot for said years, respectively, to the State Board of Equalization of Taxes of New Jersey, said board having superseded the State Board of Taxation with all its said powers, and that said board, after taking evidence, determined the true value to be \$1,603,000 and \$1,743,000 for said years respectively. That in each of the years 1900 and 1901 complainant appealed to said State Board of Taxation from said assessments for said years, respectively, on said lot 1, and that said board reduced said assessments to \$500,000, and that said lot was assessed that sum in the years 1902, 1903, and 1904. That in each of the years 1906 and 1907 complainant appealed from said assessments made on said lot for

said years to said State Board of Equalization of Taxes, who determined the true value of said lot for each of said years to be the sum of \$747,820, and reduced the said assessments to said sum. That these two lots, 22 and 1, consist partly of upland and partly of land under the waters of the Hudson River, the greater part being still under water. That lot 22 comprises 448 acres of which 6 acres are occupied and used for railroad purposes, and that during all of said years such 6 acres were taxed by the state of New Jersey, through its State Board of Assessors, which has the exclusive power to tax such lands. That such taxes, so assessed by the state authorities, have been paid, and that under the laws of said state the taxes levied by Jersey City thereon are unlawful and void. That pending the review in the state and United States courts, respectively, of the right of Jersey City to tax said lands, no attempt was made by said city or its officers to enforce the collection of any of said taxes, and that from such determination in the United States Supreme Court until October 27, 1908, complainant was negotiating with certain of the officers of said city to get a fair settlement of all of said taxes, on which date such negotiations were broken off. That complainant has exhausted all the remedies afforded by the laws of the state of New Jersey in respect to the correction of said valuations and assessments and to prevent the enforcement thereof. That by the statutes of such state, as "interpreted by the decisions of its courts, the only remedy afforded to a taxpayer where property is assessed at a larger rate than other property in the taxing district, but not in excess of its true value, is to apply to said State Board of Taxation, or to the said Board of Equalization in each year, to increase the assessments upon property undervalued for the purposes of taxation, and that such increase can only be made after due investigation and upon notice to the owners of each parcel of property so underassessed. That the number of parcels of real estate in the city of Jersey City so underassessed during the years 1899 to 1906, inclusive, amounted to at least 160,000 separate parcels owned by at least 60,000 separate owners; and your orator charges and insists that not only would it have been impossible within the time afforded by law to have given notice to each owner and proved the underassessment of each parcel upon a hearing, but that the cost of such a proceeding would have been absolutely prohibitive, and that such remedy afforded no remedy at all." That it has no adequate remedy at law to correct said discriminations, or to prevent the enforcement thereof, or to recover back the taxes so assessed in case it pays them in order to prevent the sale of its said property, as no legislative remedy has been provided to meet such cases. That, if a remedy to recover back any part of the taxes so paid exists, "it would involve a multiplicity of suits, because part of the said taxes when collected are paid over by the city authorities to the state, the county collector of Hudson county in said state, and the other part is retained by the aforesaid city." That the true value of said lots 22 and 1 in each of said years did not exceed \$1,603,000 and \$500,000, respectively, and that the total taxes on such sums at the rate charged by the city during said years amounts to \$495,635.04. That,

to place complainant on an equality with said owners of other property in said city, it should pay but \$297,381.02, that being 60 per cent. of the last-stated sum. That said sum of \$297,381.02 was tendered to the city collector (the other named defendant) on December 19, 1908, in payment of said taxes, and that such payment was refused. That the said city collector has advertised said property for sale to enforce the collection of such taxes, and that, if such sale be made, complainant will be deprived of its said property without due process of law, in violation, not only of the Constitution of the state of New Jersey requiring that property be assessed for taxes by uniform rules and according to the true value, but also of the fourteenth amendment of the Constitution of the United States of America.

The complainant, after tendering itself ready to pay such sum for taxes as the court shall direct either to Jersey City or into court, prays that this court determine the amount of taxes which the complainant should pay for said years, that the excess of such taxes be canceled, and that the defendants be restrained from collecting by the sale of said lands or otherwise any taxes in excess of the sum that shall be finally decreed to be due to such municipality. It also contains the usual prayer for general relief.

The answer, unverified, so far as is pertinent to the questions raised on this record (the defendants, as stated, not having offered any evidence either in contradiction of complainant's case as made by the pleadings and its proofs), in substance, denies that the suit is of a civil nature in equity, arising under the Constitution of the United States; that the taxes assessed by Jersey City on the 6 acres of lot 22 are unlawful and void; that complainant has no adequate remedy at law for any of its alleged grievances; that complainant's property is to be taken without due process of law; and that it is denied the equal protection of the law in violation of the fourteenth amendment of the Constitution of the United States. It asserts that the United States Courts have no jurisdiction in the subject-matter of the suit; that complainant has a full and adequate remedy at law; that the New Jersey Court of Chancery affords the same relief as this court where the remedy at law is not adequate; that, if the facts set out in the bill constitute any ground of action, it is cognizable by the courts of New Jersey; that complainant is not entitled to any relief in the courts of equity of the United States; "that the validity of the imposition of the taxes stated in the bill of complaint has been affirmed by the Supreme Court and the Court of Errors and Appeals of New Jersey and by the Supreme Court of the United States in a controversy between the same parties involving the same subject-matter; and that the matters stated in said bill of complaint are *res judicata*, and that the said complainant is guilty of such laches as to bar it of any relief under said bill."

The gravamen of the bill of complaint is the intentional and systematic discrimination against complainant's properties in the matter of taxation by overvaluing them and undervaluing the other properties comprised in the same class. The complainant concedes that, so far

as the valuations of its own properties are concerned, it is concluded by the judgments of the state tribunals. The results of the several appeals made to such tribunals are shown by the following table:

Year.	Block.	Lot.	Original Assessment.	Reduced to.
1899	2154	22	\$1,603,000	affirmed.
"	1497	1	771,000	affirmed.
1900	2154	22	1,603,000	affirmed.
"	1497	1	771,000	\$500,000
1901	2154	22	1,603,000	affirmed.
"	1497	1	771,000	\$500,000
1902	2154	22	1,603,000	affirmed.
"	1497	1	500,000	affirmed.
1903	2154	22	1,603,000	affirmed.
"	1497	1	500,000	affirmed.
1906	2154	22	2,390,000	\$1,603,000
"	1497	1	1,125,000	\$ 747,820
1907	2154	22	3,720,000	\$1,743,000
"	1497	1	1,750,000	\$ 747,820

[1] *As to the undervaluation of other properties.* The manner of defendants' denial of complainant's charge of designed and systematic undervaluation is significant. While they in their other denials of complainant's charges unequivocally contradict them and directly put them in issue, they, in this behalf, merely deny an intentional and systematic discrimination in the method of assessing the properties of complainant and those of other owners in said city. Such a manner of taking issue is not a denial of the charge of intentional and systematic undervaluation of the properties other than complainant's, but only that the method employed was discriminatory, leaving it to be inferred that such undervaluation was general, and hence is an admission of a designed and continued discrimination between complainant's and such other properties. *Atchison, T. & S. F. Co. v. Sullivan*, 173 Fed. 456, 97 C. C. A. 1. The failure of defendants to introduce any opposing evidence to that offered by complainant avoids the necessity of any extended summary of that offered. As to it, it is sufficient to say that it clearly established a well-defined, a systematic, plan persistently carried out by the city assessors, whereby they intentionally grossly underassessed the property of others within the city, and cast upon complainant a greater burden of taxation than its lawful and just share. This practice was in disregard of the constitutional mandate that "property shall be assessed for taxes under general laws and by uniform rules according to its true value" (N. J. Const. art. 4, § 7, par. 12), and the general laws framed to effect such tax laws (3 Gen. Stat. N. J. 1895, pp. 3282, 3344, and P. L. 1903, p. 394), and is such a denial of the equal protection of the laws guaranteed by the fourteenth amendment to the Constitution of the United States as to require this court to take jurisdiction and relieve the complainant from the unjust part of the proposed tax, regardless of the absence of diverse citizenship, or that a state court of equity has jurisdiction in the premises (*Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257; *Cummings v. National Bank*, 101 U. S. 153, 158, 25 L. Ed. 903; *Pittsburgh, Cinn., Ch. & St. L. R. Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031; *First National Bank of Toledo v. Treas.*

Lucas Co. [C. C.] 25 Fed. 749; Taylor v. Louisville & N. R. Co., 88 Fed. 350, 372, 31 C. C. A. 537; Louisville Trust Co. v. Stone, 107 Fed. 305, 46 C. C. A. 299; Chicago Traction Co. v. Raymond [C. C.] 114 Fed. 557, affirmed in Raymond v. Chicago Traction Co., 207 U. S. 20, 37, 38, 28 Sup. Ct. 14, 52 L. Ed. 90; Atchison, T. & S. F. Co. v. Sullivan, *supra*), unless, as contended by defendant, an adequate remedy at law exists for the correction of such grievance or the subject-matters thereof are *res judicata*, or the complainant is barred from maintaining its suit by laches.

[2] *As to adequate remedy at law.* The State Board of Taxation, established in 1891 (N. J. P. L. 1891, p. 189), and its successor, the State Board for the Equalization of Taxes, established in 1905 (N. J. P. L. 1905, p. 123), were the statutory tribunals created by the state for the equalizing, revising, and enforcing of taxes. These were appealed to by the complainant to correct said discriminations. The powers of these boards to reduce individual assessments to true value when they exceed the same is undoubted, and was so decided (Central R. R. v. Newark, 74 N. J. Law, 1, 65 Atl. 244), and complainant is bound by this adjudication as to the assessments levied upon its properties. In Jersey City v. Board of Equalization of Taxes, 74 N. J. Law, 753, 67 Atl. 38, the Court of Errors and Appeals declined to express an opinion whether this board was authorized to investigate the value of several or many distinct properties at one time. It held, however, that, whether it dealt with only a single piece of property or with more than one, such power could be exercised only upon notice to each individual taxpayer affected by such proceeding. With this construction placed upon the statute of 1905 by the highest court of the state, and which, in matters of this kind, is binding upon this court (Forsyth v. Hammond, 166 U. S. 506, 519, 17 Sup. Ct. 665, 41 L. Ed. 1095; Adelbert College, etc., v. Wabash R. Co., 171 Fed. 805, 96 C. C. A. 465, 17 Ann. Cas. 1204), how can it be said that the remedy at law is an adequate one? When the jurisdiction of a court of equity is disputed on the grounds that a remedy at law exists to justify the court in declining jurisdiction, it must appear that such remedy is neither doubtful nor obscure, and also that it will correct the whole mischief and secure to the injured party his whole right in a perfect manner. 1 Story, Eq. Jur. § 33. The remedy at law must be as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity. Boyce v. Grundy, 28 U. S. (3 Pet.) 210, 7 L. Ed. 655; Bank of Ky. v. Stone (C. C.) 88 Fed. 383; Atchison, T. & S. F. Ry. Co. v. Sullivan, *supra*.

The highest court of the state having in effect questioned the power of this statutory tribunal to correct the abuses of undervaluation when carried on on as large a scale as is proven in this case, to turn the complainant out of this court, and require it to seek redress before such tribunal would be to compel it to (in the language of the complainant's brief) "not only assume the risk of finding at the end of the litigation that the Board of Equalization had no power to relieve its difficulty, but would be obliged to give notice to each of the individual property owners whose assessment was too low. As there are 165,-

625 parcels of real estate in Jersey City, and there were in 1906, according to the census of that year, 248,458 inhabitants of the city among whom the same are distributed, it is manifest that it would be practically impossible for any taxpayer to give the notice and conform to the practice held essential by the court of errors." Whatever may be said of the character of the remedy thus afforded by an appeal to the State Board of Equalization of Taxes, it is certainly not an adequate one. Furthermore, as charged by the bill of complaint and admitted by the answer, the taxes, when collected, are in part retained by Jersey City for its municipal purposes, and in part paid over to the county for county purposes, and in part paid to the state for state purposes. Assuming that suits for the recovery of such taxes, if paid under protest, would lie against the state, city, and county, a multiplicity of suits would be necessary, a recognized head of equity jurisprudence. The right to institute suits against such municipalities has not been shown, and, as no statute authorizing them exists, the maintenance of such suits is doubtful. Moreover, it is fundamental that the state cannot be sued without its consent, and, as to the part of the taxes received by it, no remedy at all exists.

[3] *Is the subject-matter under review res judicata?* The appeals made by the complainant to the state boards raised the matter of complainant's property being assessed relatively higher than the other properties. On none of these appeals except that involving the taxes for the year 1906 did the state boards enter upon the review and determination of the charge of undervaluing such other properties; their judgments as to such other years dealing only with the charge of overvaluation of complainant's properties. Concerning the taxes of 1906, however, the board did examine into such charge of undervaluation, and determined that such charge was well founded, and ordered the tax commissioners of Jersey City to make a reassessment of all the real estate assessed by them for the year 1906. This judgment on review by the state courts was reversed by the Court of Errors and Appeals in *Jersey City v. Board of Equalization of Taxes*, supra, in which case the court, without deciding that the board had power to enforce a reassessment where the alleged undervaluation was general, held that the board had not obtained jurisdiction over the necessary parties to such a proceeding.

It is essential to *res judicata* that the judgment pleaded as a bar should be rendered by a court not only competent to try the question, but one that obtained jurisdiction over the subject-matter or point in controversy, and in the presence of the necessary parties, investigated and determined the controversy on its merits. 2 Black on Judgments, §§ 504, 693, 713, 719; *St. Romes v. Cotton Press Co.*, 127 U. S. 614, 8 Sup. Ct. 1335, 32 L. Ed. 289. In none of the appeals before the state boards were the parties necessary for conclusive determination of the question of undervaluation present. The only judgment rendered by such boards on that question was in complainant's favor, but this was held ineffective, and therefore inconclusive because of the lack of necessary parties. This infirmity applies to all the appeals; and, as the necessary par-



ties to permit of a binding investigation and determination of the question of undervaluation were not present in any of such appeals, no adjudication had in such statutory tribunals or in the state and United States courts, so far as that question is concerned, is res judicata.

[4] *As to laches.* To constitute laches as a bar to relief in equity, something more than mere lapse of time is necessary. There must be some change of circumstances from the time the suit might have been brought rendering it inequitable to grant the relief sought. Where the defendant has not been prejudiced, and there is a reasonable excuse for the delay, the suit is not barred. Delay pending other proceedings has frequently been held excusable, not only where the termination of such proceedings was necessary for the ascertainment of facts involved in the later suit, but also where the former suit had a similar object, but proved unavailing. 16 Cyc. 152, 162, 167, 175; *O'Brien v. Wheelock*, 184 U. S. 450, 493, 22 Sup. Ct. 354, 46 L. Ed. 636; *Galliher v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 738; *Old Colony Trust Co. v. Dubuque L. & T. Co.* (C. C.) 89 Fed. 794.

[5] Complainant from 1899 to 1908 was litigating in the state courts and the United States Supreme Court the right of the city to enforce any tax upon the property in question, and during the pendency of such suit it was not chargeable with laches for not following up its protests to the taxing authorities of the city for its discrimination in values and the appeals to the state board for redress against such discrimination, with equity proceedings to prevent the enforcement of such discrimination. The city was at all times in a position to invoke the legal machinery to enforce the collection of any of such taxes assessed after 1899, and thus force either the payment thereof or an appeal to the courts restraining such collection pending the judicial review of the very right to impose a tax. The refraining by the city authorities during these years to enforce the collection of the unpaid taxes by sale of the properties, a remedy given by the state statutes, reflects the normal attitude towards the subject of such a taxation, viz., awaiting determination of the court of last resort of the right to impose such taxes before taking any further action. In my judgment, neither the failure of the complainant nor of the defendants to take additional steps pending such litigation savors of negligence, an essential element in laches. Nor does the time that elapsed between the issuing of the mandate out of the United States Supreme Court formally ending the litigation concerning the right to tax at all, and the filing of the bill in this cause (about seven months) in view of the then pending negotiations between the complainant and the city authorities to effect an adjustment of such taxes, constitute laches.

Intentional and systematic discrimination in the assessments as well as the court's power to grant, and the complainant's right to obtain relief having been conclusively established, it only remains to determine the character of complainant's relief and upon what

terms it should be granted. The percentage of valuations and assessments imposed upon the other properties below true value varied. The evidence satisfies me, however, that the general purpose of the city assessors in valuing such properties was to assess at seventy per cent. of the true value, though much of it was assessed below that figure; and the court will accept that percentage as the basis of valuation in determining the amount of taxes that should be paid. The city assessors having included in lot 22 six acres of land actually used for railroad purposes, and which were lawfully taxed by the state of New Jersey through the State Board of Assessors as first or second class railroad property, under exclusive legislative authority (4 Comp. Stat. N. J. p. 5260, §§ 445, 447), the assessed value of such six acres must be deducted from the total valuation of such lot.

[6] This deduction should be made in this suit, notwithstanding that such erroneous taxation does not present a federal question, and that the injustice arising from such double taxation is remediable at law, upon the well-recognized principle controlling in matters cognizable in equity courts, that, when jurisdiction has properly attached, it extends to the whole case and to all the issues involved, and that the court will proceed to determine any other equities existing between the parties connected with the main subject of the suit, and grant all relief requisite to the entire adjustment of such subject, provided it be authorized by the pleadings. 16 Cyc. 107; *Gormley v. Clark*, 134 U. S. 338, 10 Sup. Ct. 554, 33 L. Ed. 909; *Vreeland v. Vreeland*, 49 N. J. Eq. 322, 24 Atl. 551.

The defendant Jersey City, however, having been successful in the litigation over the basic right to tax such properties, and having been deprived of the moneys represented by the taxes that it could lawfully impose thereon, and the complainant having had the use of such moneys pending such litigation, it is but equitable that the complainant should, in addition to the principal of such tax, pay interest thereon at the rate of 6 per centum per annum. It follows that, as the amounts paid by complainant on the granting of the rule to show cause and the allowance of the preliminary injunction herein do not equal the principal of the tax payable on such seventy per cent. basis of valuation, it is required to pay such difference and also interest as aforesaid on the whole amount of taxes based on such reduced valuation from the dates that taxes imposed upon similar properties in Jersey City were due and demandable in such years respectively, less interest at the same rate calculated on the sums already paid on account of such taxes from the respective dates of such payment.

Upon the payment of such taxes, principal, and interest, the remainder or excess of the taxes assessed by Jersey City shall be canceled of record upon the tax duplicates and other books of such city, and the defendants perpetually enjoined from collecting or attempting to collect any of such excess taxes. If the parties are unable to agree on the amount to be paid in conformity with the

determination here reached, either may on five days' notice apply for a reference to ascertain such amount.

The complainant may enter a decree in accordance with this opinion, with costs to be taxed.

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In re DOYLE.

(District Court, W. D. New York. September 16, 1912.)

No. 3,036.

1. BANKRUPTCY (§ 91\*)—PREFERENTIAL TRANSFERS—INSOLVENCY—EVIDENCE.

Evidence *held* to sustain a referee's finding that the bankrupt was insolvent at the time he made a preferential transfer of certain of his property to his wife.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 137-139; Dec. Dig. § 91.\*]

2. BANKRUPTCY (§ 408\*)—DISCHARGE—DENIAL—FALSE OATH.

A bankrupt's discharge would not be denied on the ground that he made a false oath, that he did not in the year 1908 transfer any property to his wife, where it appeared that before the completion of his examination, he explained that he had testified inadvertently and mistakenly regarding such transfer, and that it had not been his intention to testify falsely.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732-736, 759, 762, 763; Dec. Dig. § 408.\*]

3. BANKRUPTCY (§ 408\*)—DISCHARGE—CONCEALMENT OF ASSETS.

Where, after adjudication, the bankrupt continued his business as agent for his wife, and the receiver sold him some of the stock on hand, and there appeared a tacit acquiescence by the receiver that the bankrupt should use certain wax paper, cartons, etc., with the understanding that the wife should pay therefor, the bankrupt would not be denied a discharge on the ground that he had concealed such material from his trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732-736, 759, 762, 763; Dec. Dig. § 408.\*]

4. BANKRUPTCY (§ 408\*)—DISCHARGE—CONCEALMENT OF ASSETS.

A bankrupt, on the day before the filing of his petition in bankruptcy, assigned his equity in certain pledged collaterals to his attorney, and these and certain money on deposit in a bank were not scheduled. The pledgee satisfied its claim out of a part of the collaterals, and afterwards the attorney tendered a conditional assignment to the trustee. *Held*, that the bankrupt's explanation that the assignment was made merely to enable the attorney to collect the surplus after satisfying the pledge was insufficient to relieve him from the charge of concealment of assets, which was sufficient to bar his discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732-736, 759, 762, 763; Dec. Dig. § 408.\*]

5. BANKRUPTCY (§ 180\*)—TRANSFER OF ASSETS—PREFERENCE—FRAUD.

Where a bankrupt transferred to his wife an undivided interest in certain warehouse property within four months of bankruptcy to secure her as a creditor, the transfer would be regarded as preferential, as distinguished from a fraudulent transfer, to which latter the element of intent to defraud is essential.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 252; Dec. Dig. § 180.\*]

**6. BANKRUPTCY (§ 414\*)—FRAUDULENT TRANSFER—DISCHARGE—"CONCEAL."**

Evidence *held* to sustain a referee's finding that a transfer by the bankrupt of certain stock in a corporation to his wife was antedated and was fraudulently made with intent to conceal the stock from his trustee, justifying denial of a discharge, the word "conceal" with reference to the concealment of assets by a bankrupt in Bankr. Act July 1, 1898, c. 541, § 1, subd. 22, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3419), being given a broad meaning.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 720-722; Dec. Dig. § 414.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1377-1384.]

**7. BANKRUPTCY (§ 414\*)—DISCHARGE—OFFENSES—WEIGHT OF EVIDENCE.**

While a bankrupt cannot be convicted of an offense involving punishment by imprisonment, as provided by Bankr. Act July 1, 1898, c. 541, § 29, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), except on evidence establishing his guilt beyond a reasonable doubt, a fair preponderance of evidence is sufficient to establish a fraudulent concealment of assets to bar the bankrupt's discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 720-722; Dec. Dig. § 414.\*]

**8. APPEAL AND ERROR (§ 1019\*)—FINDINGS OF MASTER—REVIEW—CONFLICTING EVIDENCE.**

Findings of fact by a special master on conflicting testimony, uninfluenced by mistaken conclusions of law, should not be disturbed, though the court, but for such findings, might have reached a different conclusion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4008-4010; Dec. Dig. § 1019.\*]

In Bankruptcy. In the matter of Michael Doyle, doing business under the name of Michael Doyle & Co., bankrupt. On specifications of objection to a bankrupt's discharge. Sustained in part.

James M. E. O'Grady, of Rochester, N. Y. (George P. Keating, of Buffalo, N. Y., of counsel), for bankrupt.

Harlan W. Rippey, of Rochester, N. Y., for trustee.

Lewis, McKay & McMillan, McGuire & Wood, and Harlan W. Rippey, all of Rochester, N. Y., for objecting creditors.

HAZEL, District Judge. Specifications in opposition to the discharge of Michael Doyle, the bankrupt herein, were filed by the trustee and various creditors, and, following the usual course, reference was had to a special master to ascertain the facts, and to report them with his opinion thereon to this court. The contest over the discharge of the bankrupt included eight specific objections in relation to each of which much testimony was taken; most of it, however, bearing upon the claim that the bankrupt transferred and concealed his property with intent to hinder, delay, and defraud the creditors of the bankrupt estate. At the beginning of the hearings before the special master, a number of preliminary objections were made on behalf of the bankrupt, but such objections in their entirety have not been seriously pressed. In any event, I think they are without substantial merit, and are therefore overruled.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Upon proceeding to the merits of the controversy, the evidence shows that the bankrupt and one Gebbie jointly engaged in the milk business a number of years ago at Rochester, N. Y., and that in 1895 the partnership was incorporated as the Mohawk Condensed Milk Company, and has at all times conducted a large and lucrative business. The bankrupt was bookkeeper as well as treasurer of the company, and originally owned 275 shares of its capital stock which number of shares together with additional shares he is claimed to have owned at the period of his bankruptcy. Along in about the year 1903 there was discovered a shortage in the accounts of the bankrupt as treasurer of the Milk Company, and in making good the indebtedness and liability he is claimed by the objecting creditors to have become insolvent, though he continued carrying on a separate business as an extensive dealer in fruits, dealing in domestic and foreign markets under the name of Michael Doyle & Co., and owned securities in various corporations and enterprises to the date of bankruptcy.

The evidence shows that in the year 1904 and in following years the bankrupt transferred to his wife insurance policies and securities, consisting of shares of stock in different corporations, amounting to a large sum of money. In 1906 he conveyed to her their homestead in Lake avenue, but the deed was not recorded until just before bankruptcy. He claims that several years prior thereto, while solvent, he assigned to her 270 shares of the capital stock of the Mohawk Condensed Milk Company, and also deposited large amounts of money in banks at different times in her name. In May, 1908, it was ascertained that Doyle had used in his individual business money that had come into his possession as treasurer of the Mohawk Condensed Milk Company, amounting in the aggregate to \$192,621.95. It appears that from the time he first transferred securities to his wife he concededly signed her name on withdrawal checks and deposits made by him in her name, and in all his dealings with reference to credits and deposits and business transactions generally had her complete sanction. She herself gave no attention to her husband's affairs, and was willing that he should use as he saw fit the securities and money he had assigned or given her. She owned no property whatsoever save that which had been given her by her husband at different times during a period of 20 years anterior to the bankruptcy. The general claim of the objecting creditors is that the bankrupt has been insolvent since 1900, and that the various assignments of securities to his wife were made pursuant to a scheme by which she was to hold title thereto in order to withhold them from his creditors and from his trustee in the event of his adjudication as a bankrupt. In support of the contention that he was the personal owner of such assigned properties, it is pointed out that in his original schedule of assets and liabilities filed in this proceeding the 270 shares of stock of the Mohawk Condensed Milk Company are specified as an asset and subject to the lien of Belding Bros. for advances, and that subsequently he assigned such shares of stock to his wife

antedating the assignment ten years and eight months, to wit, December 24, 1897.

In May, 1908, at a meeting of his creditors held at the office of his attorney, the bankrupt practically admitted his insolvency, and at his request a committee of his creditors was appointed to examine into his affairs with a view to extending the time for payment of his debts if his business affairs and his ownership of properties, real and personal, so warranted. Afterwards the committee made a report to the creditors recommending a two years extension of time for payment, with the understanding that Doyle should transfer to the committee in trust all the real property and equities in personal property which he then claimed to own, and which concededly were of large value. He assented to the proposed arrangement on condition that the amounts realized on the sale of shares of stock, etc., over and above the amounts for which they were pledged might be used by him in the conduct of his business. However, on August 12, 1908, the committee of creditors further reported that, as a few of the creditors had put their claims in judgment, the existing negotiations for settlement had been abandoned, and that they had determined to file a petition in bankruptcy, which petition, by the way, had already been filed on the previous day by the attorney for the bankrupt who acted for the committee of creditors and the petitioning creditors. Importance is attached to the fact that the bankrupt and one of the petitioning creditors who was in his employ actively interested themselves in securing from different creditors proxies with an intention of electing a friendly trustee, and that at the creditors' meeting the challenge of the right to vote such proxies was sustained by the referee who then appointed the trustee herein. It is claimed that, when the bankrupt failed in his attempt to elect a trustee nominated by him, he filed for his wife in the bankruptcy court a claim amounting to \$76,000.

The conclusions of the special master are principally based upon inferences drawn from the acts and conduct both before and after the bankruptcy of the bankrupt, whose denials of an intent to cheat and defraud his creditors the special master elected to disregard as unworthy of credence. It would not be worth while to review at length the various grounds of opposition to the discharge of the bankrupt, or to detail the evidence more fully, inasmuch as the master in an exhaustive opinion has stated his reasons for his conclusions and drawn specific attention to the proofs, were it not that, on motion to affirm his report, it was asserted that he had shown violent prejudice against the bankrupt.

In the determination of the specifications, it is of the utmost importance to first ascertain whether the bankrupt was insolvent within the meaning of the Bankruptcy Act when the asserted transfers and assignments of properties to his wife were made.

[1] In an action brought by the trustee against Mrs. Doyle to recover a preference—i. e., the conveyance on or about July 1, 1908, of the White street property—it was held by the trial court that at such

time and from March 1, 1908, the bankrupt was actually insolvent, and his insolvent condition known to the transferee. Was such his condition at a period earlier than that found by the trial court? The special master found that the bankrupt was insolvent in 1900, and continued in that condition throughout the years preceding the bankruptcy. His fruit business, before 1907, is claimed by him to have been fairly successful, although always uncertain from year to year as to profits, and he claims to have accumulated a substantial property from his investments from which he frequently not only assigned to his wife securities, stocks, etc., but also gave her money in various sums aggregating many thousands of dollars. Aside from his ownership of shares in the Mohawk Condensed Milk Company and the fruit business, he was the owner of a large number of shares of stock in a street railway enterprise in New England continuing therein from 1891 to the time of the bankruptcy. He was also a stockholder in the Manitou Beach Railroad to the amount of about \$100,000, which interest, owing to the destruction of the railroad by a severe storm in the spring of 1908, terminated in the complete loss of the investment. While he was perhaps ignorant of his insolvency, as that term is defined by the Bankruptcy Act, and believed himself financially responsible a short time before the petition herein was filed, yet the excessive book values of his property, real and personal, the incumbrances thereon including outstanding accounts and items which, instead of being cleared off, were carried on his books from year to year as assets of his business, would seem to indicate his insolvency at an earlier period than found by the state court. On this subject it may briefly be stated that in the latter part of the year 1901 the liabilities of the bankrupt exceeded his assets by \$47,820.09, and that such condition continued in increasing amounts in the following years, so that in the year 1908 there was a deficit of \$73,381.70.

The conclusion, however, of the special master on this point is attacked as unfair to the bankrupt, as it is claimed that there was clear error in the major premise upon which it was based, in that the bankrupt did not carry upon his books as an asset an item of indebtedness to a Rotterdam firm of \$84,673.77, and it is denied that his books were incorrect or false in this particular. The bankrupt contends that the claim of Vanderhoven Bros. was not in fact carried as an asset, that in 1904 the debt was compromised by the payment of \$16,000 and his liability accordingly decreased, so that there was a saving to the business of \$68,783, and not the claimed loss of \$100,000. The witness Tylee, an expert accountant who for a period of four or five years prior to the bankruptcy was a bookkeeper for the bankrupt, substantially testified that the books carried the account of Vanderhoven Bros. as an asset and failed to show a settlement prior to 1904. It appears, true enough, that the ledger carried the account as a liability, yet there was no corresponding credit to the merchandise account prior to October 21, 1904. While it is not thought that the evidence establishes intentional falsification of the books, yet that they show large losses in the business from year to year and the insolvency of the bankrupt for a period of four or five years prior to the bank-

ruptcy is sufficiently demonstrated, and in reaching this conclusion I have not omitted to consider the claim of the bankrupt that various properties, including Brighton real estate, were not sufficiently taken into account by the special master.

[2] As to the specifications: The special master found as established specification 2 which relates to a false oath made by the bankrupt, in that he testified that he did not in the year 1908 transfer any property to his wife. I think, however, that in view of the bankrupt's explanation before the completion of his examination that he had testified inadvertently and mistakenly regarding such transfers of securities, and that it was not his intention to falsely testify negatives any intention on his part to make a false oath in this proceeding.

[3] Nor do I regard the third specification, relating to the concealment of wax paper, cartons, etc., should bar his discharge. It appears that, after his adjudication, the bankrupt continued his business as agent for his wife, and that the receiver sold him some of the stock on hand, and that correspondence was afterwards exchanged between the bankrupt and the receiver relating to the purchase by the bankrupt of additional property that had been left in his possession. The evidence falls short of showing that there was a fraudulent concealment of the property within the meaning of the Bankruptcy Act. In fact, there seems to have been a tacit acquiescence by the receiver, who was entitled to take the property into his possession, that the bankrupt should use such materials with the understanding that Mrs. Doyle would pay therefor.

[4] The fourth specification relates to the transfer by the bankrupt to his attorney of his equity in certain securities which were not scheduled and of money on deposit in the National Bank of Commerce. The assigned securities had been pledged as collateral security for previous loans and advances to the bankrupt, and, though the bank has since satisfied its claim out of part of the collateral pledged to it, the assignee, Mr. O'Grady, has not realized anything on the remaining securities or on the amount realized on the sale by the bank, nor taken the same into his possession under his assignment. Since the argument he has tendered to the trustee the delivery of an assignment of his interest in the securities, but, according to the reply brief, such assignment was conditional and in the opinion of counsel for the trustee necessitates bringing an action against the bankrupt to recover the equities. Such conditional assignment will not now relieve the bankrupt from the consequences of his acts, or be considered to negative his obvious intention to conceal his equities in such property, which, according to the evidence, amounted to about \$900. The assignment to his attorney was made on the day before the filing of the petition in bankruptcy, and was delivered to the bank holding the securities in pledge after the adjudication. The explanation of the bankrupt that the assignment was made merely for the purpose of enabling his attorney to collect the surplus after satisfying the pledge seems especially incredible in view of the fact that he was thoroughly familiar with the bankruptcy proceedings which were then imminent, and his omission to schedule his interest in the said securities indicates an



intentional concealment of his property and an utter disregard of his duty to surrender it to his creditors.

[5] By the seventh specification, the bankrupt is charged with having deeded to his wife an undivided one-half interest in the warehouse on White street. It is shown that in an action in the Supreme Court of this state by the trustee against Mrs. Doyle it was decided that the conveyance to her was to secure her as creditor to the amount of \$10,000, but, as the conveyance was made within four months of bankruptcy, a preference had been given his wife by the bankrupt over other creditors of the same class, and by decree of the court such deed was canceled and annulled. The learned court expressed the opinion that the said transfer was not fraudulently made, but that it was made in the belief that the bankrupt was still solvent. The special master, however, believed that the evidence before him disclosed a fraudulent concealment by the bankrupt of his property under section 14b of the Bankruptcy Act. Inasmuch as the Supreme Court expressly found that \$10,000 was borrowed by the bankrupt from Mrs. Doyle a number of years before the conveyance, it may fairly be accepted I think that the transfer was in the nature of a preferential payment to Mrs. Doyle, a creditor, as distinguished from a fraudulent transfer to which latter the element of an intent to defraud is essential. *Githens et al. v. Shiffler et al.* (D. C.) 112 Fed. 505; *In re Maher* (D. C.) 144 Fed. 503.

[6] The fifth specification charges a transfer by the bankrupt while insolvent of 270 shares of the capital stock of the Mohawk Condensed Milk Company of the par value of \$27,000. The bankrupt testified that he transferred these shares of stock to his wife on December 24, 1897, the consideration therefor being his love and affection for her, and that later, on January 6, 1908, he assigned to her five additional shares which were not included in the earlier exhibit assignment. He claims to have been clearly solvent at these times, and, indeed, there is no evidence to show that that was not the situation at the date of the earlier assignment.

The ramifications of this stock which is now held by the Genesee Valley Trust Company as a pledge for advances to the bankrupt, and which is valued at \$60,000 over the amount pledged, need not be dwelt upon. Its fraudulent concealment concededly depends wholly upon whether or not it was actually assigned by the bankrupt to his wife in the year 1897. It was scheduled by the bankrupt as an asset, and at the time of the bankruptcy was held by Belding Bros. of New York City as collateral security, being afterwards pledged to the Genesee Valley Trust Company. It appears that because of his ownership thereof Doyle in 1908 became entitled to receive 812 shares of increased stock in the Mohawk Condensed Milk Company of the value of \$81,200. All of the stock was issued to the bankrupt save one-half of the said increased stock, which was issued to Mrs. Doyle at the suggestion of the Bank of Commerce for the purpose of securing a loan of \$40,000 made to her after a refusal of the same to the bankrupt. The bankrupt testified that he had assigned the original shares to his wife,

and the purported assignment was offered in evidence. No claim is made that Mrs. Doyle took title to the stock, or that it was transferred to her on the books of the company. Her testimony as to her ownership was indefinite and contradictory. Her version of the transaction is that in 1905 a friend advised her to have this stock put in her name, and that, shortly afterwards, she received 270 shares, and within a year or two 5 additional shares, while the purported assignment was dated ten years before the transfer of the latter shares. She also testified that the assignment was made to secure advances to her from the Genesee Valley Trust Company and Belding Bros. for and on account of her husband, but the evidence clearly shows that she borrowed for Mr. Doyle after the bankruptcy proceedings were instituted, and not before. Subsequent to the bankruptcy the bankrupt prevailed upon Mr. Badger to give his note to the Genesee Valley Trust Company for \$88,855.-92, the amount for which the stock was pledged to Belding Bros., and which was then held by the Trust Company as collateral to the Badger note, together with other shares owned by Curtice Bros. At such time there was delivered to the Trust Company an agreement between Mrs. Doyle and Mr. Badger reciting that Mrs. Doyle was the owner of 275 shares of stock in the Mohawk Condensed Milk Company, and that, on payment of the Badger note, such number of shares would be transferred to her.

The theory of the objecting creditors is that at the time the bankrupt scheduled such shares of stock subject to the claim of Belding Bros. he believed the trustee would accept his view that there was no equity therein, but that, failing in the election of a friendly trustee, he attempted to conceal his equities by the purported assignments in evidence, and the recitation of ownership in Mrs. Doyle, contained in Exhibit 47. The special master fully considered the circumstances in their entirety. Rejecting the testimony of the bankrupt and his wife in relation to the assignment of the shares of stock, he credited the testimony of the witness Hamilton, a handwriting expert, who testified that in his opinion the purported assignment was executed in the fall of 1908, and not in December, 1897, as claimed by the bankrupt. The opinion was based upon a comparison of the signature of the assignment with the admitted handwriting of the bankrupt in 1897 and 1908 and upon a chemical test of the ink used, but such expert testimony was contradicted by another handwriting expert, the witness Osborn, who asserted that in his opinion it was impossible to state the month or year of the execution of the assignment, though he admitted that the handwriting of the bankrupt had changed from 1897 to 1908. Testimony of handwriting experts, the use of the microscope to make a test of disputed handwriting or of the particular ingredients of the ink used, is at times of undoubted assistance in determining whether or not the writing under consideration was done at a purported time; but, in view of the contradictory testimony of the expert witnesses, I do not ascribe very much value to the testimony of the witness Hamilton, and would not

on that testimony alone discredit the assignment, but the many peculiar circumstances in the case support that view and persuasively indicate that such stock at the filing of the petition herein was really the property of Doyle subject only to the pledge of Belding Bros.

[7] No one would perhaps wish to convict the bankrupt of committing an offense punishable by imprisonment under section 29 of the Bankruptcy Act on such a showing, but, to bar a bankrupt's discharge, it is enough, I think, that the evidence by a fair preponderance establishes a fraudulent concealment, and proof thereof beyond a reasonable doubt is unnecessary. In *re Leslie* (D. C.) 119 Fed. 406; In *re Delmour* (D. C.) 161 Fed. 589; In *re Dauchy* (D. C.) 122 Fed. 688; *Collier on Bankruptcy* (9th Ed.) 339. In disregarding the testimony of the bankrupt and his wife, the special master acted clearly within his rights; the conclusion reached by him being that the evidence was so conflicting that it could not be safely considered to negative the presumption of fraud following from the conduct of the bankrupt. The fact that at the outstart the bankrupt scheduled such shares as an asset would seem to strongly negative the bona fides of the assignment. His absolute control over the stock from the time it was issued down to the bankruptcy to the positive exclusion of his wife, his various pledges thereof to banks and Belding Bros. without informing the pledgees until after the bankruptcy of his assignment to his wife, his assumed ownership, the failure of himself and wife to assert to Gebbie during the complications with the Milk Company the wife's ownership of the stock, the failure to transfer the same on the books of the company, are all circumstances which to my mind indicate the absence of an intention to legally transfer the stock to Mrs. Doyle. The purported assignments standing alone, without the delivery of the property therein described or without some affirmative act indicating Mrs. Doyle's ownership thereof, do not persuade me of the legality of the assignments, or that the bankrupt actually divested himself of title thereto. As said by Judge Ray in *Re Leslie*, *supra*, in passing upon the question of the weight of the testimony:

"Courts are not compelled to accept the bald statements of interested witnesses, or of any witness when his statements are laden with inconsistencies, or burdened with inherent improbabilities, or discredited by incriminating confessions."

From all the circumstances preceding and following the bankruptcy, it is difficult to escape the conclusion that the bankrupt designed to save as much as possible out of the financial wreck, and, having reason to believe that the stock was of much more value than the amount for which it was pledged, attempted to conceal the same.

[8] To permit its disposal by fraudulent methods would obviously prevent a just administration of his estate, and I am therefore constrained to hold that the findings of fact by the special master upon conflicting testimony, uninfluenced by any mistaken conclusions of law, should not be disturbed, even though this court

but for such findings might have reached a different conclusion. Such is the rule enunciated in *Re Harr* (D. C.) 16 Am. Bankr. Rep. 213, 143 Fed. 421, and in numerous other cases.

Another specification, the ninth, dealing with an intent on the part of the bankrupt to conceal his true financial condition, as shown by his failure to keep books of account from which his financial condition could be ascertained, has been sustained by the special master, but I think it would serve no useful purpose to explicitly pass upon such specification. Enough has been stated to show that the bankrupt intentionally concealed certain portions of his property to hinder, delay, and defraud his creditors; such concealment not being avoided by the mere scheduling of the 275 shares of stock as an asset, for the word "conceal" by subdivision 22 of section 1 of the Bankruptcy Act is given a broad meaning, and the subsequent acts of the bankrupt, and the evidence generally, showing that he has attempted to keep such property or the equities therein from the possession of his trustee is controlling of the question of whether or not there was a concealment thereof to hinder, delay, and defraud creditors.

My conclusion is that specifications 2, 3, and 7 are overruled, while specifications 4 and 5 are sustained. It follows that the discharge of the bankrupt will be denied.

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#### STROMBERG-CARLSON TELEPHONE MFG. CO. v. SIMMONS.

(District Court, N. D. Georgia. August 29, 1912.)

##### 1. REFORMATION OF INSTRUMENTS (§ 19\*)—GROUNDS—MUTUAL MISTAKE.

Where a preliminary contract by which defendant was to execute to complainant a series of notes, some of which were to run a number of years, clearly provided that they should contain a provision making the entire debt due on default in the payment of any note or interest, but such provision was omitted by mutual mistake, complainant is entitled to have the notes reformed by its insertion.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 74-78; Dec. Dig. § 19.\*]

##### 2. REFERENCE (§ 99\*)—REFERENCE BY CONSENT—FINDINGS OF MASTER.

Where an entire case is referred to a master by consent of the parties, his findings of fact are entitled to the weight of the verdict of a jury.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 148-156; Dec. Dig. § 99.\*]

##### 3. ACTION (§ 62\*)—PREMATURE COMMENCEMENT—EXTENSION OF DEBT.

Pledges of additional collateral by a debtor after defaults in meeting partial payments *held*, under the evidence, not to have been made under an agreement, express or implied, for an extension of the time of payment, so as to render a suit brought by the creditor several months afterward premature.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 718-723; Dec. Dig. § 62.\*]

Premature commencement of actions, see note to *American Bonding & Trust Co. v. Gibson County*, 76 C. C. A. 159; *City of Trinidad v. Hokasona*, 102 C. C. A. 424.]

In Equity. Suit by the Stromberg-Carlson Telephone Manufacturing Company against C. Jerome Simmons. On exceptions to report of special master. Report confirmed, and decree for complainant.

See, also (C. C.) 185 Fed. 211.

The following is the report of John M. Slaton, special master:

By order of your honor of date April 6, 1911, the above case was referred to me as special master, to make and report my findings in accordance with the terms of said order, which report I herewith submit:

The complainant was engaged in the business of manufacturing telephones, supplies, etc. The respondent was interested in the Atlanta Telephone Company, having been its president. The indebtedness constituting the subject-matter of this litigation was for borrowed money. The bonds, stocks, etc., pertained to the Atlanta Telephone Company.

The complainant filed a bill against the respondent, averring that certain notes executed by him to complainant failed, through error of the scrivener, to contain an acceleration clause making the whole debt due, which clause was intended by both parties, in accordance with a preliminary contract between them, to be included. Further, said bill averred that certain collateral pledged to secure said notes was improperly described therein as "first-mortgage bonds," instead of "gold mortgage bonds." Complainant prayed a reformation of the notes, a decree in its favor for the principal and interest of said notes against said respondent, and a decree for the sale of the security pledged, and for general relief.

The respondent filed an answer admitting the indebtedness, but denied the right of the complainant to reformation as prayed, and claimed that the debt was not due for reasons hereinafter stated. He further charged that inequitable conduct on the part of complainant in preventing him from realizing on the pledged securities should debar the complainant from prevailing in this case.

#### Reformation.

The first question is the right of reformation. The whole case centers about a contract dated July 11, 1907 (Rec. p. 20). That contract, made between complainant and respondent, clearly contemplated a pledge of "gold mortgage bonds," and, in fact, the complainant has in its custody as pledged "gold mortgage bonds." Mr. Simmons himself testifies: "Now I knew that the Stromberg-Carlson Company were to have for my debt gold bonds." The evidence shows beyond dispute the right to reformation in this particular.

The contract of July 11, 1907 (Rec. p. 20), provided that the indebtedness should be put in "note form," and that said note should run through a period of 14 years, interest to be paid at certain times, and the principal to be reduced at certain intervals, in default of compliance with which the whole debt should be due. Mr. McCanne, representing complainant, did not prepare the notes until January, 1908. The delay was occasioned by preliminary steps essential to carry out the contract. His testimony is to the effect that he had before him the contract of July 11, 1907, and endeavored to follow it. As a form for guidance, he utilized a blank employed by the trust company with which he dealt. Either his eye overlooked one line in dictating to the stenographer, or the stenographer made the error of omitting from the note the words: "This whole obligation shall immediately become due and payable." This accelerative clause had been inserted at the suggestion of a member of the executive committee of complainant, when the form prepared by Mr. McCanne for a payment of the entire debt in one and two years was modified so as to allow a longer extension. This accelerative feature was fully explained to Mr. Simmons (page 624). The embarrassed condition of the Telephone Company, the long number of years through which the indebtedness was to run, the helpless situation of the complainant without it, all emphasize its importance.

It is true that Mr. McCanne, in following the form of pledge for expressing the contract of July 11, 1907, put into the note the provision, not called for by said contract, that the securities might be sold without notice and

bought in by the pledgee. Also two notes were executed instead of one, which is manifestly immaterial. But, when Mr. McCanne returned the notes to Simmons, he accompanied them with a letter stating: "We now inclose notes prepared for you to execute in accordance with the terms of the preliminary agreement of July 11, 1907." Mr. Simmons says he examined the notes and found the accelerating clause omitted, but thought the change of the notes was intentional. I think that, under the circumstances, Mr. Simmons was estopped from objecting to the reformation of the notes.

Mr. Simmons' recollection about the matter is admittedly hazy, for he testifies, in explanation of his subsequent letters, inconsistent with his knowledge of the omission of the accelerative clause, that he had forgotten about it.

In fact, every letter and document in the case shows an insistence upon the contract of July 11, 1907, and no documentary evidence in the case is consistent with any theory except the presence of the accelerative clause in the notes. Mr. Simmons and his son differ from Messrs. McCanne, Kodolf, Wolf, and Conklin, but every letter from Mr. Simmons, every paper signed by him, every letter to him containing pertinent communications undenied by him, all establish that he believed the complainant had the right to declare the entire debt due.

The circumstances of the case show no laches. The letter to Mr. Simmons containing the notes said they were executed in accordance with the contract of July 11, 1907, and Mr. McCanne had the right to rely on his attention being called by Mr. Simmons to any variance therefrom. Mr. McCanne unintentionally omitted the accelerative clause, and, finding the facts as above stated, I find in favor of the reformation of the notes in that particular.

Did the deposit of other securities operate, under the facts, to postpone the default or to render the suit premature?

Under the contract of July 11, 1907, certain "first-mortgage bonds" were to be exchanged for "gold mortgage bonds," which were to be pledged for the indebtedness of Mr. Simmons to complainant. No payment on the notes, either as interest or in reduction of the principal, was made subsequent to February, 1908. Mr. Simmons was begging for time, explaining the depression in business and loss of telephones by reason of the panic. Being in arrears and being pressed for payment (page 95), Mr. Simmons on October 28, 1908, wrote to Mr. McCanne, representing complainant, suggesting that he take about \$80,000 in bonds (which turned out to be \$69,000), and which were not covered by the contract of July 11, 1907, and that Mr. McCanne sell them, paying up Simmons' arrearages (page 96). Instead, McCanne took the \$69,000 in bonds as additional security (page 97), and made a specific written agreement (pages 101, 102) that said bonds are to be held under the agreement of July 11, 1907, varying only in the provision that more bonds on account of payments shall be returned of the \$69,000 lot than of those pledged in the July 11, 1907, agreement.

Mr. Simmons, failing to make any payment on his indebtedness, was visited in Atlanta by Mr. McCanne on February 19, 1909 (page 102), and again Mr. Simmons signed a specific pledge agreement for a deposit of \$13,000 more gold bonds (pages 103, 104), expressly providing that they should be held under the contract of July 11, 1907, differing only in the proportionate withdrawals on reductions of the debt.

It will be observed from the original contract of July 11, 1907, respondent was obligated to exchange first-mortgage bonds for gold mortgage bonds, and he had not effected exchange of but about \$40,500 of these bonds (see also page 113). Complainant insisted that this should be done (page 119). The unexchanged bonds seemed to have been pledged for indebtedness with some Atlanta creditor. The complainant insisted (page 121) that respondent either pledge with it as additional security the \$6,000 of bonds held by him, or that they should be utilized in effecting the exchange of bonds above mentioned. On October 11, 1909, Mr. Simmons adopted the former alternative, and pledged with complainant the \$6,000 of bonds under a specific agreement that they should come under the July 11, 1907, agreement. The pledge specifically provided that this pledge of the \$6,000 of bonds should be released if the exchange of the bonds named in the pledge were made by Simmons. Otherwise, they should "be held unconditionally."

There are the three deposits of bonds on which respondent claims an implied indulgence which would render the suit premature. In one instance, Mr. Simmons testifies (page 264) that Mr. McCanne did not say "in so many words, 'we will indulge you.'" He said: "We are indulging you."

Doubtless the deposits were made with the hope of indulgence, and McCanne thought such was the hope of Simmons. But McCanne denies any promise of indulgence, and the express terms of the pledge exclude indulgence. In his brief respondent claims a right of indulgence of five years. But the deposit of bonds is followed up to the very date of suit by letters from Mr. Simmons admitting the right of complainant to sue for the entire indebtedness, and negating the possibility of reliance by respondent on any indulgence. The very last deposit of the \$6,000 of bonds was for the purpose expressly of forcing an exchange of bonds as provided by the agreement of July 11, 1907.

I must hold that the deposit of bonds created neither expressly nor impliedly any right of indulgence or extension of time of payment.

#### Clipping Coupon Agreement.

The Atlanta Telephone Company had suffered reverses, and was badly in need of rehabilitation. Complainant owned a large number of bonds as did Mr. Simmons. Receivership was threatened under foreclosure. Therefore an agreement was made on June 5, 1909 (pages 113, 114), that all the bondholders who could be persuaded should clip their coupons, thus enabling the company to use interest money for needed repairs, etc. This was equally beneficial to complainant and respondent. This agreement provided that, if the rehabilitation did not progress satisfactorily to the committee named, a foreclosure might be brought on by them. Respondent claims that Mr. McCanne induced him to consent to this, thereby depriving him of means to meet his indebtedness to complainant, upon the promise of postponing his indebtedness.

In the first place, it will be observed that on June 5, 1909, the date of the agreement, many defaults had taken place on the part of respondent. He was equally interested with complainant in the reconstruction of the property and the avoidance of foreclosure. Even with this security against foreclosure its avoidance was not assured. The testimony of Mr. Simmons was vague (pages 269, 350-354), and expressed his understanding as to extension rather than express language. His agreement (page 113) did not convey any such idea. His letters subsequently recognized that his entire indebtedness was due. If the additional bonds were deposited as claimed, then there was no need of extension. I am forced to find that no indulgence can be predicated on the clipping of the coupons.

#### Bad Faith.

It is further claimed by respondent that complainant should not prevail in this suit because it interfered in bad faith with his sale of the telephone properties, thereby disabling him from paying his indebtedness.

The evidence totally fails to sustain this defense.

#### Conclusion.

While there is conflict in the memories of witnesses on several points at issue, the situation and surrounding circumstances are with the complainant.

Beyond this, however, the master must report that every letter, agreement, and document in the case, signed by either party to this litigation, is in favor of complainant, and consistent only with its contentions. The claims of complainant are asserted in numerous letters to respondent, and nowhere is there a denial or dissent on his part.

I therefore recommend that complainant be granted, by appropriate decree, the relief prayed in its bill.

I recommend as follows:

The notes should be reformed so as to describe the bonds pledged as "gold mortgage bonds," instead of "first-mortgage bonds," and reformed further to provide that if respondent, C. J. Simmons, should default in any payment

either of interest or the annual reduction of the principal of said notes, the whole obligation shall immediately become due and payable.

That respondent C. J. Simmons be decreed to pay forthwith to complainant the sum of \$139,921.57 principal, with interest at 6 per cent. per annum from February 1, 1908, said decree to have the effect of a general judgment against respondent. By stipulation of complainant and respondent there are to be credited on the interest the sum of \$6,562.50 of date August 1, 1911, and the further sum of \$6,562.50 of date February 1, 1912.

That complainant has the right to immediate foreclosure against and sale of all the collateral securities held by it, and described in the pleadings in this case and that complainant has a special lien thereon to the amount of this decree.

Hardeman, Jones, Callaway & Johnston, of Macon, Ga., for complainant.

Anderson, Felder, Rountree & Wilson, and Robert C. & Philip H. Alston, all of Atlanta, Ga., for respondent.

NEWMAN, J. This case is now heard on exceptions to the report of the special master. The report shows the character of the case, the questions involved, and the facts necessary to an understanding of these questions without restating them.

[1] There are but two questions involved as the case now stands. The first question is the right of complainant to have a reformation of the notes given to it by the defendant Simmons and an accelerating clause added, which it is alleged it was the intention of both parties at the time the notes were made to embody in the same. The second is made by the contention of the defendant that this suit was prematurely brought. The master found against the defendant on both of these questions. As to the first question, that is the right of reformation, there can be no doubt of the duty of the court to confirm the report of the master. The issue was one largely of fact with some conflict in the evidence, and it can hardly be questioned, it seems to me, that there was evidence to sustain the master's report.

[2] The special master's finding, he having been selected by the parties and appointed by consent, is entitled to the weight of the verdict of a jury. The parties agreed on Mr. Slaton, an able lawyer, as special master, and the case was referred to him. In effect, I think the language of Mr. Justice Field, in *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764, is applicable here. It is as follows:

"But when the parties consent to the reference of a case to a master or other officer to hear and decide all the issues therein, and report his findings, both of fact and law, and such reference is entered as a rule of court, the master is clothed with very different powers from those which he exercises upon ordinary references, without such consent; and his determinations are not subject to be set aside and disregarded at the mere discretion of the court. A reference by consent of parties of an entire case for the determination of all its issues, though not strictly a submission of the controversy to arbitration, a proceeding which is governed by special rules, is a submission of the controversy to a tribunal of the parties' own selection, to be governed in its conduct by the ordinary rules applicable to the administration of justice in tribunals established by law. Its findings, like those of an independent tribunal, are to be taken as presumptively cor-



rect, subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise."

Even if it be not such a reference as there contemplated, error on the master's part must be plain and manifest.

The simple question was, Did the parties, by mutual mistake, omit the accelerating clause from the notes? And the master, after a full hearing of all the evidence which could throw light on the question, decided that they did. There is no legal ground for disturbing his finding.

[3] The conclusion of the master on the next question is stated by the master as follows:

"There are three deposits of bonds on which respondent claims an implied indulgence which would render the suit premature: \$69,000 of bonds not covered by the contract of July 11, 1907, or the notes sued on, transferred as additional security to complainant on November 17, 1908 (see page 101 of the master's report of the evidence); \$13,000 of bonds pledged in February, 1909 (see page 104 of the master's report of evidence); \$6,000 of bonds transferred to complainant October 11, 1909 (see page 124 of the master's report of evidence). Doubtless the deposits were made with the hope of indulgence, and McCanne thought such was the hope of Simmons, but McCanne denies any promise of indulgence, and the express terms of the pledge exclude indulgence. In his brief respondent claims a right of indulgence for five years, but the deposit of bonds was followed up to the very date of the suit by letters from Mr. Simmons, admitting the right of the complainant to sue for the entire indebtedness and negating the possibility of reliance by respondent on any indulgence. The very last deposit of \$6,000 of bonds was for the purpose expressly of forcing an exchange of bonds, as provided by the agreement of July 11, 1907. I must hold that the deposit of bonds created, neither expressly nor impliedly, any right of indulgence or extension of time of payment."

The facts found by the master on this subject, as will be seen, are: (1) The three deposits of bonds, \$69,000; \$13,000 and \$6,000, aggregating \$88,000; (2) the further fact that Simmons made these deposits with the hope of indulgence by reason thereof; (3) that McCanne, acting for the complainant company, knew that Simmons hoped for such indulgence, but denied any promise of indulgence, and that the express terms of the pledge exclude indulgence; (4) and, finally, that letters written by Simmons, up to the very date of the suit, negative the possibility of his having relied on such indulgence.

This states succinctly the case made by the master's report, and I am satisfied that there is sufficient evidence to justify and sustain this finding. There was clearly no express agreement for an extension, and the master seems to be supported by evidence in finding that there was nothing from which an agreement to extend could be implied. Assuming that the master has found the facts correctly, under the law there would be no right to postponement. I do not discuss the numerous authorities cited pro and con, but they are quite fully collated in 7 Cyc. 894, 895. It may be proper to remark, however, that there was some indulgence of Mr. Simmons by the com-

plainant, because the last deposit of bonds was in October, 1909, and suit was not brought until May 17, 1910.

Very able and earnest arguments were made by both the counsel arguing this case for the defendant on this feature of the case, and I was very much impressed by them, and have consequently given the evidence and argument careful examination and much thought; but in any proper and reasonable view of the facts I am constrained to hold that the special master was justified in finding that there was no legal obligation, expressed or implied, on the part of the complainant to forbear suit at the time the suit was brought. What occurred in connection with the coupon-clipping agreement adds nothing to the right of the defendant in this respect, so far as I can see. I am compelled to overrule the exceptions to the master's report, and to confirm the same.

A decree of reformation will be entered in accordance with the master's report, and also a decree for the sum named therein, less the amount to be credited by reason of the recent receipt by complainant of interest, which, in a stipulation filed by it with the court, it is conceded amounts to \$13,125.

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DONAHOE et al. v. FRANKS.

(District Court, E. D. of Pennsylvania. September 14, 1912.)

No. 625.

1. SPECIFIC PERFORMANCE (§ 101\*)—REPUDIATION OF CONTRACT—TENDER—EXCUSE.

It is not a prerequisite to specific performance of a contract for the sale of real property that a tender be made of property or money where the opposite party has expressed a purpose not to comply with, but to repudiate the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 290, 295, 311-317; Dec. Dig. § 101.\*]

Necessity of tender of performance of contract, see note to *Hosmer v. Wyoming Ry. & Iron Co.*, 65 C. C. A. 91.]

2. SPECIFIC PERFORMANCE (§ 66\*)—RIGHT OF VENDOR.

Where a vendee may maintain a suit in equity for specific performance of a contract for the sale of land, the vendor may also maintain a bill for specific performance of the vendee's agreement to pay the purchase money.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 197; Dec. Dig. § 66.\*]

3. SPECIFIC PERFORMANCE (§ 58\*)—CONTRACT—CONSTRUCTION—"RETAINED."

A contract for the sale of certain real property provided for payment of \$500 cash on the making of the contract and the balance on a specified date, when the deal was to be closed. It then declared that, if the vendee should make default in paying the balance as provided, the \$500 payment should be forfeited to the vendors and "retained" by them as liquidated damages for breach of the contract, and for the failure of the vendee to pay the balance of the consideration. *Held*, that the word "retained" could not be construed to mean "accepted," and that the \$500 payment should be regarded as security only for the performance of the

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

contract by the vendee, and its retention by the vendors on the vendee's refusal to perform did not preclude them from maintaining a suit for specific performance of the vendee's obligation to pay the balance of the price.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 179, 180; Dec. Dig. § 58.\*

For other definitions, see Words and Phrases, vol. 7, p. 6196.]

In Equity. Suit by John Donahoe and another against Byron Franks for specific performance. On final hearing. Decree for complainants.

Linton Satterthwaite, of Trenton, N. J., for complainants.

Willis G. Kendig, of Lancaster, Pa., for respondent.

THOMPSON, District Judge. A bill was filed by the plaintiffs for specific performance by the defendant of a contract for the purchase of certain lands at Trenton, N. J. The suit was based upon an agreement in writing as follows:

"Articles of agreement, made and entered into the first day of June, A. D., nineteen hundred and ten, between John Donahoe (and Mary Donahoe, his wife) and Thomas Nolan, (and Laura Nolan, his wife) of the city of Trenton, in the county of Mercer and state of New Jersey, parties of the first part and Byron Franks, of the same place, party of the second part, witnesseth:

"The said parties of the first part, in consideration of the sum of nine hundred dollars an acre, to be paid as hereinafter provided, hereby agree to sell unto the said party of the second part, his heirs and assigns, all the certain lot, tract or parcel of land, situate in the city of Trenton, aforesaid, bounded and described as follows, to wit: [Here follows description of the land.]

"And it is mutually agreed by and between the parties hereto that the said party of the second part shall, at or before the ensembling of these presents, pay to the said parties of the first part the sum of five hundred dollars (\$500), and that the balance of said consideration, to wit, the sum of twenty thousand, nine hundred and twenty dollars (\$20,920), shall be paid by the said party of the second part to the said parties of the first part, at ten o'clock of the forenoon of the first day of September, A. D. nineteen hundred and ten, at the office of William M. Jamieson, in the Forst Richey building at the corner of Warren & State streets, in said city of Trenton, at which time and place the said parties of the first part will deliver to the said party of the second part a good and sufficient deed in the law for said premises.

"And it is mutually agreed that the said parties of the first part shall supply to the said party of the second part full searches in reference to said premises, and that the said deed of conveyance shall be a general warrant deed containing full covenants.

"And the said parties of the first part covenant and agree to and with the said party of the second part, that the said premises shall be free and clear of any and all encumbrances. The quantity of the land in said tract to be determined by a competent surveyor to be chosen by both parties.

"It is mutually agreed by and between the parties hereto that all clays on said premises that have been mined or pilled and all clays on the parts of said premises where the surface thereof has been broken in order that clay may be taken therefrom for the purposes of the manufacture of bricks, that the said parties of the first part may have the privilege of removing all such clays off and from said premises at any time between the date of these presents and the first day of November, nineteen hundred and ten, notwithstanding that an absolute deed of conveyance therefor may have been made and delivered to the said party of the second part as aforesaid.

"And it is mutually agreed by and between the parties hereto that if the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

said party of the second part should default in the payment of the said balance of said consideration at the time and place as aforesaid, that the said payment of five hundred dollars (\$500) so made by the said party of the second part to the said parties of the first part shall be forfeited to the said parties of the first part and retained by them as liquidated damages for the breach of this contract, and for the failure of the said party of the second part to pay the said balance of the said consideration money as aforesaid.

"In witness whereof, the said parties of the first part with their respective wives, and the said party of the second part have hereunto set their hands and seals the day and year first above written.

"John Donahoe. [Seal.]

"Mary Donahoe. [Seal.]

"Thomas Nolan. [Seal.]

"Laura Nolan. [Seal.]

"Byron Franks. [Seal.]

"Signed, sealed, and delivered in the presence of Wm. M. Jamieson."

The agreement was duly acknowledged before a master in chancery of New Jersey. Under the agreement the purchase was to be completed September 1, 1910. The bill sets forth that the plaintiffs, at the request of the defendant, executed in writing on August 31, 1910, an agreement to extend the time for performing the contract by the defendant from the 1st day of September, as expressed in the contract, until the 3d day of October, 1910; that the defendant had the premises surveyed by Carl Rickey, civil engineer and surveyor selected by him, who reported the quantity of land in the tract to be 23.42 acres; that the purchase price of the premises at \$900 an acre in accordance with the survey amounted to \$21,078, which amount the plaintiffs agreed to accept in lieu of the \$21,420 named in the agreement; that the sum of \$500 was paid by the defendant at the time of the execution of the agreement, and there remained unpaid the sum of \$20,578; that on October 3, 1910, pursuant to the agreement of extension, the plaintiffs were present at the place mentioned in the agreement with a deed executed by plaintiffs and their respective wives, conveying the premises clear of incumbrances, the deed being a general warranty deed with covenants against all incumbrances or defects in the title, and that they tendered themselves ready to deliver the deed and full searches showing the premises to be free from all incumbrances, but that the defendant failed to appear at the time and place agreed upon to pay the balance of the purchase money, and to receive delivery of the premises. The bill further averred that the plaintiffs had since that time frequently requested the defendant to perform his contract and pay the balance of his purchase price, and were at all times ready to deliver the deed and searches to the defendant on his paying the remainder of the purchase price, but the defendant had always refused to perform his part of the contract, and to pay the balance of the purchase price and accept the deed. The defendant in his answer admitted the execution of the agreement, and denied—

"\* \* \* however, that by the said agreement he agreed to purchase the premises therein described, but avers that the said agreement was an optional agreement for the purchase of the said premises, and that it was understood by and between all of the parties thereto that the said agreement

should be so held and construed, and that the failure of the said defendant to exercise the rights granted to him by the said agreement should not obligate him beyond the forfeiture of the sum of five hundred (\$500.00) dollars paid by him, the said defendant, to the said plaintiffs, on the date of the execution of the said agreement."

He further denied the execution of the extension agreement at his request, and averred that while he had requested of William M. Jamieson, Esq., attorney for the plaintiffs, that he procure for him an extension of the agreement, he had been advised by Mr. Jamieson that the plaintiffs had refused to make any such extension, whereupon he had notified Mr. Jamieson that it would be impossible for him to exercise the rights granted to him by the agreement. He further denied that he had had a survey made of the premises, or that he had acquiesced in the survey of the civil engineer, or that there had ever been submitted to him a change in the purchase price by reason of the quantity of land being less than that set forth in the agreement. He admitted the payment by him to the plaintiffs of the sum of \$500, and averred:

" \* \* \* That the said sum was, by mutual agreement of all parties to the said agreement, to be forfeited by him to the said plaintiffs under the terms and conditions of the said agreement, and that it has been retained by them as liquidated damages for the failure by him, the said defendant, to exercise the rights granted to him thereunder. The said defendant denies that he is obligated to the said plaintiffs in the said sum therein mentioned, viz., twenty thousand five hundred and seventy-eight (\$20,578.00) dollars, or any other sum or sums of money, and avers that the retention by the said plaintiffs of the said sum of five hundred (\$500.00) dollars is, and was stipulated in said agreement, full compensation for any and all loss or damages suffered or sustained by the said plaintiffs by reason of the failure of the said defendant to exercise the said agreement, as provided in the last paragraph of the same, more fully set forth at the foot of page four of said bill."

He averred that he had received no notice either directly or indirectly of the agreement of extension, and no notice, directly or indirectly, that the plaintiffs were to meet at the place specified in the agreement of extension on October 3, 1910, or at any other place or time for the purpose of tendering to him, the defendant, the deed and searches for the premises.

The allegations of the bill are amply sustained by the testimony of the witnesses for the plaintiffs, and no evidence was introduced on behalf of the defendant. It is shown by the testimony that on June 4, 1910, three days after the execution of the agreement, the defendant entered into an agreement in writing with Martin Fitzgerald, by which the parties were to work mutually together for the best interest of both parties in the sale and improvement of all the land secured from Donahoe and Nolan, and to share in all the profits of whatever nature from the property, Franks to receive 75 per cent. and Fitzgerald 25 per cent. The defendant, through Mr. Fitzgerald, had the land surveyed and marked out in lots by Carl H. Rickey, the civil engineer, in June, 1910. The survey showed the acreage to be 23.42 acres, instead of 23.8 acres, and this acreage with the equivalent diminution in the purchase price was agreed to by the defendant per-

sonally with Mr. Jamieson, attorney for the plaintiffs. On August 30, 1910, the defendant wrote Mr. Fitzgerald as follows:

"Room 5, Elmore Building,

"Trenton, N. J., Aug. 30th, 1910.

"Martin T. Fitzgerald, Trenton, N. J.

"My Dear Sir: I have a party in Buffalo that I think I can sell the lots to if you can get an extension of even 30 or 40 days and I will divide the profits with you, if we can sell to him we can make a good thing out of it. You say you can get an extension now do so, this is to your interest as well as mine.

Yours respt. [signed] Byron Franks."

Under the authority of the above letter, Mr. Fitzgerald obtained an extension to October 3, 1910, and Mr. Fitzgerald then notified the defendant by the following letter that the extension had been secured:

"141 East State Street,

"Trenton, N. J., Aug. 31, 1910.

"Mr. Byron Franks, Lancaster, Pa.

"Dear Sir: I have secured the extension you asked for and I trust you will soon be in position to take over the property. I advised the owners that you would surely be in position before the time was up on the extension so now you must get busy on this.

"Yours very truly."

The defendant then wrote Mr. Fitzgerald as follows:

"Room 5, Elmore Building,

"Trenton, N. J., Sept. 1st, 1910.

"Martin T. Fitzgerald, Trenton, N. J.

"My Dear Sir: See L. C. Case in regard to Buffalo party, he is in communication with him. Yours respt.

[Signed] Byron Franks."

The extension agreement was prepared by Mr. Jamieson, attorney for the plaintiffs, and delivered to Mr. Fitzgerald, who took it to the plaintiffs' place of business, where it was signed by them and delivered to Mr. Fitzgerald as agent for the defendant. Mr. Jamieson, at the request of the plaintiffs, procured searches against the property, and prepared a deed in conformity with the terms of the agreement which was executed and acknowledged by the plaintiffs and their respective wives, conveying the land in fee simple to the defendant. The plaintiffs on October 3, 1910, were present at the office of Mr. Jamieson, as agreed in the original contract and extension thereof, ready to deliver the deed and searches, but the defendant failed to appear and to pay the balance of the purchase money and to complete the sale. Whereupon Mr. Jamieson wrote the defendant, who, on October 7, 1910, replied as follows:

"Room 5, Elmore Building,

"Trenton, N. J., Oct. 7, 1910.

"William M. Jamieson, Esq., Trenton, N. J.

"My Dear Sir: In reply to your letter will say, in the contract I signed with Donahue & Nolan there was specific liquidated damages, a forfeit of \$500. I am the loser. Thanking you for any favors you have done me, I remain,

Respt. yours [signed] Byron Franks, Lancaster, Pa."

[1] It is apparent that Mr. Fitzgerald in securing the extension was acting under the authority of the defendant, and whether the

defendant was notified by Mr. Fitzgerald of the time when the plaintiffs were present at Mr. Jamieson's office to tender the deed and searches is immaterial, as it is not a prerequisite to specific performance that a tender be made of property or money where the opposite party has expressed a purpose not to comply with, but to repudiate, the contract. *Blanton v. Kentucky, etc., Co.* (C. C.) 120 Fed. 318; *Pollock v. Brainard* (C. C.) 26 Fed. 732; *Cheney v. Libby*, 134 U. S. 68, 10 Sup. Ct. 498, 33 L. Ed. 818; *McCullough v. Sutherland* (C. C.) 153 Fed. 418.

[2] It is well established that, where a vendee may maintain a suit in equity for specific performance of an agreement of sale of lands, the vendor may maintain a bill for the specific performance of the vendee's agreement to pay the purchase money. "The right of a vendor to come into a court of equity to enforce a specific performance is unquestionable. Such subjects are within the settled and common jurisdiction of the court." Mr. Chief Justice Marshall in *Cathcart v. Robinson*, 5 Pet. 264, 8 L. Ed. 120. See, also, *Raymond v. San Gabriel, etc., Co.*, 53 Fed. 883, 4 C. C. A. 89; *McCullough v. Sutherland* (C. C.) 153 Fed. 418. "The granting of the equitable remedy of specific performance is, in the language ordinarily used, a matter of discretion, not an arbitrary, capricious discretion, but of a sound, judicial discretion, controlled by established principles of equity, and exercised upon a consideration of all the circumstances of each particular case. Where, however, the contract is in writing, is certain in its terms, is for a valuable consideration, is fair and just in all its provisions, and is capable of being enforced without hardship to either party, it is as much a matter of course for a court of equity to decree its specific performance as for a court of law to award a judgment of damages for its breach." *Pomeroy's Equity*, § 1404.

[3] The defendant contends, however, that the agreement is alternative in its terms, and is, in effect, an option upon his part either to pay the purchase money and take the land, or to forfeit the \$500 paid down at the time of the execution of the agreement as liquidated damages, relying upon the final paragraph of the agreement, which is as follows:

"And it is mutually agreed by and between the parties hereto that if the said party of the second part should default in the payment of the said balance of said consideration at the time and place as aforesaid, that the said payment of five hundred dollars (\$500) so made by the said party of the second part to the said parties of the first part shall be forfeited to the said parties of the first part and retained by them as liquidated damages for the breach of this contract, and for the failure of the said party of the second part to pay the said balance of the said consideration money as aforesaid."

The question is whether the sum provided to be forfeited as "liquidated damages" was intended as security for the performance of the contract, or whether under the clause quoted above the contract is to be construed as an option by which, at the election of the defendant, he could pay the purchase money and take the land, or refuse to take the land and lose the money which had been paid.

The fact that the sum is stated to be "liquidated damages" is immaterial unless the contract is to be construed as an option, and the forfeiture of the sum named is to be substituted for the payment of the purchase money at the defendant's election.

"The difference between penalty and liquidated damages is, as regards the common-law remedy, most material; for according to common law, if the sum named is not a penalty, but the agreed amount of liquidated damages, the contract is satisfied either by its performance or the payment of the money. But, as regards the equitable remedy, the distinction is unimportant; for the fact that the sum named is the amount agreed to be paid as liquidated damages is, equally with a penalty strictly so called, ineffectual to prevent the court from enforcing the contract in specie." Fry's Specific Performance, § 146.

"The simplest illustration of this is the ordinary case of a stipulation on the sale of real estate that if the purchaser fail to comply with the condition he shall forfeit the deposit, and the vendor shall be at liberty to resell and recover as and for liquidated damages the deficiency on such resale and the expenses. Such a condition has never been held to give the purchasers the option of refusing to perform the contract if he choose to pay the penalty, nor to stand in the way of specific performance of the contract." Id. § 147.

"Notwithstanding the contract stipulates for the payment of liquidated damages in case of failure to perform, the court may decree specific performance, unless an option for payment instead of performance be given in the contract." Waterman on Specific Performance, § 22. *Hull v. Sturdivant*, 46 Me. 34.

"If the agreement be construed as giving to the party the option to do the act or pay a certain sum, equity will not interfere. In determining the question, the court will have regard to the whole agreement, and not merely look at the language expressing the penal sum. It may treat the word 'penalty' as meaning liquidated damages, or the words 'liquidated damages' as meaning a penalty. It may do this, notwithstanding the contract be alternative in its form, if the court can clearly see that the contract is to perform one of the alternatives." Waterman on Specific Performance, § 23.

The language of the agreement is sufficiently plain to be construed without taking into consideration any extrinsic evidence as to the intention of the parties as to its construction. It is clear that what the parties intended as set out in the agreement was that the plaintiffs should sell to the defendant the tract of land in question, and that the defendant should pay the sum of \$500 down and the balance upon the delivery of the deed. There is nothing in the language of the contract which indicates that the defendant at his election should pay the purchase money and accept the deed or forfeit the \$500 deposited and avoid the completion of the contract. The penalty by way of liquidated damages was intended as security for the performance of the contract by the defendant. The contract is for the sale of the land, and the damages are for its breach, and equity will enforce the contract against the party in default, and not permit a party to pay the damages and refuse to perform. *Brown v. Norcross*, 59 N. J. Eq. 427, 45 Atl. 605; *O'Connor v. Tyrrell*, 53 N. J. Eq. 18, 30 Atl. 1061. In both of the cases last above cited the parties were bound by an agreement with a stipulation for liquidated damages in case of failure to perform, and the stipulation was construed to be intended to secure the per-



formance of the contract. In the latter case—*O'Connor v. Tyrrell*—Chancellor McGill held that under such a contract it was not optional with the defaulting party to perform or to pay the sum named, and that damages did not become a factor in the consideration of the remedies until there had been an honest effort to perform and a failure, and he decreed specific performance.

The agreement to pay liquidated damages in the present case I think must be construed in accordance with the foregoing authorities. It clearly was not the intention of the parties that the defendant should, at his election, accept the deed and pay the purchase money, or refuse to perform and forfeit the deposit money, and the stipulation for liquidated damages must therefore be construed as a security for performance. The defendant, however, contends that the agreement has been carried to completion by both parties because the defendant agreed to pay and the plaintiff agreed to accept a sum of money as liquidated damages, and the defendant did pay, and the plaintiffs did accept, the same. He relies upon the decision in *Moss v. Wren*, 102 Tex. 567, 113 S. W. 739, 120 S. W. 847, where a stipulation was contained in the contract that, upon default, "the purchaser shall forfeit the amount paid hereon to seller, and the same shall be paid to seller by said trustee and accepted by said seller as and for liquidated damages for such injury and damages as the seller may suffer by reason of the nonperformance of this contract on the part of the purchaser," and where it was held that, inasmuch as the vendor had agreed to "accept" the sum as liquidated damages, the court would not decree specific performance, but hold him to his contract to accept a certain sum in lieu of performance. It is urged by the defendant that the language in the last paragraph of the contract providing that the \$500 shall be "retained" should be construed as though the word "retained" read "accepted." I do not think the language will bear that construction. The word "retain" means to hold back. The money was deposited in the hands of the plaintiffs, and they are no doubt entitled to hold it back pending the disposition of the controversy, but holding it back is not in any sense equivalent to accepting it in lieu of the performance of the contract. The deposit was made as security for the performance of the contract, and its retention by the plaintiffs surely puts them in no worse position than if it had not been made at the time, but it had been agreed that the amount should be paid in the future on failure to perform.

I am of the opinion that the plaintiffs are entitled to the relief prayed for, and a decree may be entered accordingly.

MODERN WOODMEN OF AMERICA v. HATFIELD et al.<sup>1</sup>

(District Court, D. Kansas. August 26, 1912.)

No. 1,313.

## 1. COURTS (§ 292\*)—UNFAIR COMPETITION—USE OF CORPORATE NAME—SUIT BY FOREIGN CORPORATION.

A fraternal beneficiary society incorporated under the laws of a state may maintain a suit in equity in a federal court in another state to enjoin citizens of the latter state from forming a corporation under its laws for conducting the same business of insuring the lives of its members, and having a name similar to complainant's for the fraudulent purpose of deceiving complainant's members and the public and unlawfully appropriating complainant's business and good will.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 834; Dec. Dig. § 292.\*]

Unfair competition in use of trade-mark or trade-name, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

## 2. INSURANCE (§ 692\*)—BENEFIT INSURANCE SOCIETIES—INCORPORATION—KANSAS STATUTE.

Gen. St. Kan. 1909, §§ 4303-4318, governing the organization of fraternal beneficiary societies, which in section 4309 provides that on the filing with the Superintendent of Insurance of a certificate stating the names of the applicants, and, inter alia, the "proposed corporate name of the association, which shall not too closely resemble the name of any similar association," if he shall find that its provisions are in accordance with section 4303, he shall indorse his approval thereon, and the certificate, when recorded, shall constitute the articles of association, do not vest in the superintendent a discretionary power to determine whether or not the name too closely resembles that of another association, but that question is one which may be determined by the courts in the first instance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1832; Dec. Dig. § 692.\*]

In Equity. Suit by the Modern Woodmen of America against Rodolph Hatfield and others. On demurrer to bill. Overruled.

Ferry, Doran & Dean, of Topeka, Kan., for complainant.

Rodolph Hatfield, of Wichita, Kan., and J. G. Johnson, of Peabody, Kan., for defendants.

CAMPBELL, District Judge. In this case the question now is on demurrer to the bill. It appears from the bill that complainant is an Illinois corporation, a fraternal beneficiary society, having for its purposes fraternal relations among its members and financial aid to their beneficiaries upon their death; that it has been, and is now transacting business in this state under due authorization since 1883, has about 80,000 members, has paid out to beneficiaries of deceased members more than \$100,000,000, and is now paying out \$11,000,000 per annum. Its organization as to head camp and subordinate officers is then set out, and the facts that the organization extends to 35 states of the Union and portions of Canada, and that

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

its revenues are derived from dues and assessments comprising general and benefit funds. It is then alleged:

"That the complainant has fixed laws, rules, and regulations which are passed and adopted by the Head Camp of the society; that, under these laws, rules, and regulations, the society is controlled and managed and its funds collected and distributed; that these laws, rules, and regulations, and all forms adopted by the Head and Local Camps thereunder, are the property and assets of the complainant society; that they are distinctive and well known to its membership and to the general public; that the local camps of the state of Kansas are known as 'the Kansas Woodmen,' and have been so known for many years; that the Modern Woodmen of America is known to be a strong, safe, well managed, fraternal beneficiary society, and that as such its name and the component parts thereof have a good will and property value; that the word 'Woodmen' is the principal part and the essence of the complainant's name; that the good will thereof has been established at great expenditure of time and money; and that as used in complainant's name it is a descriptive word, and that the public is in the habit of designating the complainant society by that name."

The defendants are alleged to be citizens of Kansas, and the amount in controversy is alleged to exceed \$3,000, exclusive of interest and costs.

It is then alleged:

"That at a meeting held in January, 1912, the complainant, through its Head Camp, or lawmaking body, deemed it wise, and for the best interest of the society and its members, to increase the rates of assessments, and at said meeting lawfully increased the same, said increase to become effective January 1, 1913; that the defendants herein, and others acting with them, whose names are to the complainant unknown, and are too numerous to be here inserted, if known, confederated and conspired together, and are now confederating and conspiring under the pretext of opposing said increase of rates, to fraudulently and unlawfully appropriate to themselves and their alleged new society, the name, title, insignia, designations, laws, rules, regulations, and property of the complainant, Modern Woodmen of America; that in consummation of said unlawful conspiracy and fraudulent acts said defendants have flooded the Kansas membership of the Modern Woodmen of America, and the public, with letters, writings, and articles issued through a publicity bureau created by them, urging said Kansas members of the Modern Woodmen of America to desert said society and to enter and become members of an alleged new society under the name of 'The Kansas Fraternal Woodmen,' and are also soliciting the public to become members of said alleged new society; that in further consummation of said unlawful and fraudulent purposes said defendants have made application to the charter board of the state of Kansas for charter for their said alleged new society under the name and title of 'the Kansas Fraternal Woodmen'; that said defendants have incorporated in the proposed name of their new society the word 'Woodmen' for the purpose and with the intent of misleading and deceiving the members of the Modern Woodmen of America, and the public, and of thus appropriating the good will and fixed property rights of the complainant, by leading and causing said membership of the Modern Woodmen, and the public, generally, to believe that the new society is in truth and in fact a branch or part of the Modern Woodmen of America, well knowing that the Kansas members of said organization are known, and have for many years been known, as 'The Kansas Woodmen.'"

This, complainant charges, is fraudulent and unlawful, in that it is an attempt to appropriate its name and good will and mislead and deceive its membership and the general public, and is in violation of the state statutory prohibition against the adoption of a name too closely resembling that of a similar association. The

recitations of the bill are further amplified by setting forth details not necessary here to repeat. It is charged that the use of the name "the Kansas Fraternal Woodmen" will tend to and will mislead and deceive complainant's members and the general public, and will lead to confusion and to the great and irreparable injury of the complainant, and that, unless enjoined, the defendants will apply to the state superintendent of insurance for a certificate of authority to do business in the state under the name of "the Kansas Fraternal Woodmen."

The prayer is that defendants be enjoined from soliciting membership or distributing literature in the name of "the Kansas Fraternal Woodmen," or attempting to procure or procuring from the state charter board a charter in such name; or from the State Superintendent of Insurance a certificate of authority to do business in such name, or from using complainant's form of organization, etc., of complainant's funds, property, or good will.

The demurrer raises two questions: (1) That a foreign corporation doing business in a state only by license has no standing in a United States court of equity to question the right of citizens of the state granting it the license to take any necessary steps under the statutes of the state in which the court is located for the creation of a corporation bearing the same or similar name as the foreign corporation. (2) That complainant, a foreign corporation, cannot invoke a United States court of equity, sitting in Kansas, by injunction, to restrain or enjoin these defendants from applying to duly constituted tribunals, clothed with limited judicial and discretionary powers, for a charter and permission to do business in the state.

[1] In support of the first proposition, the defendants cite *Lehigh Valley Coal Co. v. Hamblen et al.* (D. C.) 23 Fed. 225, and *Continental Ins. Co. v. Continental Fire Ass'n*, 101 Fed. 255, 41 C. C. A. 326. In the former case it was held by the Circuit Court for the Northern District of Illinois, Judge Gresham presiding, that as the complainant was a foreign corporation, doing business in the state only by comity, and at the sufferance of the state, the complainant had no standing in the federal court to procure an injunction restraining the defendants from receiving stock subscriptions or taking any other steps necessary to be taken under the statute in the creation of the new corporation. It is to be noted that the defendants in that case, under a peculiar provision of the state law, were acting as commissioners to open books for subscriptions to the capital stock of the corporation, and are held by the court to perform a function under the laws of the state, if not as officers, at any rate as instrumentalities employed by the state. The court further held that, in view of the Illinois law prohibiting the issuance of a license to commissioners to receive stock subscriptions in the name of a corporation, the same as that of one or more other existing corporations, the question was primarily one for the Secretary of State. But the court does not hold that the foreign corporation, complainant in that case, is without

redress in the federal court against the defendants, acting not as state instrumentalities, but as officers of the corporation, for he says:

"I do not say what may be done if the defendants succeed in creating their corporation bearing the complainant's name, and a suit shall be brought by complainant to prevent individuals claiming to be officers or managers of such corporation from interfering with the complainant's business as already stated."

But subsequently, in the case of *Peck Bros. & Co. v. Peck Bros. Co.*, 113 Fed. 291, 51 C. C. A. 251, 62 L. R. A. 81, the Circuit Court of Appeals for the same circuit decided the question in favor of the right of the foreign corporation to such relief, saying in reference to a contrary decision by an Appellate Court of the state:

"We are compelled, with deference, to differ with the learned court, if it intended to hold that incorporation under the laws of the state of Illinois protects one from the consequences of his own wrong. In a certain limited sense the sovereignty of the state had conferred the name. There is, however, in the term 'sovereignty' no magic to conjure by. It can confer upon individuals no right to perpetrate wrong. Nor do we think that the sovereignty of the state of Illinois sought to do that. It has a general law of incorporation, by which any body of men combining for the purpose of business may incorporate under any name they may select. The name is not imposed by the law, but is chosen by the incorporators. With that selection the sovereignty of the state has nothing to do. The act of sovereignty allowing incorporation is permissive, not mandatory. It sanctions the act of incorporation under the name and for the business proposed, if that name and that business be otherwise lawful. The sovereign by the act of incorporation adjudges neither the legality of the business proposed, nor of the name assumed. That is matter for judicial determination by a court having jurisdiction of the subject when the legality of the business or of the name is called in question. If one may not use the name imposed upon him in invitum so that it shall work wrong to another, by what token may he become incorporated under a name selected by himself to effect like wrong? And how is the sovereignty of a great state impugned by the denial to incorporators of a right to perpetrate such a wrong? Is it possible that a sovereignty of a state can be thus invoked to perpetrate a fraud? If it may be, then indeed will that sovereignty stand for oppression, and not for justice. Then could one who, in connection with a business to which his name had been attached and had given value to it, having disposed of their right to use that name to another, and so by the law prohibited from using it in connection with a like business under circumstances that would work a fraud, be enabled to effect the fraud by simply becoming incorporated under that name under the sovereignty of the state of Illinois. We cannot bend our judgment to the conclusion that a sovereign state designed thus to confer immunity for wrong. \* \* \* With respect to the denial by the Supreme Court of Illinois of the right of a foreign corporation to contest in the courts of that state the right of a domestic corporation to the corporate name given it by the state in its articles of incorporation, even if that name be selected in fraud and be used to perpetrate a wrong, we are not concerned. The state of Illinois has the undoubted right to regulate its own courts in its own way, and, if it so will, to turn a deaf ear to a demand for justice. A federal court, however, is organized in part to listen to complaints of citizens and corporations of one state against citizens or corporations of another state, and its doors may not be closed by any ruling of a state tribunal. We study the decisions of the highest court of a state with respectful deference, but cannot be concluded thereby in such a case as the present one, when the ruling invoked, in our judgment, works a grievous wrong. We cannot follow the decision in the *Hazelton Case*. The doctrine of the Illinois court, as we conceive, is not in accord with the decisions of the federal and of other state courts. *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* (C. C.) 32 Fed. 94; *Rogers Co. v. Rogers Mfg.*

Co., 17 C. C. A. 576, 70 Fed. 1017; Publishing Co. v. Dobblinson (C. C.) 72 Fed. 603; Higgins Co. v. Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 27 L. R. A. 42, 43 Am. St. Rep. 769; Holmes, Booth & Hayden v. Holmes & Atwood Mfg. Co., 37 Conn. 278, 293, 9 Am. Rep. 324."

In the second authority cited, Continental Insurance Co. v. Continental Fire Association, *supra*, there is not a distinct holding that a foreign corporation is without redress in such case. The court says:

"As under and in accordance with the laws of the state of Texas the defendant was incorporated under the specific name of the 'Continental Fire Association,' it has a *prima facie* right, certainly, under that name, to carry on in the state of Texas the business for which it was incorporated; and it would seem that a foreign corporation, with no such franchise, and doing business in the State of Texas only by license, is without standing to question the right of the defendant to use in its business the name granted and authorized by the State of Texas"—citing *Boston Rubber Shoe Co. v. Boston Rubber Shoe Co.*, 149 Mass. 436, 21 N. E. 875.

The court then states that in the cases coming under its observation (citing them) the controversy has generally been between corporations of the same state. The court further observes that it has found no such case in which a foreign corporation has been heard to complain, and cites and quotes from *Coal Co. v. Hamblen*, *supra*. The weight of the court's observations upon this question as an authority is, however, considerably affected by the latter part of the decision, which holds that, however all this may be, if it is assumed that the corporate name of a business corporation is practically its trade-mark, and that equity will deal with it in a proper case on principles analogous to those governing the use of the trade-marks, still the facts in the case do not sustain plaintiff's contention.

In the case of *Peck Bros. Co.*, *supra*, in which is cited *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* (C. C.) 32 Fed. 94, Mr. Justice Bradley, then of the United States Supreme Court, is quoted as observing in the latter case:

"As to the imitation of the complainant's name, the fact that both are corporate names is of no consequence in this connection. They are the business names by which the parties are known, and are to be dealt with precisely as if they were the names of private firms or partnerships. The defendant's name was of its own choosing, and, if an unlawful imitation of the complainant's, is subject to the same rules of law as if it were the name of an unincorporated firm or company. It is not identical with the complainant's name. That would be too gross an invasion of the complainant's right. Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another."

And from *Hopkins on Unfair Trade*:

"Where the defendant is a corporation whose corporate name includes a proper name, and was selected by the incorporators with the intent and for the purpose of deceiving the public into the belief that its goods are the goods of the plaintiff, such frauds will, of course, be enjoined."

The right of a foreign corporation to equitable relief by injunction against the fraudulent use of the same or similar name by a domestic corporation in the state and federal courts is further supported by the

following authorities: *U. S. L. & H. Co. of Maine v. U. S. L. & H. Co. of N. Y.* (decided by the U. S. C. C. for the Southern Dist. of N. Y. in 1910), 181 Fed. 182; *Phila. Trust, Safe Dep. & Ins. Co. v. Phila. Trust Co.* (U. S. C. C., Dist. Dela.) 123 Fed. 534 (decided in 1903); *Knights of Maccabees of the World v. Searle et al.* (decided by the Supreme Court of Nebraska in 1905) 75 Neb. 285, 106 N. W. 448; *Atlas Assurance Co. v. Atlas Ins. Co.* (decided by the Supreme Court of Iowa in 1907) 138 Iowa, 228, 112 N. W. 232, 114 N. W. 609, 15 L. R. A. (N. S.) 625, 128 Am. St. Rep. 189. As will be observed, one of the above cases involved a fraternal beneficiary association. That such associations, especially when incorporated, although not solely business corporations organized only for profit, may so protect themselves from injury resulting from the fraudulent use of the same or similar names by other like organizations, is supported by the following authorities: *Knights of Maccabees of the World v. Searle*, supra; *Intern. Com. of Y. W. C. A. v. Y. W. C. A. of Chicago*, 194 Ill. 194, 62 N. E. 551, 56 L. R. A. 888; *Daughters of Isabella No. 1 v. National Order of D. A.*, 83 Conn. 679, 78 Atl. 333, Ann. Cas. 1912A, 822.

If, as charged in the bill and admitted by the demurrer, so far as the present consideration is concerned, the use of the name "the Kansas Fraternal Woodmen" is for the purpose of misleading and deceiving complainant's members and the general public, and of injuring and destroying the complainant, and of appropriating its business and good will and the use of such name in the manner and for the purpose charged will tend to and will mislead and deceive complainant's members and the public, leading to confusion and consequent injury to complainant in the benefit and good will attaching to its name, then no reason is conceived why the defendants may not be now enjoined from proceeding to perfect the organization, rather than wait until it is perfected, and then enjoin them from engaging in the business for which the organization is contemplated, unless that reason be found in defendants' second contention.

[2] Under the second contention, it is urged that the statutes of Kansas governing the organization and operation of fraternal beneficiary societies (General Statutes of 1909, §§ 4303 to 4318, inclusive) confer upon the State Superintendent of Insurance and possibly upon the state charter board, when considered in connection with the law creating that board, the duty and authority to determine whether the name proposed to be used by the defendants does or does not too closely resemble the name of complainant. Section 4303 is a legislative definition of a "fraternal beneficiary association," as that term is used in the act. The complainant and the proposed organization of the defendants come clearly within its terms. Section 4304 permits the continuance in business of all foreign associations coming within the definition in the preceding section, and then doing business in the state, and provides that they shall thereafter be governed by the act, and shall make reports and designate the State Superintendent of Insurance as agent for service of process as provided by the act. This, under the allegations of the bill, applied to complainant.

Section 4305 has reference to such foreign associations as may thereafter come in. Section 4306 provides for annual reports by every such association in answer to 25 stipulated questions and certain additional inquiries which the Superintendent of Insurance is authorized to make.

Section 4307 requires the appointment of the Superintendent of Insurance by foreign associations doing business in the state as agent for service of process.

Section 4308 provides for the issuance of permits by the Superintendent of Insurance to existing foreign associations doing business in the state.

Section 4309 provides in detail for the organization of such associations within the state, requiring that they shall file with the Superintendent of Insurance a certificate in writing, stating (a) the names and places of residence of the applicants; (b) proposed corporate name of the association, which shall not too closely resemble the name of any similar association; (c) its objects, purposes, etc.; (d) location of principal office; (e) number of directors, etc. The section then proceeds:

"When said certificate has been duly signed and acknowledged by the proposed incorporators, it shall be filed with the Superintendent of Insurance of this state, and, in case the Superintendent of Insurance shall find that its provisions are in accordance with section 1 of this act, he shall issue to said incorporators duplicate copies of said application, with his certificate indorsed thereon that said corporation has been duly authorized to conduct the business provided for in its said application according to the provisions of this act. When one of said certified copies shall have been filed for record in the office of the register of deeds of the county in which the principal office shall have been established, the remaining copy shall constitute the articles of association of said corporation. Provided, that said Superintendent of Insurance shall not issue said certified copies until said incorporators have paid him a fee of \$25.00, and shall have satisfied him that there have been obtained bona fide applications for membership and insurance in said proposed association from at least 500 applicants, and that a benefit fund has been established, and cash deposited therein to an amount at least equal to twice the amount of the lowest certificate proposed by said association, and the proposed by-laws, benefit certificate, and application have been submitted to said Superintendent of Insurance, and found by him to be not in conflict with this act."

It is conceded by counsel, and I think properly so, that the term "application," where last above used, has reference, not to the application for permission to organize, but to the application which a proposed member of the organization must make to initiate the process by which he may become a member.

Section 4310 provides, among other things, that an association organized under this act shall be a body corporate and politic by the name adopted in the certificate of organization, with certain powers therein stated. Of the remaining sections only 4317 appears to have any relevancy to this inquiry. That section provides:

"None of the provisions of this act shall be construed as vesting discretionary power in the Superintendent of Insurance, but his construction of and decision under any section of this act shall stand and be binding on all parties in interest until reversed by a court of competent jurisdiction in an ac-



tion in the nature of an action in mandamus, to be prosecuted at his or its own cost, by any person or association dissenting from such construction or decision."

It is noted that this section first provides that the power lodged in the Superintendent of Insurance by the act shall not be construed as discretionary. Ordinarily, without such a saving clause, or provision for appeal, the decision of such a tribunal in a matter within its limited jurisdiction is final, and it was evidently to prevent such finality attaching to the Superintendent's decisions that this provision was incorporated in the act. If the question as to whether the name of defendant's proposed corporation too nearly resembles that of complainant is properly one primarily for the consideration of the Superintendent of Insurance, then the complainant should first make its contention before him, and, if unsuccessful there, must then avail itself of the remedy provided by the act. But is that a question which the Superintendent of Insurance is empowered to consider and determine? His jurisdiction as to such organization is special and limited by the terms of the act. It is true it is provided that his construction of and decisions under any section of the act shall stand and be binding upon all parties in interest until reversed as provided. But this must be construed as confined to such constructions and decisions as the act in other sections empowers him to make. If by the terms of the act he must issue the certificate if he find in favor of the applicants as to other features, regardless of the fact that in his judgment the name too closely resembles that of another association, then a decision by him of that question is futile. When the certificate of the proposed corporation setting forth the several things required by the act, duly signed and acknowledged, is filed with the Superintendent of Insurance, if he shall find that its provisions are in accordance with the first section of the act, he is required to issue his certificate, provided the requisite fee is paid, the requirements as to applications for membership and insurance and cash deposit complied with, and the proposed by-laws, benefit certificate, and application have been submitted to him, and found to be not in conflict with this act. A consideration of the question as to whether the provisions of the certificate are in accordance with the first section does not involve the question of similarity of names, nor do I find that it is involved in the finding which the Superintendent of Insurance must make under the proviso.

From a consideration of the entire act, I conclude that, while the act provides against the use of a name too closely resembling that of another association, it does not repose in the State Superintendent of Insurance the power to determine that question, but, as suggested in the Peck Bros. Case, *supra*, leaves it for the determination of the courts in a proper action. It follows that the Massachusetts authorities cited by demurrants do not apply here as to the Superintendent of Insurance (*Gregg v. Mass. Medical Society*, 111 Mass. 194, 15 Am. Rep. 24, and the *Scottish Clans Case*, 151 Mass. 558, 24 N. E. 918, 8 L. R. A. 320) for the reason that there it appeared that the question was one primarily for the special state tribunal or board. If it be true, as suggested, that possibly in view of the statute creating a

state charter board, organizations, such as we are now considering, must also apply to that board for a charter or permission to do business, which I think doubtful, the only duty imposed by the statute upon that board which could possibly give it jurisdiction to determine the question of too near resemblance of names is the provision that it shall determine the "good faith" of the proposed organization. That, in my opinion, has reference to the honest intention of the organizers to actually and in good faith carry on the business indicated in their proposed articles of incorporation, but does not include a consideration of the question as to whether the proposed name too closely resembles that of some other.

In view of the foregoing considerations, I find that the demurrer should be overruled; and it is so ordered.

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In re FAIRLAMB et al.

(District Court, E. D. Pennsylvania. August 30, 1912.)

No. 3,871.

**BANKRUPTCY (§ 336\*)—PROOF OF CLAIM—AMENDMENT.**

Where the trustee of a bankrupt circulated a paper containing a proposition for settlement among the creditors for their signatures, with a statement by each of the amount of his claim, and it was signed by all and returned and filed with the referee within a year, it constituted a sufficient claim to be amendable after the expiration of the year by a creditor which signed it in the belief that proof of claim was not required, but without whose assent the settlement could not have been effected.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 523, 524; Dec. Dig. § 336.\*]

In Bankruptcy. In the matter of R. Crosby Fairlamb and others, copartners trading as the P. H. Fairlamb Company, bankrupts. On certificate of referee relating to order allowing amendment of claim by the Western National Bank. Affirmed.

Julius C. Levi, of Philadelphia, Pa., for Western Nat. Bank.

Peter M. MacLaren, of Philadelphia, Pa., for objecting creditor.

THOMPSON, District Judge. An adjudication in bankruptcy was entered November 11, 1910. On April 27, 1912, the referee, upon petition of the Western National Bank, entered a rule upon the trustee to show cause why the bank should not be allowed to amend its proof of claim and file a formal proof of claim nunc pro tunc, and on May 22, 1912, the referee made the rule absolute, and ordered that the Western National Bank be granted leave to file an amended proof of claim nunc pro tunc.

A short time after the adjudication in bankruptcy at a meeting of creditors, a proposition of settlement was submitted by which a corporation was to be formed to be called P. H. Fairlamb Company, Incorporated, to which the assets of the P. H. Fairlamb Company,

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

bankrupt, were to be transferred, and a committee of creditors was appointed to secure the consent of all the creditors in writing to accept stock of the proposed corporation and certain securities in settlement of their claims against the bankrupt. Within a year after adjudication, the signatures of all the creditors, including the Western National Bank, were obtained to an agreement, the essential clause of which is as follows:

We, the undersigned, hereby agree to accept in settlement of or on account of our claims the said common stock of the P. H. Fairlamb Company and the stock of the said Bell-Union Coal & Coke Company in the amounts of each set opposite our respective names without prejudice to our claims in the event of the said proposition not being accepted and settlement effected, and for the balance of our claim will accept certificates of the trustees holding the "Trust Fund."

The following is the form of signature arranged on the paper:

Name of Creditor.	Amount of Claim.	Amount of Coal Stock.	Amount Common Stock P. H. Fairlamb Co.	Trustee's Certificates.
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The bank in signing the paper set out the amount of its claim, together with the amount of coal stock, the amount of common stock of the P. H. Fairlamb Company, and the amount of trustee's certificates which it agreed to accept. Creditors to the amount of about \$200,000 filed with the referee within the year formal proofs of claim, while creditors in amount of approximately \$100,000, among whom was the bank, did not file such proofs. The trustee of the bankrupt company was to be trustee under the trust deed, to be manager of the P. H. Fairlamb Company, Incorporated. He was active in obtaining the settlement and signatures to the agreement, and the agreement was delivered to him and remained in his possession as trustee. The bank claims that its signature having been obtained to the agreement by the trustee in bankruptcy and committee of creditors, and it having signed the agreement to accept stock in the new corporation in payment of its claim against the bankrupt estate, and being unrepresented by counsel, it was under the impression that a settlement had been made, and no further steps were necessary upon its part. Its position is that its signature to the agreement, filed with the trustee within the year and setting out the amount of its claim, is sufficient in substance as a proof of claim to empower the court to permit it now to file an amended proof of claim setting out the formal requirements under section 57a of the Bankruptcy Act.<sup>1</sup> The contention of the petitioner for review is that the mere signing of the agreement setting out the amount of its claim filed with the referee within the year was not in substance a sufficient claim for the bank to base an amendment upon, and further relies upon the fact that the trust deed contains a clause providing that the funds of the P. H. Fairlamb Company, Incorporated, should be distributed among the creditors "who had filed claims duly allowed by the referee in bankruptcy," and its contention appears to be that the failure of the bank to file its formal claim within the year is evidence of its abandonment of any assertion of its claim under the settlement agreement.

I do not think that this clause in the trust deed will bear the construction which the petitioner desires to put upon it. If the signa-

<sup>1</sup> U.S. Comp. St. 1901, p. 2443.

ture to the agreement and statement of the amount of the bank's claim filed with the referee is sufficient upon which to base the amended claim, the due allowance by the referee may be made at any time prior to final distribution. The "proof" of a claim must not be confused with the "allowance" of the claim. Those are two distinct acts or proceedings, and the allowance, absolute or conditional, may or may not result from and follow the proof of the claim. *Hargadine-McKittrick Dry Goods Co. v. Hudson*, 122 Fed. 232, 58 C. C. A. 596, 10 Am. Bankr. Rep. 225; *In re Hornstein* (D. C.) 122 Fed. 266, 10 Am. Bankr. Rep. 308.

It was conclusively settled in the case of *J. B. Orcutt Co. et al. v. Green*, 17 Am. Bankr. Rep. 72, 204 U. S. 96, 27 Sup. Ct. 195, 51 L. Ed. 390, that a claim delivered to the trustee in bankruptcy within the year is sufficiently filed within the meaning of section 57 of the Bankruptcy Act. It remains to be determined whether there was sufficient in substance in the agreement to constitute an amendable claim.

In the case of *In re Kessler*, 25 Am. Bankr. Rep. 512, 184 Fed. 51, 107 C. C. A. 13, the bankrupt firm had made an assignment for the benefit of creditors. A creditor firm in Paris sent to the assignee an account in detail of its transactions with the assignor showing a balance owing to the creditor. The account was accompanied with a letter stating that it was an extract of account of the firm showing a debit balance of Fr: 140720, and adding that a firm of New York attorneys were authorized to represent the creditor in the matter. There was no verification under oath, nor any statement whether any security was held as collateral therefor. Thereafter a petition in bankruptcy was filed, and a receiver was appointed, who was afterwards elected trustee. The assignee turned over to the receiver, among other things, the letter and account of the Paris creditor. It was held by Judge Lacombe, following the case of *Orcutt Company v. Green*, that the presentation and delivery of claims to the trustee within the year was sufficient, and that the creditor's claim contained "enough by which to amend," and, in view of the circumstances, the amendment was allowed. See cases cited in Judge Lacombe's opinion and in footnote. The courts have been extremely liberal in permitting amendments to proofs of claim where the amendment does not affect the substance of the claim.

In the case of *In re McCallum & McCallum* (D. C.) 11 Am. Bankr. Rep. 447, 127 Fed. 768, Judge McPherson said:

"If the proof of a right that had already been asserted in substance should thereafter (after the year) be found to lack form or precision, ordinarily, I suppose, such defect might still be remedied; but, as Judge Archbald said in a similar case—his opinion was afterward adopted by the Circuit Court of Appeals—the general right to amend, regardless of the time which has elapsed, is abundantly sustained by the authorities. \* \* \* But to do so it is plain there must be in the record as it stands the substance of that which is asked for. The right to amend can go no further than to bring forward and make effective that which in some shape is already there." *Re Mercur* [D. C.] 8 Am. Bankr. Rep. 275, 116 Fed. 655; *Id.*, on appeal, 122 Fed. 384, 58 C. C. A. 472."

In that case (*McCallum & McCallum*) a creditor, having proved his claim against the bankrupt firm, sought to amend it after the year had expired, so as to add to it a claim against one of the partners

individually as indorser upon a firm note to the order of the partner. It was held that the claim against the partner was a separate contract, and not in substance part of the original claim, and could not be tacked on to the original claim by amendment.

In the Case of Roerber, 11 Am. Bankr. Rep. 464, 127 Fed. 122, 62 C. C. A. 122, in commenting upon the allowance of amendment, the court said:

"Bankruptcy courts have the usual powers of courts of justice upon motion and for good cause to allow amendments. All parties were advised of the claim within the year. There is no dispute that the amount claimed is justly owing from the bankrupt. The amendment was in furtherance of justice and within a legitimate exercise of the power of amendment."

In the present case all the creditors signed the agreement within the year, and all creditors and the trustee were advised in writing upon the agreement filed with the trustee of the claim by the Western National Bank and its amount. The settlement under the agreement could not have been consummated unless the bank had signed the agreement. As was said by Judge McPherson in the Northampton Portland Cement Co. Case (D. C.) 25 Am. Bankr. Rep. 565, 185 Fed. 542, where a similar plan was under consideration:

"It seems clear that such a plan cannot be imposed upon unwilling creditors. \* \* \* In my opinion a bankruptcy court has not been empowered to embark in enterprises of this kind. They may be desirable, but the creditors must determine that for themselves. The usual course of administration may be certain to result in heavy loss, but the court must pursue that course unless the act has authorized the use of exceptional means."

To quote the language of the referee in this case:

"The equities of the claimant to file an amended proof of claim in the case in hand is much stronger than that in the case of *In re Kessler*. The signature to the paper was solicited by the trustee in bankruptcy, and the agreement was to receive distribution from the company to be formed who would settle with the creditors not directly out of the bankrupt's funds, but in stock of the said company. The creditors were naturally misled into the delusion that they would receive this distribution by virtue of their signature to the paper without further action on their part. The corporation organized to make this settlement, of course, were not bound to accept the amounts for which the creditors signed as final determination of the actual amount due the creditor, but the paper having been prepared for the signatures of all creditors, and requiring the signatures of all creditors to make it valid, the creditors had good ground to take it for granted that the amounts for which they signed not having been in any way disputed were accepted as proper claims."

I am of the opinion that the agreement filed with the referee, signed by the bank, setting out the amount of its claim and the securities which it agreed to accept, under the circumstances of this case, was sufficient in substance to constitute an amendable claim, and that it would be inequitable to permit the petitioner to enjoy the fruits of a settlement, which could not have become effective without the bank's assent, and to largely increase its dividend by forbidding the bank to be put in the position of having its claim allowed when the petitioner, together with all other creditors, was fully advised of the amount of the bank's claim.

The order of the referee of May 22, 1912, is affirmed, and the petition for review dismissed.

In re CHIN K. SHUE.)

(District Court, D. Massachusetts. January 26, 1912.)

No. 575.

**1. CUSTOMS DUTIES (§ 126\*)—SEARCH WARRANT—REMOVAL OF DOCUMENTS.**

A search warrant issued to a customs inspector, authorizing him to search a particular place for merchandise fraudulently introduced into the United States, and to seize such merchandise, if found, did not justify the removal of letters, books, and papers from the premises, and such removal constituted a trespass, for which the officers were liable to prosecution by the ordinary remedies.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 290-295; Dec. Dig. § 126.\*]

**2. CONTEMPT (§ 11\*)—ABUSE OF MANDATE—SEARCHES AND SEIZURES—CUSTOMS DUTIES.**

A United States commissioner, in issuing a search warrant authorizing a customs inspector to search certain premises for merchandise fraudulently introduced into the United States, and to seize the same, if found, as provided by Rev. St. § 3066, does not act judicially; and hence the warrant, when so issued, is not to be regarded as issued under the authority of the court.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 23-26; Dec. Dig. § 11.\*]

**3. CONTEMPT (§ 10\*)—ACTS OF OFFICERS—CUSTOMS INSPECTOR—MISUSE OF PROCESS—PUNISHMENT.**

Where a customs inspector, assisted by an inspector of the Department of Commerce and Labor, entered petitioner's premises pursuant to a search warrant, issued by a United States commissioner, authorizing the customs inspector and his assistant to search for merchandise fraudulently introduced into the United States, and to seize the same, if found, and without authority removed certain letters and other documents and records, which they refused to return, they in so doing were not acting as officers of a federal court, and therefore were not subject to be proceeded against for contempt in a federal court, under Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1163 [U. S. Comp. St. Supp. 1911, p. 237]) § 268, authorizing such courts to punish for contempt any of their officers for misbehavior in official transactions, etc.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 19-22; Dec. Dig. § 10.\*]

Petition by Chin K. Shue for an order compelling William H. Tighe, customs inspector for the Massachusetts district, and Richard Taylor, an inspector of the Department of Commerce and Labor, to return certain letters and documents taken from petitioner's place of business pursuant to a search warrant, and to punish them for alleged abuse of process. Denied.

Thomas J. Barry and Harry J. Jaquith, for petitioner.  
William H. Garland, for respondents.

DODGE, District Judge. December 14, 1911, a United States commissioner for this district issued a search warrant under Rev. St. U. S. § 3066, as amended April 25, 1882 (22 Stat. 49, c. 89 [U. S. Comp. St. 1901, p. 2008; 1 Supp. Rev. St. p. 337]), to William H. Tighe, a customs inspector for this district, authorizing him, with necessary and proper assistants, to enter premises at No. 11 Harrison avenue, in Bos-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ton, to search there for merchandise fraudulently introduced into the United States, and to seize such merchandise, if found. The inspector has indorsed the warrant:

"Received Dec. 14, 1911. I executed said warrant the same day. No violation of the law found."

The present petition was filed December 22, 1911. The petitioner is a member of a firm of Chinese merchants, which carries on business in the premises which the warrant describes. He alleges that Tighe entered the premises, with the warrant, on December 14th, with several assistants, one of whom was Richard Taylor, an inspector in the Department of Commerce and Labor; that Tighe and his assistants, having completed their search, knew that no violation of the law had been discovered; that under cover of the warrant Tighe and Taylor took and carried away from the premises certain articles there found by them, without any lawful right; that some of the articles so taken away have been returned, but that others have been retained by Tighe and Taylor, among them certain letters to customers of the firm, addressed in its care, and being held by the firm for delivery to the addressees; that said letters were sealed when taken away; that Tighe and Taylor have returned some of them, but all had been opened before they were returned; that demand has been made upon Tighe for the articles not returned, but that he still retains them; that the taking away of said articles was an abuse of the process of the court, and violated the petitioner's rights under the fourth and fifth amendments to the Constitution.

The petitioner asks the court to direct the commissioner to certify the proceedings before him, and that Tighe and Taylor show cause why they should not be ordered to return all property and papers taken as above, and why they should not be punished for contempt in exceeding their authority under the warrant.

[1] The commissioner has filed a certificate showing the issuance of the warrant and its return as above. The evidence at the hearing showed that several warrants similar to the one above mentioned were issued to Tighe at the same time, authorizing searches of different premises in Boston; that the search at 11 Harrison avenue was made by persons employed by Tighe as his assistants, of whom Taylor was one; that letters, books, and papers belonging to the petitioner were taken away from the premises by them while making the search; and that Taylor, though he has since returned some of these, still retains certain letters and account books so taken away.

The warrant obviously afforded no justification for the removal of the letters, books, and papers thus taken away from the premises. Whoever so took them away committed a trespass, for which the petitioner has the usual remedies, or of which he has the right to complain to the department whereof the persons guilty of the trespass were officers. The question here is: Were Tighe and Taylor at the time officers of the court, within the meaning of section 268 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1163), which re-enacts Rev. St. § 725 (U. S. Comp. St. 1901, p. 583)? Unless they were, the court is without power to deal with their acts as "misbe-

havior" of its officers "in their official transactions," and adjudge them in contempt as this petition asks.

Section 3066 entitled Tighe to the warrant primarily because of the fact that he was one of the customs officers mentioned in that section. Title 34 of the Revised Statutes, in which section 3066 is contained, consists of the laws regulating the collection of duties upon imports. Elsewhere in the same title are prescribed the duties of each customs officer mentioned in section 3066 and the manner of his appointment. Neither in connection with his duties nor with his appointment is any reference made to the courts. If, therefore, he is to be called in any sense an officer of the court, it is only by virtue of the fact that this warrant was issued to him. The duties which he undertook to perform under the warrant appear rather to be statutory duties required of him as a customs officer than duties imposed upon him by any court or magistrate. It is not claimed that the warrant was improperly issued or was invalid for any reason. The claim that Tighe or his assistants were officers of the court involves the assumption that it was valid.

[2] Whether or not the warrant can be said to have issued under the authority of the court is the next inquiry. It makes no mention of the court, is neither signed by its clerk nor under its seal, and it does not by its terms purport to clothe the customs officer with any authority of the court. Unless the commissioner was exercising the authority of the court in issuing it, I do not see how the court can be said to have authorized it in any sense. Elsewhere in title 34 there are provisions that the judge may issue warrants of similar character required in administering the customs law. See section 3091. Warrants under that section are to issue to the marshal, who is the officer by whom service of process issued by the court is regularly to be made, and are, therefore, warrants issued by the court's authority. Warrants under section 3066 are not issued to the marshal, and the judge is only one of several magistrates empowered to issue them.

Commissioners are officers appointed by the court (Act May 28, 1896, c. 252, § 19, 29 Stat. 184), but it does not follow that they are officers of the court for all purposes. Regarding them it is said that, "though not strictly officers of the court," and "to a certain extent independent in their statutory and judicial actions," they are, "so far as relates to their administrative action," subject to the court's control. *U. S. v. Allred*, 155 U. S. 591, 595, 15 Sup. Ct. 231, 233 (39 L. Ed. 273). While in proceedings before the commissioner, which are preliminary to or in aid of proceedings before the court, he may be said to act under the court's authority, as when he causes the arrest of alleged offenders, and imprisons or bails them for trial under Rev. St. § 1014 (U. S. Comp. St. 1901, p. 717), there are other things, which the statutes elsewhere authorize or require him to do, wherein no proceedings before the court are contemplated. No reason appears for saying that he acts by the court's authority in performing such functions. His authority to perform them comes from the statutes, independently of the court which appointed him.

Justices of the peace were the only magistrates authorized by section 3066 to issue search warrants to customs officers before the



amendment of that section in 1882. As then amended it now gives the same authority to any "district judge of cities, police justice, or any judge of the Circuit or District Court of the United States, or any commissioner of the United States \* \* \* court." Justices of the peace are state officers, who do not, merely as such, exercise any judicial functions. Rev. Laws Mass. c. 161, § 5. In issuing such a warrant, therefore, the commissioner is exercising the same authority which a judge may exercise, and neither exercises any greater authority than may be exercised by a justice of the peace. These provisions afford little support to the conclusion that a commissioner acts under section 3066 by the authority of the court. The section, indeed, cannot be said to afford much scope for the exercise of any function, properly called judicial, by the magistrate, whoever he may be. Probable "cause to suspect" on the customs officer's part is all that is required to be shown, not reasonable cause to believe. Nor is it provided that the magistrate "may" issue the warrant; the language is that the customs officer "shall be entitled" to it.

[3] Even upon the theory that this warrant issued under authority from the court, further difficulties oppose the conclusion that the customs officer entitled to it becomes upon receiving it an officer of the court within the meaning of section 268 of the Code. As has been said, the court has had nothing to do with appointing him. Merchandise seized by any customs officer under such a warrant as this he holds for the collector of customs, in whose custody section 3086 (U. S. Comp. St. 1901, p. 2015) places it pending adjudication. Section 3086 was enacted in 1866. Before its enactment, the goods seized were to be in the marshal's custody pending adjudication, and this would have been the custody of the court. When in the custody of the collector under section 3086, and after the collector has proceeded against them in court for forfeiture, the collector's custody is regarded as the court's custody for some purposes. The *G. G. King* (D. C.) 16 Fed. 921. But there would seem to be little reason to suppose that, in making the seizure and in dealing with the goods before the collector proceeds against them, the customs officer acts as an officer of the court.

The only authority cited in support of the petition is *In re Birdsong* (D. C.) 39 Fed. 599, 4 L. R. A. 628. In that case a state official was treated as an officer of a federal court for the purposes of Rev. St. § 725 (U. S. Comp. St. 1901, p. 583). But he committed the act there regarded as a contempt while actually executing a sentence imposed by the court upon a federal prisoner committed to the state jail whereof he was keeper.

In view of all that has been shown bearing upon the questions raised, I am not satisfied that Tighe and Taylor, or either of them, or their assistants, were, while making the search of these premises, officers of this court in such sense as empowers it to direct them, upon petition, to return the property removed or be adjudged in contempt, or in any way to deal with them under section 268 of the Judicial Code.

The petition must therefore be dismissed.

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UNITED STATES v. RIDGWAY et al.

(District Court, W. D. Washington, N. D. August 8, 1912.)

Nos. 2,168, 2,169.

**1. INDICTMENT AND INFORMATION (§ 99\*)—FORM—DIFFERENT COUNTS—INCLUSION BY REFERENCE.**

Where an indictment contained several counts for using the post office establishment in furtherance of a lottery or similar scheme, and the first count described the scheme in full, it was sufficient that subsequent counts included a description of the scheme by reference to the first count thereof, and they were not rendered invalid because the offense described in the first count was barred by limitations.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 270, 270½; Dec. Dig. § 99.\*]

**2. POST OFFICE (§ 34\*)—OFFENSES—USE OF MAILS IN FURTHERANCE OF A LOTTERY OR SIMILAR SCHEME—STATUTES.**

Criminal Code (Act March 4, 1909, c. 321, § 213, 35 Stat. 1129 [U. S. Comp. St. Supp. 1911, p. 1652]), prohibiting the use of the mails in furtherance of a lottery or similar scheme, superseded Rev. St. § 3894 (U. S. Comp. St. 1901, p. 2659), relating to the same subject.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 54; Dec. Dig. § 34.\*]

**3. INDICTMENT AND INFORMATION (§ 131\*)—OFFENSES—JOINDER—FELONY—MISDEMEANOR.**

Under Rev. St. § 1024 (U. S. Comp. St. 1901, p. 720), providing that where there are several charges against any person for the same act or transaction, or for two or more acts or transactions of the same class of offenses or crimes, which may be properly joined, they may be joined in a single indictment in separate counts, charges of misuse of the mails in furtherance of a lottery or similar scheme were properly joined in a single indictment in separate counts, though some of the counts charged a misdemeanor and others a felony.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 424; Dec. Dig. § 131.\*]

**4. POST OFFICE (§ 48\*)—MISUSE OF MAILS—LOTTERY—INDICTMENT—SCIENTER.**

An indictment for misuse of the mails in furtherance of a lottery or similar scheme, charging that defendants "did then and there willfully, knowingly, unlawfully, and feloniously deposit \* \* \* a certain letter and circular concerning a certain scheme" previously described, sufficiently charged that defendants knew that the letter deposited by them concerned the scheme; and, it being also alleged that defendants devised such scheme, the indictment was not objectionable for failure to allege a sufficient scienter.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67-80; Dec. Dig. § 48.\*]

**5. POST OFFICE (§ 48\*)—MISUSE OF MAILS—LOTTERY SCHEME—INDICTMENT.**

Criminal Code (Act March 4 1909, c. 321, § 213, 35 Stat. 1129 [U. S. Comp. St. Supp. 1911, p. 1652]), prohibits the use of the mails in furtherance of a lottery or similar scheme offering prizes dependent in whole or in part on lot or chance. *Held*, that where an indictment, after fully describing a scheme to dispose of certain lots of unequal value by means of a drawing, alleged that defendants did willfully, etc., deposit in the post office a certain letter and circular concerning such scheme which was described as one offering prizes dependent in whole or in part on lot or chance, such allegation cured a prior general averment that it was "a scheme dependent on lot or chance" as distinguished from "a

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

scheme offering prizes dependent on lot or chance" described in the statute.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67-80; Dec. Dig. § 48.\*]

6. POST OFFICE (§ 34\*)—MISUSE OF MAILS—"LOTTERY OR SIMILAR SCHEME."

An indictment charging misuse of the mails in furtherance of a lottery or similar scheme charged that defendants, having acquired certain land, conceived the idea of platting it into lots of unequal value and on a certain number of the lots erecting houses, rendering the inequality greater, then selling the lots at \$140 each, the particular lot secured by a purchaser, however, not to be known or identified at the time of purchase, but that, after all the lots were sold, there was to be a drawing under defendants' supervision by which the lots were to be parceled out by lot or chance to each purchaser and deeded in accordance with the drawing. *Held*, that such scheme was in all respects similar to a lottery, and that the furtherance thereof by means of letters and circulars sent through the Post Office Department constituted a violation of Criminal Code (Act March 4, 1909, c. 321, § 213, 35 Stat. 1129 [U. S. Comp. St. Supp. 1911, p. 1652]), prohibiting the use of the mails in furtherance of a lottery or similar scheme.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 54; Dec. Dig. § 34.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4245-4252; vol. 8, pp. 7710-7711.

Nonmailable matter, see note to *Timmons v. United States*, 30 C. C. A. 79; *McCarthy v. United States*, 110 C. C. A. 548.]

W. A. Ridgway and another were indicted for using the post office in furtherance of a lottery, and they demurred to the indictment. Demurrer overruled, except as to counts 1 and 5.

W. G. McLaren, of Seattle, Wash., for the United States.

Kerr & McCord and Hammond & Hammond, all of Seattle, Wash., for defendants.

CUSHMAN, District Judge. This matter is now before the court upon demurrers to the indictments in the above numbered causes.

The first count of the indictment in cause No. 2,169 is as follows, to wit:

"That heretofore, to wit, on or about the 9th day of April, 1910, one W. A. Ridgway and one R. E. Glass, at the city of Seattle, county of King, state of Washington, within the Western District of Washington and within the jurisdiction of this court, then and there being, did then and there willfully, knowingly, unlawfully, and feloniously deposit and cause to be deposited in the post office in the United States of America, at said city of Seattle, to be sent and delivered by the post office establishment of the United States, a certain letter and circular concerning a certain scheme dependent upon lot or chance, then and there being operated and conducted within the Western District of Washington by a certain corporation called 'Jovita Heights Company,' and which said letter and circular were then and there intended for the purpose of promoting, aiding, and furthering the carrying on of the business of said scheme, and which said letter, omitting the letter head, was in words and figures as follows, \* \* \* and which said letter and circular were contained in a certain sealed envelope, then and there addressed and directed as follows, to wit: \* \* \*"

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

And which said scheme hereinbefore referred to was as follows:

"That the said W. A. Ridgway and R. E. Glass should acquire in the name of the Jovita Heights Company, a corporation, certain vacant, unimproved lands within King county, in the Western District of Washington, which they should plat and cause to be platted into lots and blocks under the name of Jovita Heights, which said lots should be of different and unequal values; and it was further a part of said scheme to build houses of different values upon twenty-four of said lots, thereby rendering said lots of more value than the other lots which were unimproved by buildings of any kind; and it was a part of said plan of said defendants to offer said lots for sale to persons throughout the United States and to enter into contracts with said purchasers, whereby said lots were to be sold to them for the sum of one hundred and forty (\$140.00) dollars each, but at the time of such sale the lot or lots so purchased should not be identified, but after all of said lots were so sold and contracted to be sold, a drawing should be had by which said lots should be parceled out to each purchaser by lot and chance, which said drawing was to be conducted on said property under the supervision of said W. A. Ridgway and R. E. Glass and their agents and employes, and that, after said drawing, a deed or deeds should be issued to each purchaser conveying to him the lot or lots so drawn by him; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

The other counts are of similar import, but are based upon and describe different letters and circulars as the subject-matter of the mailing. There are 11 counts in the indictment in cause No. 2,169 and 10 counts in indictment No. 2,168. The indictments not only embrace charges of violations of section 3894, R. S. (U. S. Comp. St. 1901, p. 2659), but of section 213 of the Criminal Code of 1910 (Act March 4, 1909, c. 321, 35 Stat. 1129 [U. S. Comp. St. Supp. 1911, p. 1652]). The plaintiff admits that prosecution for any offenses charged in counts 1 to 5 in indictment No. 2,168 is now barred by the statute of limitations.

[1] The first point urged in defendants' demurrer is that the only count in this indictment which sets forth and describes the "scheme" is the first count. The other counts incorporating the allegations describing the "scheme" by reference to the first count, and the first count being barred by the statute, the others fall with it. This position cannot be sustained.

"One count may refer to matter in a previous count, so as to avoid unnecessary repetition; and, if the previous count be defective or is rejected, that circumstance will not vitiate the remaining counts, if the reference be sufficiently full to incorporate the matter coming before with that in the count in which the reference is made. *Blitz v. U. S.*, 153 U. S. 308-317 [14 Sup. Ct. 924, 38 L. Ed. 725]." *Crain v. U. S.*, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097-1099.

[2] It is further urged that the indictments are demurrable for the reason that there is an improper joinder of offenses, in that counts 1, 2, 5, and 7 of indictment 2,168 are under section 3894, R. S., providing a maximum imprisonment of one year, and the remainder of said counts are under section 213 of the Criminal Code, providing a maximum imprisonment of two years; it being contended that a felony and misdemeanor cannot be joined in the same indictment. Section 213 of the Criminal Code of 1910 supercedes section 3894 of the Revised Statutes. They treat of the same

offenses, to wit, using the mails in furtherance of a lottery or similar scheme. Section 213 is somewhat more comprehensive than section 3894. The offenses described are not only of the same class, but they cover the same ground.

[3] Section 1024 of the Revised Statutes (U. S. Comp. St. 1901, p. 720) provides:

"Where there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, *or for two or more acts or transactions of the same class of offenses or crimes, which may be properly joined*, instead of having several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

See, also, 10 Encyc. Pl. & Pr. p. 550; 22 Cyc. 402, and cases cited. Supporting the text of the latter, *U. S. v. Spintz* is cited—(C. C.) 18 Fed. 377—in which decision it is said:

"Counts in an indictment under sections 3922 and 3924 Revised Statutes [U. S. Comp. St. 1901, p. 2683] may be properly joined under section 1024, although the former be a misdemeanor and the latter a felony."

[4] The next objection made is that there is no sufficient scienter; that it is not charged that the defendants knew that the letter deposited was concerning a "scheme" offering prizes. A demurrer was, by this court, sustained to a former indictment against these parties which charged that the defendants "did then and there willfully, knowingly, unlawfully, and feloniously deposit and cause to be deposited in the post office of the United States of America a certain sealed envelope, \* \* \* and contained within said envelope was a letter"; the court holding that this was not a sufficient allegation that the letter was knowingly mailed. The charge in the present indictment is that the defendants "did then and there willfully, knowingly, unlawfully, and feloniously deposit \* \* \* a certain letter and circular concerning a certain scheme." This is a sufficient charge that the defendants knew that the letter deposited by them concerned the scheme, and, as it is charged that the defendants devised this scheme, it cannot but be presumed that they knew its nature.

[5] It is further objected that the indictment falls short of charging the necessary scienter in another particular. That portion of the statute involved in this case—section 213 of the Criminal Code of 1910—condemns the sending of a letter concerning "a lottery \* \* \* or similar scheme offering prizes, dependent in whole or in part upon lot or chance." Section 3894 reads: "Other similar enterprise offering prizes, dependent upon lot or chance." The objection is that the language does not cover the statute; that "a scheme dependent upon lot or chance" is not "a scheme offering prizes dependent upon lot or chance." If the language quoted is unaided by any other language in the indictments, the objection is good, and the indictments are defective; but the first count closes as follows: "and which said certain scheme here-

inbefore referred to was as follows: \* \* \*” Then proceeds to describe the scheme as above set out. The counts other than the first conclude: “And which said scheme was the scheme hereinbefore described in the first count of this indictment, commencing with the words: \* \* \*” With this express reference to the “scheme” mentioned in the last part of each count, it will be sufficient to cure the loose language used in the beginning of the count, provided the scheme described in closing the count is one “offering prizes dependent in whole or in part upon lot or chance.”

This brings us to the final objection urged by the defendants, which is decisive of both questions; that is, it is contended that in the “scheme” as described no prizes are offered dependent upon lot or chance.

[6] By the indictment above quoted it is charged that the lands to be acquired by the defendants were to be platted and the lots were to be of unequal value, and upon a certain number of them houses were to be erected, rendering the inequality in value still greater. The lots were to be then sold at \$140 each; but the lot secured was not to be known or identified at the time of the purchase. After all were sold, there was to be a drawing, under the supervision of the defendants, by which the lots were to be parceled out by lot or chance to each purchaser and thereafter deeded to each in accordance with the drawing. This arrangement was certainly a scheme similar in all respects to a lottery. If, in place of lots of land, there were to be taken a large number of envelopes, mostly empty, but in 24 of which money was placed and chances on the drawing of the envelopes sold at \$1 a chance, the fact that it was such would be more clearly apparent; but the principle of the scheme would be the same.

It may be, as contended by counsel for defendants, that, after the purchase of lots, there is no law against the owners apportioning the property by drawing lots. Among other cases cited, as supporting the demurrer, is that of *Chancy Park Land Co. v. Hart*, 104 Iowa, 592, 73 N. W. 1059. In that case the court expressly pointed out that, “without a scheme or plan to distribute by chance on the part of the promoters, the vital part of the lottery was lacking.” In the case at bar it is charged that there was such a scheme on the part of the promoters, the defendants, a scheme not devised after the purchase of the property in common, to identify and segregate the holdings of the owners, but a scheme devised in advance, presumably to stimulate the gambling instinct and induce the buyers to take a hazard, in hopes of a reward largely in excess of the investment.

The demurrers are overruled, save as to counts 1 to 5, above indicated.

## BALDWIN v. PACIFIC POWER &amp; LIGHT CO. et al.

(District Court, D. Oregon. September 23, 1912.)

No. 5,589.

## 1. REMOVAL OF CAUSES (§ 111\*)—RIGHT TO REMOVE—COMMENCEMENT OF SUIT.

Under Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1094, 1101) §§ 28, 51, providing that a suit commenced in a state court is not removable to the federal court, unless it is one which plaintiff could have brought in such court by original process, and where jurisdiction is founded solely on diversity of citizenship, suit in the federal court can be brought only in the district of the residence of either the defendant or the plaintiff, a federal court cannot acquire jurisdiction by removal of an action commenced in a state court by a citizen of another state against a nonresident defendant, whether a corporation or an individual, who is a citizen of a state other than that of plaintiff, unless plaintiff is an alien, even by consent of both parties.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 237, 239; Dec. Dig. § 111.\*]

## 2. COURTS (§ 276\*)—FEDERAL COURTS—JURISDICTION—CITIZENSHIP—RESIDENCE—WAIVER.

The right of a defendant to be sued in a federal court in a district in which either the plaintiff or defendant resides is personal and is waived by a nonresident defendant, in an action brought in a state court, filing a petition for removal and by a nonresident plaintiff filing an amended complaint in the federal court after removal and signing a stipulation giving defendant time in which to plead thereto.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815; Dec. Dig. § 276.\*]

Waiver of right as to district in which suit may be brought, see note to Memphis Sav. Bank v. Houchens, 52 C. C. A. 192; McPhee & McGinnity Co. v. Union Pac. R. Co., 87 C. C. A. 634.]

## 3. REMOVAL OF CAUSES (§ 86\*)—FOREIGN CORPORATION—RESIDENCE.

Where defendant, a Maine corporation doing business in Oregon, was sued in the Oregon state courts, and filed a petition for removal, alleging that it was not a resident or inhabitant of Oregon, it was estopped to claim, in support of its right to remove, that, having complied with the laws of Oregon regulating foreign corporations by appointing a resident agent on whom service of process might be made in suits against it in either the state or federal courts, it became for the purpose of federal jurisdiction a resident or inhabitant of the district in which it was doing business.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 132, 166-179; Dec. Dig. § 86.\*]

## 4. COURTS (§ 274\*)—FEDERAL COURTS—JURISDICTION—CORPORATIONS—CITIZENSHIP.

The citizenship of a corporation is conclusively presumed, for the purposes of federal jurisdiction, to be that of the state in which it is created; and, while a corporation organized in one state may be licensed to do business in another, its citizenship remains in the state in which it was organized, though the local law may declare that on compliance therewith it becomes a domestic corporation, and it cannot, therefore, be required without its consent to answer in a federal court other than that in the district in which it was incorporated to a civil

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

action brought by a citizen of a different state, though it may be doing business in the district where sued, and have a general agent there.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 814; Dec. Dig. § 274.\*]

Citizenship of corporations for purposes of federal jurisdiction, see notes to *St. Louis, I. M. & S. Ry. Co. v. Newcom*, 6 C. C. A. 174; *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

At Law. Action by Mary Baldwin against the Pacific Power & Light Company and another. On motion to remand. Granted.

Bennett & Sinnott, of The Dalles, Or., for plaintiff.

Wilbur, Spencer & Dibble and Thomas Mannix, all of Portland, Or., for defendant corporation.

BEAN, District Judge. This action was brought in one of the state courts of Oregon against the Pacific Power & Light Company and one Bailey to recover damages for a personal injury. The plaintiff is a citizen and resident of the state of Wisconsin. The defendant corporation was organized and exists under the laws of the state of Maine and doing business in Oregon. It presumably has complied with the laws of the state governing foreign corporations by executing and filing a power of attorney appointing a resident agent "upon whom lawful and valid service may be made of all writs, etc., in any action, suit or proceeding commenced" against such corporation in any of the courts of the state or the United States therein. Lord's Oregon Laws, § 6726. The defendant Bailey is a citizen and resident of Oregon. The cause was removed to this court by the defendant corporation, alleging that it is a citizen of the state of Maine, and organized, created, and incorporated under the laws of such state, and is a nonresident of the state of Oregon, and that Bailey was fraudulently joined with it as a defendant in order to defeat the jurisdiction of the federal court. The plaintiff joins issue on the question of fraudulent joinder, and moves to remand because (1) the defendant Bailey is a citizen and resident of the state of Oregon and properly made a party; and (2), if this is not so, the defendant corporation is a nonresident, and not entitled to a removal. The first question may be passed as the latter is determinative in the matter.

[1] A suit commenced in a state court is not removable to the federal court unless it is one plaintiff could have brought in such a court by original process. Section 28, Judicial Code; *Tennessee v. Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511; *Cochrane v. Montgomery*, 199 U. S. 260, 26 Sup. Ct. 58, 50 L. Ed. 182, 4 Ann. Cas. 451; *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264. And, where jurisdiction is founded solely upon diversity of citizenship, suit in a federal court can be brought only in the district of the residence of either the defendant or the plaintiff. Section 51, Judicial Code (Act March 3, 1891, c. 231, 36 Stat. 1101). It was consequently held by the Supreme Court in *Ex parte Wisner*, *supra*, that under sections 1, 2, and 3 of the act of March 3, 1887, as corrected by the act of August 13, 1888 (chapter 866, 25 Stat. 433 [U. S. Comp. St.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



1901, p. 508]), which are substantially the same as the provisions of the Judicial Code referred to, a court of the United States could not acquire jurisdiction by removal of an action commenced in a state court by a citizen of another state against a nonresident defendant who is a citizen of a state other than that of plaintiff, even by consent of both parties, and this doctrine was followed by the Court of Appeals of this circuit in *Yellow Aster M. & M. Co. v. Crane*, 150 Fed. 580, 80 C. C. A. 566.

[2] It was, however, subsequently modified by the Supreme Court in *Re Moore*, 209 U. S. 490, 28 Sup. Ct. 585, 52 L. Ed. 904, 14 Ann. Cas. 1164, to the extent that the right to be sued in the district in which either the plaintiff or the defendant resides is personal to the parties and might be waived, and was waived by a nonresident defendant in an action brought in the state court filing a petition for removal, and by a nonresident plaintiff filing an amended complaint in the federal court after removal and signing a stipulation giving the defendant time in which to plead thereto, and it may be that the appointment by a foreign corporation of a local agent authorized to receive service of summons in all actions or proceedings brought in the federal court of the district of his residence will be deemed a consent to be sued in such district. *Gilbert v. New Zealand Ins. Co.* (C. C.) 49 Fed. 884, 15 L. R. A. 125.

[3] It is contended, however, that the rule announced in the *Wigner* and *Moore* Cases applies to natural persons only, and not to corporations, and that a corporation organized under the laws of one state which is doing business in a sister state, and which has complied with its laws regulating foreign corporations by appointing a resident agent upon whom service of process may be made in suits brought against it in either state or federal court, becomes, for the purpose of jurisdiction of the federal court, a resident or inhabitant of the district in which it is doing business. Judge Deady seems to have been of that opinion in the case of an alien corporation (*Gilbert v. New Zealand Ins. Co.*, *supra*), but this position as applied to the defendant is in direct conflict with the allegations of its petition for removal, in which it is stated that it is not a resident or inhabitant of Oregon, but of the state of Maine. If it is sound, the allegations of the petition are untrue, and defendant is a resident of the state, and therefore not entitled to remove, on the ground of diversity of citizenship, a case brought against it in the state court for the right of removal is confined to a nonresident.

[4] As I understand the decisions of the Supreme Court, the citizenship of a corporation is conclusively presumed, for the purposes of jurisdiction of the federal courts, to be that of the state in which it was created; and, while a corporation organized in one state may be licensed or empowered by law to do business in another, its citizenship remains in the state in which it was organized (*St. Louis & S. F. Ry. v. James*, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802; *Louisville Ry. v. Louisville Trust Co.*, 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081), although the local law may declare that on compliance therewith it becomes a domestic corporation (*Southern Ry. v.*

Allison, 190 U. S. 326, 23 Sup. Ct. 713, 47 L. Ed. 1078; *Walters v. C., B. & Q. Ry.* [C. C.] 104 Fed. 377; *Mo. Pac. Ry. v. Castle*, 224 U. S. 541, 32 Sup. Ct. 606, 56 L. Ed. 875, Supreme Court, decided May 13, 1912). It cannot be required, without its consent, to answer in a federal court other than that of the district in which it was incorporated to a civil action brought by a citizen of a different state, although it may be doing business in the district where sued and have a general agent there. *Shaw v. Quincy M. Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; *In re Keasbey & Mattison Co.*, 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402; *Western Land v. Butte & Montana Co.*, 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101; *Galveston, Harrisburg & San Antonio Ry. v. Gonzales*, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248. Hence the holdings are that a corporation organized in one state cannot remove a suit brought against it in another by a resident of a state other than that in which the action is brought without the consent of the plaintiff. *Stone v. C., B. & Q. Ry.* (D. C.) 195 Fed. 832; *Puget Sound Sheet Metal Wks. v. Gt. Nor. Ry.* (D. C.) 195 Fed. 350; *Sherman v. S. P. Co.* (C. C.) 192 Fed. 711; *Decker, Jr. & Co. v. Southern Ry.* (C. C.) 189 Fed. 224; *George v. Tenn. R. & I. Co.* (C. C.) 184 Fed. 951; *Gruetter v. Cumberland Tel. & Tel. Co.* (C. C.) 181 Fed. 248. The rule is otherwise where the plaintiff is an alien. *Katalla v. Rones*, 186 Fed. 30, 108 C. C. A. 132. The only case to which my attention has been called or which I have been able to find to the contrary is that of *Bogue v. C., B. & Q. Ry.* (D. C.) 193 Fed. 728; and, while I entertain the highest regard for the learning and ability of the judge deciding that case, I am wholly unable to concur in his reasoning or conclusion, and I think his position is answered by Judge Van Valkenburg in *Stone v. C., B. & Q. Railway*, *supra*. Logically a corporation cannot be a nonresident for the purpose of removal within the meaning of section 28 of the Judicial Code, and at the same time a resident for the purpose of original jurisdiction under section 51. It cannot occupy such a dual capacity. It must be one or the other.

Motion to remand is therefore allowed.

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In re SPRINGER.

(District Court, E. D. North Carolina. September 30, 1912.)

**1. BANKRUPTCY (§ 404\*)—PARTNERSHIP—PETITION FOR DISCHARGE—FAILURE TO APPLY—CONCLUSIVENESS—SUBSEQUENT PROCEEDINGS.**

Involuntary proceedings having been instituted in New York in September, 1908, against a partnership of which petitioner was a member and against the members of the firm individually, petitioner failed to apply for discharge within the time required, on which failure creditors having provable debts which had been proved in such proceedings brought suit against petitioner thereon in North Carolina and obtained judgment, whereupon petitioner filed a voluntary bankruptcy proceeding in December, 1911. *Held* that, the proceeding in New York having been against the firm and partners as well, petitioner's failure to ob-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tain a discharge therein was a bar to his discharge in the subsequent proceeding as to the debts provable in the former one.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 679, 681, 691; Dec. Dig. § 404.\*]

2. BANKRUPTCY (§ 404\*)—PARTNERSHIP—ADJUDICATION AGAINST PARTNERS.

A partnership may commit an act of bankruptcy and be adjudged a bankrupt on its own petition or the petition of its creditors without proceeding against or joining the partners individually, though both the partnership and the individual partners may in the same proceeding be adjudged bankrupts, and in such case the partners may receive a discharge both individually and as members of the firm.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 679, 681, 691; Dec. Dig. § 404.\*]

What persons are subject to bankruptcy law, see note to *Mattoon Nat. Bank of Mattoon, Ill., v. First Nat. Bank of Mattoon, Ill.*, 42 C. C. A. 4.]

In Bankruptcy. In the matter of bankruptcy proceedings of Horace D. Springer. On petition for discharge. Denied.

E. K. Bryan, of Wilmington, N. C., for petitioner.

Kenan & Stacy, of Wilmington, N. C., for creditors.

CONNOR, District Judge. On the 1st day of December, 1911, Horace D. Springer was, upon his voluntary petition, duly adjudged a bankrupt by this court and filed schedules of his indebtedness and his property, as required by the act of Congress (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) relating to bankruptcy. Having complied with the requirements of the act and the orders of the court in the premises, on the 2d of July, 1911, he filed his petition for a discharge from all debts provable against his estate, except such as are exempt by law from such discharge. Notice of said petition was duly given to creditors and, on the day fixed for the hearing, Powell & Campbell and Merritt, Elliott & Co. of New York, creditors, appeared and objected to the granting of said petition, filing specifications setting forth the grounds of such objection. The objection is based upon the following facts:

Prior to August, 1908, petitioner was engaged in the mercantile business in the city of Yonkers, N. Y., as copartner with one Thos. J. Mulligan, and on the 2d of September, 1908, the said Springer and Mulligan, as copartners, and individually, were, upon the petition of creditors, in involuntary proceedings, adjudged bankrupts by the District Court of the United States for the Southern District of New York. They filed schedules of their indebtedness and property as partners, and proceedings were had in said cause in accordance with the provisions of the bankruptcy act.

Mulligan was, upon his petition filed in said proceedings, granted a discharge, both as copartner and individually.

[1] Petitioner, Horace D. Springer, failed to file, within the time prescribed by law, a petition for his discharge, and has not, until this time, filed such petition; nor did he ask the court to extend the time for doing so. His failure to file such petition was due to his ignorance of the law, and the negligence of his attorney in advis-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing him in the premises, and to no other cause. The debts of the creditors objecting to his discharge herein were scheduled in the said proceedings in New York as creditors of said copartnership. They proved their claims therein, and the same were allowed. It further appears that the same creditors, and none other, are scheduled in the proceeding in this court as in the proceeding in the Southern district of New York. The objecting creditors herein, after the failure of said Springer to file his petition for a discharge in the proceedings in New York, obtained judgment on their debts against said Springer in the superior court of New Hanover county, N. C. When the petition for adjudication was filed, the creditors now objecting appeared and objected to the adjudication. This objection was overruled without prejudice. The question now presented is whether petitioner is entitled to his discharge. It must be conceded that no cause appears in the record which, under the provisions of the bankrupt act, or the amendments thereto (section 14), makes it the duty of the court to deny the petition. It is, however, uniformly held that a denial of the petition for a discharge in a former proceeding in bankruptcy is, when properly pleaded, quoad debts then existing and provable, a bar to granting a discharge in a second proceeding. This conclusion is based upon the familiar principle, applied to proceedings in bankruptcy, that the right to a discharge, as between the parties to the former proceeding, is *res judicata*. *Blumenthal v. Jones*, 208 U. S. 64, 28 Sup. Ct. 192, 52 L. Ed. 390. The same principle has been applied to cases in which the bankrupt fails to apply for a discharge within the time prescribed by the act—twelve months after adjudication, or by the permission of the court, upon good cause shown, “within, but not after, the expiration of the next six months.” The result of the decisions of Circuit Courts of Appeal is thus stated by Mr. Collier:

“The failure to apply for a discharge within the time limited has the same effect as a denial of a discharge from the debts in the former proceeding, and the bankrupt may not thereafter institute voluntary proceedings for the purpose of securing a discharge from debts scheduled in the former proceedings.” Collier on Bankruptcy (8th Ed. 259) 9th Ed. 318.

In *Kuntz v. Young*, 131 Fed. 719, 65 C. C. A. 477 (8th Circuit) Sanborn, Judge, says:

“The failure of the bankrupt to apply for a discharge from his debts in the involuntary proceedings within 12 months after the adjudication foreclosed his right to such discharge. It is only within that time that he may, under the bankruptcy law, make a lawful application to be relieved from his debts. The record of his failure to make the application in that proceeding was, in effect, a judgment by default in favor of his creditors, to the effect that he was not entitled to a discharge from their claims. \* \* \* The denial of an application for a discharge from debts provable in proceedings under a petition in bankruptcy under the act of 1898 renders the issue of the right to a discharge from those debts in a proceeding in a subsequent petition *res judicata*. A failure to apply for a discharge within 12 months after the adjudication in the earlier proceeding has the same effect.”

The exact question presented here, unless differentiated by matters referred to later, is presented and discussed in a well-considered

opinion by Judge Grubb in *Re Bacon*, 193 Fed. 34, 113 C. C. A. 358 (C. C. A. 5th Circuit). He says:

"The argument is made with force, as this bankrupt is not shown to have been guilty of any offense depriving him of the right to a discharge, and as the excepted debts were provable in bankruptcy, and not comprised in any of the excluded classes, their exclusion, in effect, ingrafts on the bankruptcy act an additional ground for denying a discharge, by implication, when the act expresses the ground for denying the bankrupt his discharge and the classes of debts excluded from its operation when granted."

After pointing out the effect of permitting a bankrupt who has failed to apply for a discharge in one proceeding, to do so in a second proceeding, he says:

"Such a situation would make the bankruptcy law, in its practical administration, oppressive and intolerable, and has led the courts to read into the law, by implication, the common-law principle of *res judicata*, as a defense to an application for a discharge by a bankrupt who has already applied for a discharge from the same debt under a former petition, and been denied it, or who, having filed a former petition, has failed to apply for his discharge thereunder, until after the expiration of the time fixed by law therefor."

He cites and quotes the language of the court in *Kuntz v. Young*, *supra*, saying:

"This case has been followed by the Circuit Court of Appeals for the First and Second circuits, as well as by numerous District Courts, and to secure uniformity of decision in the different circuits, if for no other reason, we incline to this view"—citing a long line of decided cases.

Judge Shelby writes a concurring, and Judge Pardee, a dissenting, opinion. In that case a discharge was granted, excepting from its operation such debts as were provable under the former proceeding.

In *Re Silverman*, 157 Fed. 675, 85 C. C. A. 224 (C. C. A. 2d Circuit), the question is treated as settled against the right of the bankrupt who has failed to apply for a discharge in the first proceeding. We may treat the law as settled by the Supreme Court in *Blumenthal v. Jones*, *supra*, that, when a discharge in one proceeding has been denied, a discharge will not be granted *quoad* debts then existing in another proceeding, if the fact is properly brought to the attention of the court. This decision is, of course, based upon the doctrine of *res judicata*, because no such provision is to be found in the statute. The act is mandatory that, unless the causes set forth are found to exist, the bankrupt shall be granted his discharge, if he file his petition therefor, within the time fixed.

I concur with counsel for petitioner that the question presented here is not presented in *Blumenthal's Case*. That case is not an authority for refusing the discharge here, except in so far as it recognizes the doctrine of *res judicata* as applicable to a case in bankruptcy, in which the discharge has been denied in a former proceeding. To that extent it is a binding authority and concludes the contention that, unless one of the statutory reasons is shown to exist, the bankrupt is entitled to his discharge in the second proceeding. The Circuit Courts of Appeal and the District Courts have uniformly held that the principle applies when the bankrupt fails to apply for

a discharge in a former proceeding. The decisions are all based upon the theory "that, as in all other judicial proceedings, an adjudication refusing a discharge in bankruptcy finally determines for all time, and all courts, as between those parties privy to it, the facts upon which the refusal is based," and a failure to apply for a discharge is held by Circuit Courts of Appeal and District Courts to have the same effect upon the rights of a bankrupt. The decisions are founded upon a principle of general application and of a wise policy.

The question has not been presented in this, the Fourth, circuit. In view of the decisions of the courts of other circuits, and "to secure uniformity of decision," I feel constrained to follow them. It appearing that no other debts than those existing at the date of adjudication, in the first proceeding, are scheduled in the present proceeding, a discharge excepting such debts would be of no value to petitioner. It is strongly insisted by counsel for petitioner that in none of the cases cited was a bankrupt a member of a copartnership, which had been adjudged bankrupt. He insists that the bankrupt act, and numerous decisions cited, recognize the fact that a partnership is a distinct legal entity for the purpose of proceeding in bankruptcy. This is undoubtedly true.

[2] That a partnership may commit an act of bankruptcy and upon the petition of its creditors, or upon its own petition, be adjudged bankrupt, without proceeding against or joining the partners individually, is made clear enough by section 5 of the act, and numerous decisions of the courts. It is, however, equally clear that, in either involuntary or voluntary proceedings, both the partnership and the individual members thereof may, in the same proceeding, be adjudged bankrupts, and that, upon conformity to the law, the partners may apply for and receive their discharge, both as partners and as individuals. The record of the District Court for the Southern District of New York, duly certified to this court, shows that the petition in that court was filed against, and it was adjudged that "Horace D. Springer and Thos. J. Mulligan, individually and composing the firm of Springer & Mulligan, are hereby declared and adjudged bankrupt"; that Mulligan filed his petition for a discharge from his debts as a member of the partnership and individually; and that it was granted. Conceding, therefore, that the partnership was a legal entity and, as such, subject to proceedings in bankruptcy, and conceding further that if the first proceeding had been against the partnership alone, not including the individual partners, that the principle of *res judicata* would not apply to petitioner Springer, I think that, in the light of the record in the first proceeding, the decisions cited apply to this case, and preclude petitioner from the right to have a discharge from the debts existing and provable against him in the first proceeding. As there are no other debts upon which a discharge can operate, the petition must be denied. I do not think that it was necessary for the creditors to file proof of their debts.

It is so ordered.

## THE PHILADELPHIA.

(District Court, E. D. Pennsylvania. August 27, 1912.)

No. 18.

## 1. COLLISION (§ 16\*)—CONSTRUCTION OF RULES—"RISK OF COLLISION."

The term "risk of collision," as used in the Inland Rules (Act June 7, 1897, c. 5, 30 Stat. 96 [U. S. Comp. St. 1901, p. 2875]), has a different meaning from the term "immediate danger," as used in article 27, and means "chance," "peril," "hazard," or "danger of collision"; and there is risk of collision whenever it is not clearly safe to go on.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 15; Dec. Dig. § 16.\*]

For other definitions, see Words and Phrases, vol. 7, p. 6246.]

## 2. COLLISION (§ 61\*)—STEAM AND SAILING VESSELS—DISOBEDIENCE OF RULES—"RISK OF COLLISION."

A collision occurred in the Delaware river, in the daytime, between a schooner passing down, and at the time crossing to, the New Jersey side on a tack and a scow alongside of a tug passing up near the Jersey shore. The vessels were within sight of each other for a considerable time, and the schooner kept her course until within 150 feet, when, to avoid running into the tug, her helm was starboarded, and she attempted to cross the tug's bows, but was struck by the scow. The tug kept her course and speed. *Held*, that the fault was solely that of the tug, the courses of the two vessels being such as to "involve risk of collision," within the meaning of article 20 of the Inland Rules (Act June 7, 1897, c. 5, 30 Stat. 96 [U. S. Comp. St. 1901, p. 2883]), and to require the tug to keep out of the way, which she could have readily done by going to port, stopping, or reversing; that the change of course of the schooner was in extremis, and, if an error of judgment, was excusable.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 78; Dec. Dig. § 61.\*]

In Admiralty. Suit for collision by L. Furman Smith and others, as owners of the schooner Eugene Cathrall, against the steam tug Philadelphia. Decree for libelants.

Willard M. Harris, of Philadelphia, Pa., for libelants.

Howard M. Long, of Philadelphia, Pa., for respondent.

THOMPSON, District Judge. The owners of the schooner Eugene Cathrall filed a libel against the steam tug Philadelphia to recover damages arising from a collision between the schooner and the steam tug, alleged to have been caused by the negligence of those navigating the steam tug. The undisputed facts established by the pleadings and testimony are as follows:

On October 28, 1910, in the daytime, the schooner Eugene Cathrall, being light, with the mate, Max Nagel, at the wheel, while beating down the Delaware river on a voyage from Philadelphia to Cape May, was on her starboard tack crossing the river from League Island, Pa., towards the Sanitarium in New Jersey; the wind being N. W. or W. N. W. and blowing a good breeze, the weather fair, the tide ebb, the schooner proceeding at a speed of about seven miles an hour under single reef mainsail, foresail, and jib. At the same time the steam tug Philadelphia was a short distance below the Sanitarium, coming up the river with a loaded mud scow lashed to her starboard

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

side, which was laden with mud dredged from the mouth of the Schuylkill river, and being carried to a dump at Eagles Point, about one-half mile above the Sanitarium wharf. The tug and scow were proceeding up the New Jersey side of the river at a speed of about two miles per hour upon a course as close to the New Jersey side of the channel as they could safely navigate by reason of the shoals towards that shore; the tug's course being about E. S. E., and the master of the tug, Charles E. Rickards, at the wheel. The schooner was 90 feet in length, drawing 4 feet of water. The tug was 60 feet in length; and the scow she was towing was 80 feet in length and 30 feet beam, and was drawing about 10 or 10½ feet of water. The mate of the schooner, Nagel, had been going to sea since he was 14 years of age, and had been employed by L. Furman Smith, master of the schooner, for 19 years, and had sailed between Philadelphia and Cape May off and on for 10 or 12 years. A deck hand, a boy of 16, was also on deck. The master of the schooner was below. Rickards, the master of the tug, had been master of steamboats for 29 years, and held a license as second-class river and bay pilot for that time. There was no person besides Rickards on the deck of the tug. While on the starboard tack headed for the Sanitarium wharf, and about one-third of his way across the river, Nagel saw the tug about three or four points on his starboard bow, and when halfway across she was four or five points on his starboard bow. The master of the tug saw the schooner beating down the river when he was three miles away. As he proceeded up the river, when the schooner was on her last tack, he observed her two points on his port bow heading for the Sanitarium wharf. The courses of the vessels crossed; the tug kept her course and speed, and gave no signal to the schooner. The schooner kept her course and speed until she was within about 150 feet of the tug, when the mate of the schooner, fearing a collision, put his wheel hard to starboard, which threw the schooner about four points further to port. The schooner was carried directly in front of the tug, and the port bow of the scow, which extended about 10 feet forward of the tug's bow, struck the starboard bow of the schooner a glancing blow, which drove a hole in the schooner and caused her to sink. The collision occurred about 1:45 p. m. Those on board the schooner were taken off by a launch and landed on the Sanitarium wharf. The master of the tug took his scow to the dump, came back to the wharf, and took the master, mate, and deck hand of the schooner aboard his boat, where he took care of them overnight. That day about 5 p. m. a paper was prepared by the master of the tug and taken to one Hovenden Smith, a government steamboat inspector, who rewrote it. The master of the schooner signed it, and the next morning went with the owners of the tug before a notary public and made affidavit to it. The same morning the paper was signed by Nagel, the mate of the schooner. The paper is as follows:

"Between League Island & Sanitarium Wharf.

"Friday, Oct. 28, 1910.

"I, Captain L. F. Smith of the schooner E. H. Cathrell do hereby exonerate C. S. Rickards master of the tug Philadelphia from all blame and responsi-



bility in the matter and cause of the collision between the aforesaid named vessels in the Delaware river occurring at 1:45 p. m. this day between the points named on the top of this communication.

L. F. Smith.

"M. Nagel, Mate.

"Witness: Hovenden Smith.

"Sworn and subscribed before me this 28th day of October, 1910.

"Jos. H. Livezly, Notary Public.

"[Seal.] Commission expires end of Senate, 1911."

The question as to the fault which caused the collision is dependent upon the testimony of the mate of the schooner, Nagel, who was the only witness to the collision on the part of the libelants, and that of the master of the tug Rickards, who was the only witness to the collision on the part of the respondent, and upon the effect of the paper referred to. The paper purports to "exonerate C. S. Rickards master of the tug Philadelphia from all blame and responsibility in the matter and cause of the collision between the aforesaid named vessels." It was signed by Smith after hearing Rickards' account of the collision; and his explanation of the cause which induced him to sign it is that Rickards asked him to do so, in order to avoid losing his pilot's license, and agreed to help him out with the expense incurred by the collision. Rickards testified that he did not make any promise as to helping with the expense of the collision, but that Smith asked him if the American Dredging Company would help out, and he replied that he did not know. Rickards obtained the paper for the purpose of using it in an expected investigation before the board of steamboat inspectors. It was intended to be used by the owner of the tug to escape liability in case of litigation; and it is apparent that the question of expense of the collision was discussed between Smith and Rickards. From the time Smith went on board the tug until the paper was signed, he was constantly in the company of Rickards, and was willing to sign the paper upon the statements made to him by Rickards as to the cause of the collision. As an admission of the circumstances attending the collision, it has, in my opinion, but little weight, as Smith was not a witness to the collision; and there is nothing to show that he had learned the circumstances from Nagel, his mate, at the time he signed the paper, except that when he went on deck after the collision Nagel said, "He pushed a scow into us when he ought to have went astern of us." Smith was not present when Nagel signed the paper, and Nagel was induced to do so because Smith had already signed it. The circumstances of the collision are clearly shown by an analysis of the testimony of Nagel and Rickards, which are not in substantial conflict as to the relative courses and positions of the two vessels, nor as to the cause of the collision. For these reasons, I do not consider the paper of sufficient weight to overcome the testimony of the witnesses.

The steering and sailing rules contained in the act to adopt regulations for preventing collisions, applicable to the case, are as follows:

"Steering and Sailing Rules.

"Preliminary—Risk of Collision.

"Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist."

"Art. 20. When a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel.

"Art. 21. Where, by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed.

"Art. 22. Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other.

"Art. 23. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse."

"Art. 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

The primary fact to be ascertained from the evidence is whether the tug and schooner were proceeding in such direction as to involve risk of collision.

[1] The expression "risk of collision" has a different meaning from the expression "immediate danger," as used in the twenty-seventh article. "Risk of collision" means "chance," "peril," "hazard," or "danger of collision" merely, and not immediate danger. The *D. S. Gregory* and *The George Washington*, Fed. Cas. No. 4,100. "Risk of collision" means, not merely certainty of collision, if no efforts be made to avert it, but danger of collision; and there is danger or risk of collision whenever it is not clearly safe to go on. *The Aurania* and *the Republic* (D. C.) 29 Fed. 98, 123.

In the case of *The Milwaukee*, Fed. Cas. No. 9,626, it is said:

"Risk of collision begins the very moment when the two vessels have approached so near each other, and upon such courses, that, by departure from the rules of navigation, whether from want of good seamanship, accident, mistake, misapprehension of signals, or otherwise, a collision might be brought about. It is true that prima facie each man has a right to assume that the other will obey the law. But this does not justify either in shutting his eyes to what the other may actually do, or in omitting to do what he can to avoid an accident made imminent by the acts of the other. I say the right above spoken of is prima facie merely, because it is well known that departure from the law not only may, but does, take place, and often. Risk of collision may be said to begin the moment the two vessels have approached each other so near that a collision might be brought about by any such departure, and continues up to the moment when they have so far progressed that no such result can ensue."

[2] If the testimony of Nagel is to be relied upon, the *Cathrall*, had she kept on her course, would have struck the *Philadelphia* amidships. He testified that when about one-third of the way across the river on his tack he had the tug three or four points on his starboard bow, and when halfway across had her four or five points on his starboard bow; that he expected the tug to stop, or to keep out of the way by starboarding her wheel and going to port, passing to the schooner's starboard side under her stern. As the deck hand of the schooner was not produced as a witness, and no one else besides Nagel saw the bearing of the vessels from the schooner, there is no direct evidence, either in contradiction or corroboration, of Nagel's testimony on this point from any witness on the part of the libelants. Rickards, the master of the tug, whose

testimony upon the bearing of the schooner from the tug is also not corroborated or contradicted by direct evidence, testified that, as the schooner was approaching his vessel crossing the river, she was two points on his port bow, and it is evident from his testimony that this bearing did not change as the vessels approached. He testified that the schooner was pointing aft of his vessel, and would have passed under her stern if she had kept upon her course; that she would have had a clearance of not more than 50 feet. The relative courses of the vessels and their relative positions at the time of the collision indicate that the schooner would probably not have cleared the tug by going astern of her if she had kept upon her course. The schooner was 90 feet in length, and therefore was but little over a boat's length from the tug and scow when the wheel was put hard starboard. If, as Rickards testified, she was upon a course that would have passed under the stern of the tug, and upon starboarding her wheel she went off six points to port, it is improbable that she would in that short space have cleared the bow of the tug and struck the port bow of the scow. That the blow was a glancing one indicates that she nearly cleared the scow. In any event, the space by which Rickards testified the schooner would have passed him if she kept upon her course was, taking into consideration the bearing of the vessels, close enough to involve risk of collision. A slight error of judgment or a sudden change of wind would, in all probability, have diverted the course of the schooner sufficiently to bear her against the tug or scow. Under these circumstances, I find that the vessels were so proceeding as to involve risk of collision; and it was the duty of the tug to keep out of the way of the sailing vessel, and to avoid crossing ahead of her, as her master was attempting to do. *The Fannie*, 11 Wall. 238, 20 L. Ed. 114.

There was nothing to prevent the tug from stopping or reversing, as she had a headway of but two miles an hour, and the tide was against her. There was no approaching vessel which would have interfered with her going to port further out into the stream; and the only excuse her master offers for not changing his course to port was that he wanted to keep out of the way of commerce, and that, while there was no vessel in sight which would have interfered with his so doing, he thought there was apt to be. The only resource which he appears to have considered open to him was keeping further in towards the New Jersey shore, which he did not wish to do, as he might run aground, or would not have sufficient steerageway in shallower water.

The schooner had the right of way, and her mate had a right to rely upon the tug obeying the rules, and either stopping, reversing, or turning to port and passing under his stern, and thereby keeping out of his way. The tug was not in such a position of embarrassment as to permit an exception to the rules. *The Marguerite* (D. C.) 87 Fed. 953; *The Oregon*, 18 How. 570, 15 L. Ed. 515; *Belden v. Chase*, 150 U. S. 674, 14 Sup. Ct. 264, 37 L. Ed. 1218; *Excelsior v. The Bruce* (D. C.) 38 Fed. 271.

I cannot find that the schooner is in fault in the maneuver which she executed. She was sailing close to the wind; and, taking the view of her course which is derived from the testimony of the mate of the schooner and of the master of the tug, I am not convinced that the porting of her helm, thereby throwing her closer to the wind, or putting the helm hard down to port and attempting to go about, would not have carried her directly against the tug and scow.

It was the plain duty of the tug to keep out of the way of the schooner and to avoid crossing her bows; and the position in which the schooner was placed was through the fault of the tug in not stopping, reversing, or passing astern of the schooner by going to port. The maneuver was executed by the schooner when she was so close to the tug that there was immediate danger of collision if she kept her course and speed; and, under those conditions, if the mate made an error in judgment, it was excusable. *Excelsior v. The Bruce* (D. C.) 38 Fed. 271; *The Sea Gull*, 23 Wall. 165, 23 L. Ed. 90; *The Falcon*, 19 Wall. 75, 22 L. Ed. 98; *The City of New York*, 147 U. S. 72, 13 Sup. Ct. 211, 37 L. Ed. 84.

There was some evidence by witnesses on the part of the respondent of admissions made by the master of the schooner that the mate, Nagel, was drunk when at the wheel at the time of the collision; but there was not sufficient evidence to show that he was in that condition, nor that it interfered in any manner with his handling the schooner. If he had been drunk, it could readily have been discovered when he came off the schooner; and, as no witness was called who observed that he was drunk at that time, the evidence upon this point must be disregarded.

My opinion is that the tug Philadelphia was solely in fault; and it is therefore ordered that a decree be entered in favor of the libelants, with costs. A commissioner will be appointed to assess the libelants' damages.

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In re MEADOWS et al.

(District Court, W. D. New York. October 3, 1912.)

No. 3,040.

**1. BANKRUPTCY (§ 368\*)—FEES—"MONEY DISBURSED."**

Where pledgees of collateral by the bankrupt were entitled to sell the same at public or private sale without notice to the pledgors, and apply the proceeds to the payment of their liabilities, and in one case the pledgee was authorized to buy the securities pledged free from any right or equity of redemption in the pledgors, but after bankruptcy the trustee was permitted to sell the securities free from lien on payment of the debts by the pledgees when the securities were delivered to the purchaser, on which sale the trustee received a balance of \$3,802.87, representing the bankrupt's equity in the securities, such sum, and not the price secured from the purchaser, was the "moneys disbursed," within Bankr. Act July 1, 1898, c. 541, § 48, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3439), as amended by Act June 25, 1910, c. 412, § 9, 36 Stat.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

840 (U. S. Comp. St. Supp. 1911, p. 1501), on which commissions were to be allowed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 571; Dec. Dig. § 368.\*]

2. BANKRUPTCY (§ 368\*)—COMPENSATION OF TRUSTEE—EXTRAORDINARY SERVICES.

Under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), § 72, as added by Act June 25, 1910, c. 412, § 13, 36 Stat. 842 (U. S. Comp. St. Supp. 1911, p. 1512), providing that the court shall not allow a referee or trustee any other or further compensation than that expressly authorized by the act, no additional compensation can be granted for extraordinary services.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 571; Dec. Dig. § 368.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of Harold G. Meadows and Clarence De Witt, as individuals and as copartners of the firm of Meadows, Williams & Co. On exceptions to the report of the trustee. Sustained.

Shire & Jellinek, of Buffalo, N. Y., for excepting creditor.

O'Brian & Hamlin, of Buffalo, N. Y., for referee.

Bradley H. Phillips, of Buffalo, N. Y., for trustee.

HAZEL, District Judge. A creditor of the bankrupt firm has filed exceptions to the final account of the trustee in bankruptcy, objecting to the payment to the referee therein of the sum of \$3,799.70, and to the trustee of the sum of \$2,007.94, commissions on moneys realized on a sale of certain securities held by various banks as pledges for loans and advances previously made to the bankrupts. It appears that immediately after the adjudication in bankruptcy a large number of hearings were had before the referee to ascertain and discover the property of the bankrupt firm, which, prior to the adjudication, had been engaged in the business of stockbrokers, and the financial affairs of which were in a highly tangled condition. Diligent efforts were made by the receiver appointed by this court, his attorney, and the referee in bankruptcy, to take in charge and to preserve the property and assets of the bankrupts.

The schedules disclosed that many valuable stocks and bonds owned by the firm were pledged in writing to various banks as collateral for loans, with the right in the banks to sell the securities whenever the demand notes for which they were pledged were overdue and unpaid. In addition, the Fidelity Trust Company, one of the pledgees, under an agreement with the firm, had a lien upon deposit accounts. In the course of the proceedings, without a surrender of such securities having first been made by the pledgees, the referee made an order directing the trustee to sell to the highest bidder the stocks and bonds in the custody of the Fidelity Trust Company free and clear of liens, and he made an order to show cause why the stocks and bonds held as collateral security by the People's Bank, the Market Bank, and the Bank of Buffalo should

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 199 F.—20

not also be sold free and clear of incumbrances, "the liens to be transferred to the proceeds." In relation to the proposed sale the referee, with the acquiescence of the attorney for the trustee, and without objection from any of the banks, only one of which, however, the Fidelity Trust Company, appeared by attorney, proceeded as though the securities had been surrendered by the pledgees to enable their sale in the bankruptcy court, and were in the actual possession of the trustee.

The diligence of the trustee in giving notice of the sale resulted in many substantial bids for the various securities, which to brokers and financiers had a market value, and a bona fide bid of \$371,435.55 was accepted, and confirmed by the referee. Upon receipt of said amount the trustee paid the debts of the pledgees, received from each the pledged securities, and delivered the same to the purchaser. There had been a dispute between the trustee and the Fidelity Trust Company over a deposit account of \$10,670 which the bank claimed the right to offset against any loss which might occur upon the sale of the collaterals; but, upon payment of the indebtedness and release of securities, the company also surrendered the said deposit to the trustee. The amount realized over and above the secured indebtednesses—that is, the equity of redemption in the various collaterals—amounted to approximately \$3,802.87. The total assets of the bankrupt estate, including the released deposit, amounted to \$48,000.

In this situation the referee allowed the attorney for the trustee, who is now the attorney for the objecting creditor herein, the sum of \$2,000 on account of his services in the bankruptcy proceeding. He directed the payment to himself of 1 per centum, the commission specified in section 40 of the Bankruptcy Act as it read prior to the amendment of 1910, and allowed commissions to the trustee under section 48, treating the amount of the pledges as "moneys disbursed" by the trustee to creditors; and the question now is whether such payments to the pledgees come within the scope of the provisions relating to the compensation of referees and trustees.

[1] I need not stop to discuss the question of the power of the bankruptcy court to direct the sale of a bankrupt's incumbered property, provided the lienholders permit it and due notice is given them; nor to consider the contention that the pledgees, upon payment of their indebtednesses by the trustee, impliedly surrendered or waived their rights of possession and sale under their agreement, and must therefore be regarded as having submitted such rights to the bankruptcy court. The question with which we are principally concerned is: What is intended by the term "disbursed to creditors," as applied to the compensation of referees, and by the term "on all sums disbursed," as applied to the compensation of trustees?

The provisions are comprehensive enough to entitle referees to commissions on moneys paid to secured and unsecured creditors (In re Sanford Furniture Mfg. Co. [D. C.] 126 Fed. 888), and to

allow to trustees commissions on all sums disbursed by them out of the assets of the bankrupt estate, which obviously includes moneys paid for fees and expenses in the administration thereof. When, however, a secured creditor has recourse to a state court to foreclose his lien, or when personal property or securities, without coming into the custody of the bankruptcy court, are sold by pledgees under a specific contract of sale, and there is no participation by the pledgees in the proceedings of the bankruptcy court, then clearly no commissions are computable on the amounts realized by secured creditors on their securities.

In the present case, as already pointed out, the pledgees had the right to sell the collateral at public or private sale without notice to the pledgors, and to apply the proceeds to the payment of liabilities. Indeed, the Fidelity Trust Company reserved to itself the right to buy the securities free from any right or equity of redemption in the pledgors. The arrangement with the banks created, not a mere lien, as the referee seemed to think, but a pledge, which carried with it complete control, and the right of sale upon default in the payment of notes for which collateral was given. A lien ordinarily confers no such power, and there is a clear distinction between selling property free from liens, where the title and possession are in the trustee, and selling stocks and bonds pledged to a third party under a written contract.

In this case it cannot be held that the securities were even constructively in the possession of the trustee. The rights of the pledgees were not affected by the bankruptcy proceedings. As they did not avail themselves of the services of the referee and trustee to sell the securities held by them, they manifestly could not have been compelled to bear any portion of the expenses of the sale, and it is difficult to perceive the validity of the sale by the trustee of personal property which was not in his custody, or in the control of the bankruptcy court, save as to any existing equities of redemption. How could the trustee have immediately delivered the securities to the purchaser, if the pledgees had not voluntarily released them? The pledgees were adverse claimants, and could not have been summarily compelled to surrender their securities, or to submit their rights to the bankruptcy court. Certainly by the mere sale they were not compelled to deliver the collateral to the trustee. If the proceeds of the sale had been insufficient to pay the pledges, not only would the trustee have been unable to make delivery of the securities to the buyer, but the pledgees would doubtless themselves have sold under their contract.

The authorities in support of the contention of the trustee, and upon which the referee placed reliance, are clearly distinguishable. In *Re Cramond* (D. C.) 145 Fed. 966, decided by Judge Ray, the property consisted of money, subject to valid liens, due on a paving contract, which money the court held was rightly paid by the city of Rome to the trustee, instead of directly to the lienholders, and that on distribution thereof both the trustee and referee were entitled to

the commissions specified in the Bankruptcy Act. This was obviously a disbursement of a fund which came into the possession of the trustee. Not only were fees and expenses of distribution to be paid from the fund, but the lienholders were bound to pay their proportion if the circumstances so required. In *Re Sanford Furniture Mfg. Co.*, supra, certain real property of the bankrupt was held in possession by a third party under a deed of trust, and upon election of a trustee was surrendered to him and afterwards sold free of incumbrances. The court held that, as the secured creditor had used the bankruptcy court to effect a sale of the property, commissions were properly paid on the purchase price, even though said creditor had not formally submitted his claim to the bankruptcy court.

In principle, there is analogy to the case at bar in *Re Iowa Falls Mfg. Co.* (D. C.) 140 Fed. 527. There certain property covered by mortgages never came into the possession of the bankruptcy court, but was delivered by the bankrupt to the First National Bank of Iowa Falls prior to the filing of the petition. The property was sold in the state court upon a decree of foreclosure of the mortgages, but before the sale the trustee brought an action against the bank to set aside the decree. Subsequently a settlement was effected, by which the trustee received a sum of money, and he then contended in the bankruptcy court that he was entitled to commissions, not only upon the amount actually received by him on the compromise, but upon the proceeds of the sale. The court held that the value of the bankrupt's interest in the property was the amount received upon the compromise, and that the proceeds of the sale were not disbursements upon which the trustee might compute his commissions. So here the available interest of Meadows, Williams & Co. in the pledged securities was solely in the value of the equity of redemption, and compensation is limited to commissions thereon and on the assets available for distribution.

It was contended at the hearing by counsel for the objecting creditor, who by the way was counsel for the trustee at the time the allowances were made, and who did not then object thereto, that the referee, in directing the payment of commissions, had connived to bring about a colorable transaction in order to increase his compensation for the services rendered by him; but I think that under the circumstances the right to charge the commission was not altogether free from doubt, and that the referee in good faith believed that he was entitled thereto. Indeed, I think I may with propriety state that prior to making the allowances he, as an officer of the court, conferred with me as to my interpretation of *In re Cramond* and *In re Sanford Furniture Mfg. Co.*, supra, and after a cursory inspection of the syllabi, assuming that the securities were in the custody of the trustee, I stated that commissions at the rates specified in the Bankruptcy Act were apparently allowable, and suggested that only a partial payment to the trustee and to the referee be then made, payment of the balance to be deferred until later on in the proceeding, to the end that any creditor desiring to petition for review might do so. Instead of coming before me on petition for review, exceptions have been filed to the report of the trustee.



[2] Counsel for the objecting creditor concedes in his brief that under section 48 of the Bankruptcy Act the allowance made to the trustee was not improper, in view of the valuable services rendered, and that discretion vested in the bankruptcy court to make an additional allowance. Under section 2, subd. 5, of the act, prior to the amendment of 1910, additional compensation for services performed by a trustee could be allowed only where the business of the bankrupt had been continued under order of court; and, there being no other provision for compensation of trustee other than section 48, the business not having been continued, an increased allowance cannot be made, though it is true that the trustee, together with the referee, throughout a long period performed arduous and valuable services in the interest of the general creditors, which would amply justify increasing their compensation. But unfortunately this the court is precluded from doing by section 72 of the Bankruptcy Act, which substantially provides that the court shall not allow a referee or trustee any other or further compensation than that expressly authorized by the act.

The exceptions are sustained, and there must be a readjustment of the commissions to the referee and trustee on the basis of moneys disbursed and moneys realized from available assets, exclusive of the amount due the pledgees on their securities. The expenses of the trustee are allowed.

So ordered.

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SPERRY & HUTCHINSON CO. v. POMMER et al.

(District Court, N. D. New York. October 8, 1912.)

1. INJUNCTION (§ 137\*)—PRELIMINARY INJUNCTION—CONFLICTING EVIDENCE.

Where an application for a preliminary injunction is based on conflicting affidavits as to the material facts, and the case may be tried on its merits, without great delay, a preliminary injunction will not be granted except in cases of pressing necessity, as when it appears that great and irreparable damage is being done and that defendant is unable to respond in damages.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 307, 309; Dec. Dig. § 137.\*]

2. INJUNCTION (§ 136\*)—PRELIMINARY INJUNCTION—RIGHT TO WRIT.

Where, in a suit by a trading stamp concern against a competitor to restrain defendant's interference with complainant's customers by inducing them to break their contracts, defendants denied that they were doing any of the acts charged, tending to induce the merchants with whom complainant had contracted to break or violate such contracts, it was proper for the court to grant a temporary injunction restraining defendants from inducing complainant's customers to break their contracts by false statements or illegal means.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 305, 306; Dec. Dig. § 136.\*]

3. INJUNCTION (§ 142\*)—PRELIMINARY INJUNCTION—PARTIES.

Where complainant furnished trading stamps to merchants who furnished the same to customers as premiums as a reward for paying cash, and complainant claimed that defendant engaged in a similar business,

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

unlawfully induced claimant's customers, by false statements and unlawful means, to break their contracts, the court would not restrain defendant from furnishing its stamps to merchants at the suit of complainant to which the merchants were neither parties nor afforded an opportunity to be heard.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 314; Dec. Dig. § 142.\*]

4. INJUNCTION (§ 99\*)—COMPETITION.

The right to compete in any legitimate business in lawful ways and by lawful means is sacred and cannot be interfered with by injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 172; Dec. Dig. § 99.\*]

5. INJUNCTION (§ 9\*)—PRELIMINARY INJUNCTION—RIGHT TO WRIT.

A preliminary injunction will be granted only in cases where the right thereto is plain and the necessity is both apparent and pressing.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 8; Dec. Dig. § 9.\*]

6. INJUNCTION (§ 63\*)—UNLAWFUL COMPETITION—BREACH OF CONTRACT.

Where defendants had maliciously interfered with lawful and valid contracts between complainant and its customers, and are liable to continue so to do, and the damages suffered by complainant will be difficult of ascertainment, and a multiplicity of actions will be necessary to remedy such threatened wrongs, a permanent injunction will be granted without proof of express malice.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 63.\*]

7. TORTS (§ 12\*)—UNLAWFUL COMPETITION—INDUCING BREACH OF CONTRACT.

The right to compete in business does not justify unfair competition or misrepresentations, which tend to induce one party to a legal contract to refuse to perform it to the damage of the other party, or the giving of any form of consideration as an inducement to his violation of a valid contract.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 13; Dec. Dig. § 12.\*]

Unfair competition in use of trade-mark or trade-name, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

In Equity. Suit by the Sperry & Hutchinson Company against Henry Pommer and another, copartners doing business under the name of H. & J. Pommer, and another. On motion for preliminary injunction. Granted in part.

Randall J. Le Boeuf, of Albany, N. Y. (D. J. Lyons and John Hall Jones, both of New York City, of counsel), for complainant.

Goldfogle, Cohn & Lind, of New York City (Henry M. Goldfogle and Alfred D. Lind, both of New York City, of counsel), for defendants.

RAY, District Judge. The complainant moves for a preliminary injunction on the bill of complaint and affidavits filed, which allege in substance that the defendants are interfering with complainant's lawful contracts and inducing certain customers, parties to said contracts, to violate same to the great damage of the complainant; that defendants are interfering with the complainant's business in furnishing its trading stamps to merchants who are under exclusive contract with the complainant to use its stamps; and that by false representations

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

the defendants through their agents maliciously made are damaging the complainant's business to the profit of said defendants.

The complainant makes or causes to be made its trading stamps which are known as the "Green Trading Stamps." The defendants make or cause to be made and used their trading stamps which are known as the "Palace Trading Stamps." The complainant furnishes to its subscribers or those merchants under contract with it its Green Trading Stamps in pads which may contain 1,000 or 5,000 stamps, and the complainant's canvassers explain to householders that by making their purchases at these stores of said subscribers they will receive a trading stamp or stamps in accordance with the amount of the purchase, and that when a sufficient number are collected or received by the householder in this way that said stamps will be redeemed by the complainant at its premium store. The canvassers of the complainant deliver to the householders who are willing to receive them trading stamp books in blank for the convenient retention of said stamps until the required number have been collected. When the required number of these stamps has been received by the customer, he or she may go to the premium store of the complainant and there receive a premium in the form of some article of merchandise such as silverware, glassware, curtains, rugs, pictures, etc., claimed to correspond in value with the stamps collected in exchange for such stamps.

The specific object of this form of advertising is to attract customers to the stores of the complainant's subscribers, with whom the complainant has contracts to use their stamps exclusively, and to have such customers pay cash on all purchases.

The defendants, the owners and makers and distributors of the Palace Trading Stamps, are engaged in the same business, and the complainant and the defendants are therefore competitors in this business. After the stamps have been delivered to the merchant for use, there are, of course, three parties to a complete transaction; that is, the party furnishing the stamps to the merchant, the merchant who distributes the stamps, and the customer who pays cash for the goods, and the customer who receives the stamp and as a consideration for paying cash for his purchase of the merchant is eventually to receive some article of some value as a so-called premium.

The complainant alleges that it has entered into valid, written contracts with certain merchants in the city of Albany by which it has agreed to furnish these merchants its Green Trading Stamps and give the premiums to the customers of such merchants when they become entitled thereto, and that such merchants have agreed on their part to use the Green Trading Stamps of the complainant exclusively. The complainant contends that these contracts are valid and binding and violate no law. The complainant also contends that the defendants, engaged in the same business of furnishing stamps to merchants and supplying premiums to the customers of such merchants who make cash purchases, have unlawfully and wrongfully and maliciously interfered with the complainant's business and contracts with merchants to complainant's great damage in substantially the following manner, viz.: That defendants have gone to the merchants with

whom complainant has such contracts, and, by false representations and statements maliciously made, induced such merchants to disregard their contracts with the complainant and to enter into a contract or agreement with the defendants by which they are to use the Palace Trading Stamps either wholly or in part, and that they have induced these merchants to take and use such Palace Trading Stamps and discontinue the use in whole or in part of said Green Trading Stamps. The allegation is that the defendants have in such cases, and whenever and wherever they could, furnished such Palace Stamps, and that in many cases same have been used by merchants in violation of their contracts with the complainant, and that in some instances merchants have wholly broken and disregarded their contracts with the complainant.

The defendants deny that they have made any false or untrue representations or statements to these merchants or to any of them, and deny that they have done anything to induce these merchants to violate or disregard their contracts with the complainant. The defendants allege and claim that they have the right to compete with the complainant in this business, and to furnish their stamps to these merchants for use in the mode and manner and for the purposes aforesaid, so long as they make no false representations or statements, and so long as they do nothing for the purpose of inducing these merchants to break or disregard their contracts with the complainant. The defendants deny that they have said or done anything which has or will induce the merchants to violate or break their contracts with the complainant, unless it be that the mere offering to furnish their stamps to these merchants has that effect. The defendants contend that, even if the complainant has a valid contract with merchants to deal exclusively with the complainant and to take and use the Green Trading Stamps only, they, the defendants, have the right to offer these merchants their stamps for use in the same mode and manner, and that it is optional with the said merchants to take the Palace Trading Stamps and distribute them to their customers; and defendants also contend that if the merchants elect to break their contracts in that regard and use and distribute to their customers the Palace Trading Stamps as well as the Green Trading Stamps, or the Palace Stamps to the exclusion of the Green Trading Stamps, these defendants are not responsible and have committed no wrong so long as they do nothing else by way of inducement to the merchants; and defendants claim that this is not inducing these merchants under contract with the complainant to violate or break their contracts and is not an unlawful interference with the business of the complainant.

[1] The affidavits on the material questions in this case are conflicting, and the determination of the questions of law involved, if any, will depend largely on the facts as they appear on the trial. It has been settled for a long time that when affidavits as to the existence or nonexistence of the material facts alleged conflict, the question should be left for the trial court and jury, if it be a jury case, except in cases of pressing necessity, as when it appears that great and irreparable damage is being done and the defendant is unable to respond

in damages, and the trial must be so long postponed that immediate action is imperative. As to this case it can be brought to trial the first Tuesday in December next, 60 days hence, and on the trial the witnesses can be examined and cross-examined and the truth ascertained by court or jury. They reside within 100 miles of Utica.

[2] I see no necessity for a preliminary injunction except possibly in one particular. The defendants deny that they are doing any of the acts charged tending to induce the merchants to break or violate their contracts with the complainant. If they are enjoined from doing so by unlawful means, they cannot be harmed except in their feelings.

This court would not undertake to enjoin the defendants from offering or furnishing or supplying the "Palace Trading Stamps" to the merchants, who have, it is alleged, entered into contracts with the complainant to use its "Green Trading Stamps" exclusively, without notice to such merchants and hearing them. As complainant's counsel says in his brief:

"In the system there are three parties, the complainant, the subscriber (merchant), and the subscriber's customers."

[3] The alleged subscribers (merchants), who sell the goods to their customers (the consumers), who in turn get the premiums as a reward for paying cash, and such customers are not parties to this action, and for anything this court knows the merchants may desire to contest both the existence of the alleged contracts and their validity, if they do exist. I do not suppose this court can enjoin the defendants from supplying these merchants Palace Trading Stamps at the suit of this complainant if the merchant denies he is under contract with the complainant and really desires to have the Palace Trading Stamps, or if he voluntarily elects to violate his contract with complainant if he has made one, and receive the defendants' trading stamps to give his customers. I do not see that the customers of the merchants are in fact or in law parties to these contracts in any way that binds them to trade with a particular merchant or with particular merchants who are handling the Green Trading Stamps. It is settled law, I take it, that no man has the right by false statements or any illegal means to induce another, or actively attempt to induce another, under a valid contract with a third person, to break or violate such contract. I will assume, for the purposes of this motion, that the alleged contracts so far as they exist are valid, without deciding or holding them to be so, and grant an injunction restraining defendants and each of them from soliciting or requesting any merchant under contract with the complainant and known to the defendants to have such contract to violate same by means of materially false or untrue statements, or by means of any reward or compensation for so doing.

I will not decide, on this motion, that any of the alleged contracts are valid and binding on the merchants, or enjoin the defendants from furnishing the Palace Trading Stamps to any merchant who requests same or with whom they have a contract to furnish such stamps, or from offering to furnish the Palace Trading Stamps to any merchant whether under contract with the complainant or not.

As at present advised, I see nothing wrong in offering Palace Trading Stamps to any one. Active efforts by unlawful means used by A. to induce B. to violate his valid contract with C. is an unlawful and wrongful act and actionable, if successful, if it causes damage to C., and hence A. may be enjoined at the suit of C. from making efforts and using such means for such purpose, especially when there are a large number of such cases, and the unlawful acts which threaten damage promise to be successful and if not enjoined will result in a multiplicity of actions involving the same questions, and the amount of damage to the party wronged will be difficult of ascertainment or proof. It does not appear that the complainant has any exclusive right to put out trading stamps, and defendants have the right to compete with it in the business in all lawful ways. The customers of complainant are not parties here and have the right to voluntarily violate their valid contracts with complainant so far as defendants are concerned, and, if they do, must respond in damages to the injured party.

[4] The right to compete in any legitimate business in lawful ways and by lawful means is sacred and cannot be interfered with by injunction.

[5] The writ of injunction is a drastic remedy and should be granted only in cases where the right thereto is plain and the necessity therefor is apparent and pressing. This is especially true of preliminary injunctions. It must not be assumed that, in granting the injunction so far as I do, I find the defendants have solicited or used any improper means to induce any merchant to violate any existing contract, or that any merchant has broken any contract with the complainant; but as that charge is made in the moving papers and denied by the defendants, who make no claim of right to induce such merchants to break or violate existing and valid contracts between them or any of them and complainant, it can do no harm to defendants to grant the injunction so far. As already stated, the complainant can bring the case to trial at the term in December and the facts ascertained and the law applied and full justice done after the examination and cross-examination of witnesses in open court.

[6] If it shall appear on the trial that defendants or either of them have maliciously interfered with lawful and valid contracts between complainant and its customers, the merchants referred to, or any of them, and are liable to continue so to do, and that the damages will be difficult of ascertainment, and that a multiplicity of actions will be necessary to remedy such threatened wrongs, a permanent injunction can be issued. *Angle v. Chicago, St. Paul, etc., R. R.*, 151 U. S. 1, 13, 14 Sup. Ct. 240, 38 L. Ed. 55; *Green v. Button*, 2 Cr., Mees. & R. 707. It is not necessary that express malice be proved, only such as the law implies from the nature of the acts done.

[7] Of course, the right to compete in business does not justify "unfair" competition in business or trade, or misrepresentations which tend to induce one party to a legal contract to refuse to perform it to the damage of the other party, or the giving of any form of consideration as an inducement to violate a valid contract.

If defendants have already induced merchants under valid con-

tracts with the complainant to break same, and they have done so, I question the right or power of any court to enjoin defendants from furnishing such merchants with the Palace Trading Stamps; but I do not now undertake to decide the question. So whether contracts between complainant and merchants to use the Green Trading Stamps exclusively are valid and binding, or void as in restraint of trade and as tending to create a monopoly odious in the eye of the law, is a question I will not now undertake to decide. When such a contract with all its terms is before me, and the parties interested have been heard and the existence of the contract—that is, its execution and delivery—is shown, it will be time enough to determine the questions suggested. As stated, until the trial of the action this court will decline to enjoin defendants from furnishing Palace Trading Stamps to those who desire them, and thereby deprive merchants of the right and power to deal with householders who desire to gather Palace Trading Stamps in order to secure the "Premiums" offered at the Palace Trading Stamp premium stores.

There may be a preliminary injunction, enjoining and restraining defendants and each of them from soliciting or inducing, by any illegal means or method, any merchant or merchants who are known to them to have existing contracts with the complainant to use the Green Trading Stamps exclusively, to break or violate such contract or contracts, until the further order of this court.

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In re WALDEN BROS. CLOTHING CO.

(District Court, N. D. Georgia, W. D. August 29, 1912.)

No. 533.

1. BANKRUPTCY (§ 446\*)—REFEREE'S FINDINGS—REVIEW.

Findings by a referee in bankruptcy on questions of fact will not be disturbed, unless clearly and manifestly erroneous.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. § 446.\*]

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

2. BANKRUPTCY (§ 178\*)—PREFERENCES—FRAUDULENT MORTGAGE.

Where a bankrupt, with knowledge of insolvency, mortgaged its entire stock of goods and pledged its choses in action for a large loan secured by a demand note, and used the proceeds to pay three creditors, leaving a considerable number unprotected, and the lender had reasonable grounds for suspicion that the transfer was made with intent to delay the bankrupt's other creditors, it was invalid, under Code Ga. 1910, § 3224, providing that every conveyance made with intention to delay or defraud creditors, known to the party taking the same, or in case the latter shall have ground for reasonable suspicion thereof, shall be fraudulent and void against creditors, and was therefore unsustainable in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 264-274, 283, 284; Dec. Dig. § 178.\*]

In Bankruptcy. In the matter of the Walden Bros. Clothing Company. On objections to proof of the claim of F. G. Lumpkin as a secured and preferred creditor. Sustained.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

T. Leslie Bowden and Henry R. Goetchius, both of Columbus, Ga., for claimant.

Slade & Swift, Love & Fort, and Dismukes & Worsley, all of Columbus, Ga., for trustee.

NEWMAN, District Judge. This is a petition to review the action of the referee in refusing to allow a mortgage held by Frank G. Lumpkin, in the above-stated case, to be proven as a preferred debt against the bankrupt's estate.

[1] We must start into the consideration of the case with the rule in mind that the action of the referee and his findings on questions of fact will not be disturbed, unless clearly and manifestly erroneous. This has been held to be the rule in this court in many cases. *Fourie v. Shearer*, 172 Fed. 592; *Re Landsberger*, 177 Fed. 450; *Re Taff & Conyers*, 182 Fed. 904; *Re Waxelbaum*, 101 Fed. 228; *Re West*, 116 Fed. 767. But such is the rule recognized generally by the courts. *Ohio Valley Trust Co. v. Mack* (C. C. A.; Lurton, J.) 163 Fed. 155, 89 C. C. A. 605, 24 L. R. A. (N. S.) 184. The same effect is given to it as to a finding of a master in chancery.

The opportunity a referee has for seeing the witnesses and observing their manner and conduct on the stand makes his opinion particularly valuable; and this is especially true in cases like this, where the issue is knowledge, lack of knowledge, and opportunity for knowledge. The referee sees a witness, and, observing his examination and cross-examination, and his manner on the stand, gets a far better idea of the truth of a particular matter than a reviewing court from a written or printed record.

The referee has found that, at the time of the execution of the mortgage in question, Walden Bros. Clothing Company was insolvent. There is no doubt whatever, from the evidence, that he was fully justified in this finding. Any fair view of the evidence as to the value of the stock of merchandise on hand, and the accounts and notes due the company, contrasted with the admitted indebtedness, makes it clearly insolvent.

[2] At the time the mortgage was executed, was it made on the part of the bankrupt company with intent to hinder, delay, or defraud creditors? It must be conceded that there was a clear intent to delay the creditors, to say no more of it. Mortgaging its entire stock of merchandise, and pledging its choses in action, and then using the money received from the mortgage to pay three creditors, leaving a considerable number of its creditors wholly unprotected, could only have been with the knowledge that the latter class of creditors would be hindered and delayed, at least, in the collection of their debts. It must have intended that which it knew would occur. This is sufficient to bring the case within the statute. Bankr. Act July 1, 1898, c. 541, § 67c, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3419).

Really the only question in the case is whether or not Mr. Lumpkin had reasonable grounds for suspicion that by the execution of this mortgage the bankrupt company intended to hinder, delay, or defraud its creditors. Were the facts and circumstances of the case, and sur-



rounding the transaction, such as to put him on notice that such was the purpose of the Walden Bros. Clothing Company? Section 3224 of the Code of Georgia of 1910 provides as follows:

"The following acts by debtors shall be fraudulent in law, against creditors and others and as to them, null and void, viz:

"1. Every assignment, or transfer by a debtor, insolvent at the time, of real or personal property, or choses in action of any description, to any person, either in trust or for the benefit of, or in behalf of, creditors, where any trust or benefit is reserved to the assignor, or any person for him.

"2. Every conveyance of real or personal estate by writing or otherwise, and every bond, suit, judgment and execution or contract of any description had, or made with intention to delay or defraud creditors and such intention known to the party taking. A bona fide transaction on a valuable consideration, and without notice or ground for reasonable suspicion, shall be valid.

"3. Every voluntary deed or conveyance, not for a valuable consideration, made by a debtor insolvent at the time of such conveyance."

It will be seen from this that a person taking a transfer in such a case must be without "grounds for reasonable suspicion that the same was intended to delay or defraud creditors." In *Nicol v. Crittenden*, 55 Ga. 497, the Supreme Court of Georgia, through Judge Bleckley, says this:

"We hold that the court erred in charging the jury that the purchaser would be protected against the fraudulent intent of the seller unless that intent was known to him. The Code, in section 1952, expressly prescribes another condition, which is that he should be without grounds for a reasonable suspicion. And this element of invalidity was much more involved in the facts of the case than was the element of actual knowledge. The jury ought to have passed upon it, and this they were precluded from doing by the charge as given. It is impossible that the case can be fully and legally tried without scrutinizing the grounds of suspicion which the claimant may have had, and which the plaintiffs contend he did have. The jury, besides dealing with the other issue in this case, should be directed to inquire whether the debtor intended to delay or defraud creditors, and, if so, whether the claimant purchased on a valuable consideration and without notice or grounds for reasonable suspicion."

Applying this law to the bankruptcy law, what is the result? Section 67e of the Bankrupt Act is as follows:

"That all conveyances, transfers, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose, on his part, to hinder, delay or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned or incumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liable for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt, and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise, for the benefit of the creditors. And all conveyances, transfers or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the law of the state, territory, or district in which said property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee [trustee] and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt."

I do not regard the case of *Coder v. Arts*, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008, as applicable here, even if it has the meaning claimed for it by counsel for the mortgagee, because it leaves out of the question entirely consideration of the effect of a transfer void under the laws of the state in which the property is situated. Here counsel for the trustee put their case entirely on the law of Georgia. Their contention is that the mortgage is clearly void under the law of the state.

I would be unwilling to sustain the action of the referee, if in so doing it was necessary to hold that Mr. Lumpkin was guilty of any actual fraud or intentional wrong, because I do not believe that is shown by the proof. But that the referee correctly applied the law of Georgia, and had sufficient evidence to justify him in holding as he did, I do believe; and it is wholly unnecessary to hold that there was any actual fraud or any intentional wrong on the part of Mr. Lumpkin in this case. All that it is necessary to determine, and all that is determined, is that the facts are such as to justify the referee in finding them sufficient to put Mr. Lumpkin upon inquiry, that reasonable inquiry would have informed him of the intention of the bankrupt company at least to delay creditors, and that in failing to make such inquiry he was guilty of such negligence as to make this conveyance void.

In other words, the facts surrounding this transaction at the time Mr. Lumpkin took the mortgage gave grounds for reasonable suspicion of the bankrupt company's intent. He must have known that this company, by conveying all its property of every kind to him to secure a note payable on demand, put themselves out of business, so far as the mercantile world was concerned; and, having this knowledge, I think the referee was justified in finding that he should have gone further and inquired as to what was the purpose of the company in making this large loan and incumbering all its property. Certainly no court would be justified in holding that there was clear and manifest error on the part of the referee in so finding.

It is unnecessary, in the view above taken of this case, to determine whether the execution of this mortgage was a proper corporate act. It seems to be very doubtful whether there was the proper meeting and proper action by the corporation before the execution of the mortgage, authorizing the same; but, as stated, it is unnecessary to determine that.

The action of the referee is approved.

In re THWEATT.

DISMUKES v. JOHNSON.

(District Court, N. D. Georgia, W. D. August 29, 1912.)

No. 532.

**BANKRUPTCY (§ 310\*)—SECURED CLAIMS—PREFERENCES.**

A bankrupt, knowing his insolvency, applied to the claimant for a loan, to be secured by a mortgage on the whole of his two stocks of merchandise, intending to use the money to pay his indebtedness to a bank and a kinsman, leaving his other creditors unpaid. Claimant ascertained that there were no incumbrances on either stock, then went to the stores, and, after satisfying himself by a casual examination that the goods constituted good security for the loan, made it, without making any inquiry as to the bankrupt's other indebtedness, which, if made, would have shown that the bankrupt was insolvent, and that the mortgage would result in hindering and delaying creditors other than those the bankrupt intended to pay. *Held*, that claimant was charged with such knowledge, and that the mortgage was therefore invalid as to the bankrupt's other creditors, and that the claimant was not entitled to prove his claim for the amount loaned as a secured and preferred claim.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 501-507; Dec. Dig. § 310.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of L. M. Thweatt. Objections by R. E. Dismukes, as trustee, to proof of a claim by Cliff R. Johnson as a secured and preferred claim. On petition to review a referee's order sustaining the objections. Affirmed.

Slade & Swift, Love & Fort, and Dismukes & Worsley, all of Columbus, Ga., for trustee.

Hatcher & Hatcher, of Columbus, Ga., for claimant.

NEWMAN, District Judge. This is a case similar to that of *In re Walden Bros. Clothing Company*, 199 Fed. 315, just decided. The principal difference in the two cases is that in the *Case of Walden Bros. Company* the company mortgaged its entire stock of merchandise, as well as all its choses in action, notes, and accounts due it; in this case the bankrupt mortgaged the whole of his two stocks of merchandise in Columbus, Ga. Thweatt, the bankrupt, used all of the \$6,000 received from Johnson, except a trifling amount, to pay immediately his bank and his kinsman debts due them. He left a large number of creditors, as shown by his schedule in bankruptcy, wholly unprotected and unprovided for in any way. Thweatt was clearly insolvent at the time of this transaction, and he knew—must have known—that the effect of what he was doing was to delay, if not to hinder and defraud, all his other creditors, except the two he paid. This much is perfectly clear from the evidence.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

As to Johnson, these are the facts as developed by the evidence: He was approached to lend Thweatt \$6,000 and take a mortgage on his two stocks of merchandise on Broad street in Columbus, Ga., as security for the same. Johnson then went to the courthouse, and with the help of his brother ascertained that there were no incumbrances on either stock of goods. He then went to each store and casually examined the stocks of goods; that is, he made no full or thorough examination at all, but simply looked over the stock. He satisfied himself, however, that the goods on hand made good security for the loan. He made no further inquiry or examination whatever into Thweatt's affairs, or his purpose in obtaining the money. When interrogated on this subject on the witness stand, the following occurred:

"Q. You knew that he [Thweatt] owed for goods? A. No, sir. Q. You did not investigate to see? A. No, sir. Q. You did not know whether it [the merchandise] was paid for or not? A. That was none of my business. Q. You did not know, and you did not care? A. No, sir."

Johnson's idea, apparently, was that, if the goods mortgaged were free from incumbrances and of sufficient value to make his loans secure, he could shut his eyes to everything else. In this he misapprehended the law, as I understand it. The transaction was such, it seems to me, as to put Johnson on inquiry. The undisputed facts show what that inquiry would have disclosed; that is, that it was Thweatt's purpose to use the borrowed money to pay two creditors only in full, leaving all the others wholly unprovided for. He would have ascertained, also, that this necessarily resulted in hindering and delaying all of Thweatt's other creditors, except the two he intended to pay. It seems to me that only ordinary and reasonable judgment and business sense called for this inquiry. Johnson's apparent view of the law was that if he did not know anything he could not be charged with anything, and not that there was a duty on his part to do what ordinary business judgment would require of him.

This case, also, is made under the law of the state, as was the Walden Bros. Case; and the law, as I have stated, put Johnson on reasonable inquiry, and charged him with all that that would have developed, provided, of course, that the surrounding facts and circumstances were such as to put him to this inquiry. I have already stated that they were.

My conclusion is that the referee correctly found: (1) That Thweatt was insolvent at the time the mortgage was given, and knew he was insolvent; (2) that the mortgage was made with the intent, certainly to delay, if not to hinder and defraud, all the other creditors, except the two he paid; (3) that the facts and circumstances surrounding the transaction were such as to put Johnson on reasonable inquiry, and that that inquiry would have developed the fact of insolvency, and of Thweatt's intentions to pay the money received from Johnson to two creditors only, and thereby hinder and delay, if not actually defraud, all others. Cer-

tainly it must be held that the evidence before the referee was sufficient to justify him in so finding.

I do not believe that any actual fraud or intentional wrong is shown on the part of Mr. Johnson, and the case is determined solely on the law of the state, to which I have referred in the Walden Case. Sections 3224 and 4530, Code of Georgia 1910.

The action of the referee is approved and confirmed.

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UNITED STATES v. AMERICAN EXPRESS CO.

SAME v. ADAMS EXPRESS CO.

(District Court, W. D. New York. August 23, 1912.)

Nos. 853, 854.

**CARRIERS (§ 24\*)—INTERSTATE COMMERCE—DISCRIMINATION—EXPRESS COMPANIES—JOINT-STOCK COMPANY—INDICTMENT—"COMMON CARRIER."**

Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379), as amended by the Hepburn Act (Act June 29, 1906, c. 3591, § 1, 34 Stat. 584 [U. S. Comp. St. Supp. 1911, p. 1284]), provides (section 1, par. 1) that it shall apply to any corporation, person or persons, any common carrier or carriers, engaged in transportation of passengers or property from one state or territory to any other state or territory; and paragraph 2 declares that the term "common carrier" shall include express companies and sleeping car companies. *Held* that, where a joint-stock company did a general interstate express business, and had filed a schedule of its rates with the Interstate Commerce Commission, it was a quasi corporation and subject to indictment as a legal entity for discrimination in violation of the act.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 60-66; Dec. Dig. § 24.\*

For other definitions, see Words and Phrases, vol. 2, pp. 1313-1319; vol. 8, p. 7607.]

The American Express Company and the Adams Express Company were indicted for violating the interstate commerce act, and they move to quash the indictments. Motion denied.

John Lord O'Brian, U. S. Attv., of Buffalo, N. Y., and Norton, Penney, Spring & Moore, of Buffalo, N. Y. (Porter Norton, of Buffalo, N. Y., John L. Evans, of Philadelphia, Pa., and James O. Moore, of Buffalo, N. Y., of counsel), for Adams Express Co.

Rogers, Locke & Babcock, of Buffalo, N. Y. (Charles B. Sears, of Buffalo, N. Y., of counsel), for American Express Co.

HAZEL, District Judge. These are criminal proceedings, the indictment against the Adams Express Company containing five counts, and the indictment against the American Express Company containing ten counts; each charging the violation of the act to regulate commerce, passed February 4, 1887, and the amendments thereto. The defendants have separately moved, on identical grounds, to quash the said indictments, which allege offenses of the same general character; and, as the arguments thereon were

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
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heard together, a single decision applicable to each case will be filed.

The separate indictments allege that the defendants therein named are joint-stock companies, organized and existing under the common law of this state; that the Adams Express Company is a common carrier having legally established tariff rates and charges for transporting cream in cans in shipments from Arcade, in this district, to Atlantic City, Philadelphia, and Baltimore, and that it has knowingly and willfully charged and received a less compensation for transporting cream to the points stated than the rates named in the schedule published and filed by said company in conformity with the act to regulate commerce; that the American Express Company is a common carrier having legally established tariff rates and charges for transporting certain merchandise from Allequippa, Pa., to various other points; and that it has knowingly and willfully charged and received for transporting such merchandise to points stated a greater compensation than the rates named in the schedule published and filed by it in conformity with the act to regulate commerce.

The defendants contend that they are not corporations, but that they are individuals associated in a joint-stock company; and that there is no authority in law for indicting a joint-stock company as a legal entity.

The provisions of the interstate commerce act, as it was amended by the Hepburn act, in so far as material herein (omitting nonessential parts) read as follows:

Section 1, par. 1:

"That the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity \* \* \* who shall be considered and held to be common carriers within the meaning and purpose of this act, and to any common carrier or carriers engaged in the transportation of passengers or property \* \* \* from one state or territory \* \* \* to any other state or territory," etc.

Section 1, par. 2:

"The term 'common carrier' as used in this act shall include express companies and sleeping car companies."

Section 6, end of par. 7:

"Whenever the word 'carrier' occurs in this act, it shall be held to mean 'common carrier.'"

Section 10:

"That any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person, acting for or employed by such corporation, company, person, or party, shall willfully do or cause to be done \* \* \* any act, matter, or thing in this act prohibited or declared to be unlawful \* \* \* or shall be guilty of any infraction of this act for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any District Court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense."

It will be observed that section 1 in terms provides that the act applies to any corporation, or any person or persons, engaged in transporting property between the states, holding them to be common carriers; and that paragraph 2 of the same section includes express companies and sleeping car companies in the term "common carriers." Prior to such enactment, the act applied to common carriers without the particular inclusion of corporations, and express and sleeping car companies; and section 10 restricted the liability to individual common carriers and to officers, employes, and agents only of corporations. *New York Central R. Co. v. United States*, 212 U. S. 500, 29 Sup. Ct. 309, 53 L. Ed. 624. In short, under the original act, corporations were immune, and express companies were not specifically included. In this situation, in 1903, the Elkins act clearly and definitely extended the liability to corporations; and subsequently, in 1906, the Hepburn act enlarged and extended the scope of the original act, not only in relation to the nature of the transportation to which it applied, but also, as I think, to liability for infraction of the statute by express companies and sleeping car companies. By this inclusion Congress seems to have recognized the incompleteness of the term "common carriers" and its applicability to express companies. In view of this interpretation, I am of opinion that not only are express companies plainly within the terms of the act and subject to its provisions, but that Congress intended that any such company should also be amenable *eo nomine* for its infractions of the statute. It is true that Congress omitted to prescribe any specific method of prosecuting such companies to recover prescribed penalties, and the question, one of procedure, is not wholly without its difficulties.

The indictments describe the defendants as joint-stock associations. As such, they have each chosen a distinctive designation, by which they are commonly known in the transaction of the business of common carriers, and under which they have filed with the Interstate Commerce Commission their schedules of tariffs. They manage and conduct the business of transportation by directors and officers, and issue certificates of stock to their shareholders and to themselves. They have the statutory right in this state to sue and be sued practically as legal entities under the names of their president or treasurer; and, unlike in the case of partnerships, the stockholders may hold the association or company liable for damages to them, even though the stockholders, under their terms of organization, remain liable for the debts and obligations of the company. They enjoy perpetuity and succession of membership; and they use a common name in the ownership of property, both real and personal, being constantly given recognition as entities separate and apart from their shareholders.

The contention that their analogy is closer to corporations than to simple partnerships is supported by a number of decisions of the highest court of this state, decisions which are important, in that they construe the law relating to joint-stock companies cre-

ated by the Legislature of this state. *Waterbury v. Merchants' Union Express Co.*, 50 Barb. (N. Y.) 157; *Westcott et al. v. Fargo*, 61 N. Y. 542, 19 Am. Rep. 300; *People v. Wemple*, 117 N. Y. 136, 22 N. E. 1046, 6 L. R. A. 303; *In re Jones*, 172 N. Y. 575, 65 N. E. 570, 60 L. R. A. 476. In *Hibbs v. Brown*, 190 N. Y. 167, 82 N. E. 1108, a case relating to the negotiability of bonds issued by a joint-stock association, Judge Hiscock, speaking for the Court of Appeals, in an elaborate discussion of the analogies existing between corporations and joint-stock companies, says:

"Of course, there can be no doubt that a joint-stock association differs from a corporation, or that in its original conception and ultimate analysis it is like a partnership in respect to the individual liability of its members. But, upon the other hand, so many of the attributes and characteristics of a corporation have been impressed upon the modern joint-stock association that, in my opinion, for the purposes of the question now before us, we are amply justified in regarding simply the joint, quasi corporate, entity, and in saying that an obligation issued in its name upon its general credit, and binding all of its assets, complies with the requirements for a negotiable instrument, even though the practically unimportant individual liability of members is excluded."

And in a concurring opinion Judge O'Brien says:

"A joint-stock company, whatever else may be said about it, is certainly for most, if not all, practical purposes a legal entity, capable in law of acting and assuming legal obligations quite independent of the shareholders. The idea that these companies occupy some undefined and undefinable ground midway between a partnership and a corporation has practically faded away, and cannot be applied to the question with which we are now concerned. \* \* \* It is, I think, very difficult to avoid the conclusion that these companies at this day and in this state possess substantially and practically all the attributes of corporations, and still more difficult to assign any sound reason for any distinction to be made between the negotiable character of the bonds of each, when made payable to bearer. These companies are for all practical purposes quasi corporations, and, it seems to me, are clearly such, so far as concerns the negotiable character of its commercial paper."

In the Supreme Court of the United States, the more recent decisions have not given utterance to such liberal views, and the holding has been that, for the purpose of conferring jurisdiction on grounds of diverse citizenship, joint-stock companies are neither corporations nor citizens. *Chapman v. Barney*, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800; *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 20 Sup. Ct. 690, 44 L. Ed. 842; *Taylor v. Weir*, 171 Fed. 636, 96 C. C. A. 438. On the other hand, a joint-stock association, organized under the laws of another state than the state in which it conducted its business, has been held by the Supreme Court of the United States, for the purpose of taxation upon premiums of insurance, to be a corporation, and this conclusion was based solely upon the similarity of its powers and faculties to those of corporate entities. *Liverpool Insurance Co. v. Massachusetts*, 10 Wall. 566, 19 L. Ed. 1029. These decisions, I think, are readily harmonized, in that the former, relating to the jurisdiction of the court, required a strict construction of the statute; while the latter, relating to the imposition of a local tax by a state statute, depended upon a less rigid rule of statutory construction.



Answering the prime question argued at the bar with much ability by counsel on both sides, upon an examination of the authorities cited, I have reached the conclusion that the defendant associations have attributes so closely allied to corporations that they may fairly be designated as quasi corporations, and, in view of the provisions of the interstate commerce act specifically relating to express companies, may be indicted as legal entities. Such companies are the actual parties in interest, and often carry on litigation as entities under their common names, and, indeed, have even been indicted for offenses under such common names, without having raised the objection now insisted upon. Perhaps it would not have been illegal to indict only a few of the shareholders interested in the defendant companies, or, taking the state statute (section 1919 of the Code of Civil Procedure) as a guide, to indict the president or treasurer thereof, on the ground that it would have been impracticable to bring all the shareholders before the court. But there is no legal obligation on this court to adopt the latter course in a criminal case; and, if I am correct in believing that joint-stock associations, created by the laws of this state, are legal entities for all practical purposes, and are not circumscribed by the rules of the common law, then certainly the defendants are the actual parties in interest in this prosecution, and are properly indictable by their common designations. The question presented is, then, one of right, and not of remedy, and the method of procedure is sufficiently implied by the act under consideration as to render it obviously unnecessary that Congress should explicitly state the procedure by which the provisions of the act were to be enforced against express companies. Indeed, as the defendants separately possess the principal attributes of corporations, which the Legislature alone can bestow, they cannot, on a motion of this character, assert that they are mere partnerships of individuals, and not indictable as entities under the designations by which they are commonly known.

The interstate commerce act is remedial, and courts deem themselves bound to render it effective by enforcing obedience thereto. It certainly could not have been intended by Congress that unincorporated associations, if express companies, should not be prosecuted for their violations of the act; and the presumption is fairly warranted, I think, that it was aware that in any state where such companies are indebted for their organization to state statute they are not regarded merely as associations of persons owing their legal rights to the common law or as mere partnerships, but are regarded as having had their scope broadened, and as having become possessed of characteristics which impart to them a legal entity, and hence subject them to indictment as juridical persons for their violations of the statute.

The precise question herein submitted has not heretofore been before the federal courts, save recently in the case of *United States v. Adams Express Company*, in the Southern district of Ohio (unreported), where it was held that such companies are not indicta-

ble as entities by their common designations for violations of the interstate commerce act. It has been my endeavor to follow this decision reached by a court of co-ordinate jurisdiction; but I am left unpersuaded of the correctness of such ruling.

For the reasons stated, I think the indictments are sufficient in law, and the motions to dismiss are denied.

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In re WHATLEY BROS.

(District Court, N. D. Georgia, W. D. August 21, 1912.)

No. 537.

**BANKRUPTCY (§ 140\*)—GOODS FRAUDULENTLY PURCHASED—RESCISSION BY SELLER—RIGHTS OF TRUSTEE.**

Civ. Code Ga. 1910, § 3225, provides that a fraudulent buyer of goods can convey title to an innocent purchaser good as against the claims of judgments of the defrauded creditors; and section 4120 declares that a title obtained by fraud, though voidable in the buyer, will be protected in a bona fide purchaser without notice. *Held* that, under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), as amended by Act June 25, 1910, c. 412, 36 Stat. 838 (U. S. Comp. St. Supp. 1911, p. 1491), declaring that a trustee in bankruptcy shall take as a creditor having a lien by legal or equitable proceedings for the benefit of creditors generally, one induced to sell goods to a bankrupt by reason of his fraud is not entitled to reclaim the goods from the bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 193, 199, 219, 221, 225; Dec. Dig. § 140.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of Whatley Bros., bankrupts. Proceedings by the David Adler Sons Clothing Company to reclaim certain goods. On certificate to review a referee's order denying the relief prayed. Affirmed.

The report of the referee on the matter involved in this case is as follows:

"David Adler Sons Clothing Company having, on the 1st day of May, 1912, filed in this court its petition claiming title to certain property alleged now to be in the hands of W. A. McAllister, trustee of said bankrupt firm, and said matter having been, by consent of parties, set for hearing at Fort Gaines, Georgia, on the 3d day of May, 1912, and, after hearing and considering the same, the following findings are made by the undersigned referee:

"(1) That Whatley Bros.' stock of merchandise was completely destroyed by fire during the spring or summer of 1911, and thereafter, about the first of the fall of 1911, said firm began business again in Fort Gaines, Ga., and during the months of September and October received from said claimants the shipments of goods a part of which they now seek to reclaim, and the order for which said goods was taken April 27, 1911.

"(2) That for four or five seasons before said fire, said David Adler Sons Clothing Company had sold to said Whatley Bros., and knew that they were a little slow in paying bills, but did not know of their insolvency.

"(3) That at the time said order was given it is not shown that said Whatley Bros. made any definite statement to said claimants, for the purpose of obtaining credit for said goods, as to their financial standing.

"(4) That at the time said goods were delivered said Whatley Bros. owed amounts greatly in excess of their assets, which was unknown to claimants; but, under the evidence, it does not necessarily follow that said Whatley

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Bros. did not intend, at the time of the purchase and delivery of said goods, to pay for the same, as the uncontradicted evidence shows that since that time said bankrupts have paid large sums to creditors, and T. J. Whatley testified that he intended to pay for said goods purchased from said claimants.

"(5) That the merchandise now sought to be reclaimed was among the first goods shipped to said Whatley Bros. when they reopened business in the fall of 1911, and now is a part of the oldest stock held by the trustee as assets of the bankrupt firm.

"(6) That since said merchandise was purchased and received from said David Adler Sons Company said Whatley Bros. have contracted many other obligations, which are still due and have been proven as claims against said bankrupt estate."

The following are given as conclusions of law:

"(1) That this reclamation proceeding is not a contest between a creditor and the bankrupt, but is a contest between one creditor and the trustee, who represents the interests of all the creditors of said bankrupt.

"(2) That under the act, as amended June 25, 1910, 'such trustee as to all the property in the custody, or coming into the custody of the bankrupt court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien or equitable proceeding thereon.'

"Wherefore it is considered, ordered, and adjudged, that the petitioning creditors, David Adler Sons Clothing Company, are not entitled to recover from the trustee the merchandise sought to be reclaimed, and the prayers of said petition are therefore refused."

M. F. Goldstein and Little & Powell, all of Atlanta, Ga., for interveners.

Jas. W. Harris, of Cuthbert, Ga., for trustee.

NEWMAN, District Judge. If the referee correctly decided the main legal question involved in this case, it is unnecessary to consider any other matter.

The question is this: Even assuming that goods sold to a merchant on time were obtained by false and fraudulent representations, so that the seller, upon ascertaining the facts, could subsequently reclaim the goods as between himself and the purchaser, nothing else intervening, would the seller, since the amendment to the bankruptcy act of 1910, have the same right against the trustee in bankruptcy, who had taken possession of the stock of goods of which the goods in controversy were a part? In other words, is the trustee, by the act referred to, vested with such a lien as that it overrides and is superior to the right of the seller to reclamation because of fraud inducing the sale?

While the courts are not in entire accord, I think it may be considered as settled now that the purpose of the act of June, 1910, was to give the trustee in bankruptcy a lien for the benefit of creditors generally, such as a creditor would have "by legal or equitable proceedings." Such is the plain language of the amendment, and there is no escape, so far as I can see, from the conclusion that this was the intent of Congress in its enactment. It is recognized, of course, that the main purpose of the amendatory act of 1910 was to relieve general creditors from the situation which had been created by many decisions, notably by the decision in the York Manufacturing Company Case, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, by which

the liens of unrecorded mortgages and conditional bills of sale, which, under the state laws, would be good as between the parties, were held as good against the bankrupt estate. But, though probably having this particular purpose more distinctly in mind, Congress gave to trustees in bankruptcy this lien, which operates generally and which attaches to all property coming into the custody of the bankrupt court.

It has the same effect as a judgment at law or in equity. In *re Bazemore* (D. C.) 189 Fed. 236; In *re Williamsburg Knitting Mill* (D. C.) 190 Fed. 871. This latter case affirmed that of the Circuit Court of Appeals for the Fourth Circuit, in *Holt v. Henley*, Trustee, 196 Fed. 1005 (February 23, 1912); also In *re Farmer's Supply Co. and Federal Chemical Co. v. House*, Trustee, 196 Fed. 990, decided in this district May 13, 1912.

My attention has been called to *In re Flatland* (C. C. A.) 196 Fed. 310, which does not seem in accord with other cases; but I cannot agree with it, as I understand it.

How does such a lien affect the property in question here? Even assuming the allegations of the claimant's petition that the goods were obtained by the bankrupt by fraud to be true, section 3225 of the Code of Georgia of 1910 is as follows:

"Where a sale void as against creditors is made, and the property has not been seized, and no step taken to set the sale aside, the fraudulent vendee can convey to an innocent purchaser from him, for value and without notice of the fraud, a title, good as against the claims or judgments of the defrauded creditors."

Section 4120 of the Code is as follows:

"A title obtained by fraud, though voidable in the vendee, would be protected in a bona fide purchaser without notice."

The Supreme Court of Georgia, in *Mashburn & Co. v. Dannenberg Company*, 117 Ga. 567, 575, 44 S. E. 97, 101, had under consideration the effect of a mortgage on goods executed while in the possession of a vendee whose vendor subsequently sought to reclaim the same because of fraud in the sale. In the opinion by Judge Cobb this is said:

"Hence, when goods are sold and delivered to a merchant, to be paid for at a future time, the title to such goods is vested in the vendee, notwithstanding the sale was brought about by the perpetration of a fraud; and, while the vendor may rescind the sale and reclaim the goods if the credit was induced by fraudulent misrepresentations upon the part of the vendee, the vendor cannot, in such a case, follow the goods in the hands of an innocent party who has, for a valuable consideration, come into possession of them, or who, for a like consideration, has acquired a lien on them."

The above case was evidently very carefully considered by the Supreme Court of Georgia. There was a rehearing, and the decision of the court, which, so far as material here, is embodied in the language above quoted, was adhered to, as originally handed down.

It is earnestly contended here that the title which a vendee takes, in a case like this, is in the nature of a defeasible title; that it is just such a title as when a minor makes a deed or consummates a sale. It is conceded that the title is voidable and not void, but that when

avoided it relates back, just as in the case of a sale by a minor, which is voidable rather than void.

Counsel for the claimant rely earnestly upon the case of *Landauer v. Cochran*, 54 Ga. 533. In that case an attachment against a purchaser was levied on goods sold by a New York firm, in transit. The seller, finding that the purchaser was insolvent, filed a claim to the goods, and the claim was sustained, first, on the ground of the right of stoppage in transitu, but mainly on the ground that the goods were obtained from the seller by fraud, which, it is said, was clearly shown, and therefore no title passed.

The difference between this last case and that of *Mashburn & Co. v. Dannenberg Co.* is that in the last case cited and relied on by claimants there had been no actual delivery of the goods. The only delivery to the purchaser was the delivery to the common carrier. This is a marked difference in the facts; but still it must be admitted that the two cases are not in entire harmony. I think, however, that the case of *Mashburn & Co. v. Dannenberg Co.* must control. It is a more recent case, and the opinion shows in every way that it was most carefully considered by the court, and then reconsidered on motion for a rehearing.

The language quoted above could not have been carelessly used, and is so clearly applicable to the present case (assuming the trustee to have, under the amendment of 1910, the character of lien indicated above), that it is, in my opinion, controlling on the question presented.

The action of the referee in refusing the application for reclamation on the face of the petition is approved, and his decision affirmed.

If counsel should desire to take this case further and have it reviewed by the Circuit Court of Appeals, an order will be made which will protect the rights of the claimant in some way until the case can be determined by the higher court, and, if possible, at the same time allow the goods to be sold and the bankruptcy case expedited as much as possible.

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#### IN RE DOWNING.

IN RE TROUTWINE et al.

(District Court, N. D. New York. September 17, 1912.)

#### 1. BANKRUPTCY (§ 412\*)—DISCHARGE—APPLICATION—NOTICE.

Evidence held to require a finding that notice of an application for a bankrupt's discharge was properly served by publication and by mail.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 696, 697; Dec. Dig. § 412.\*]

#### 2. BANKRUPTCY (§ 417\*)—DISCHARGE—APPLICATION TO REVOKE—LACHES.

Where creditors of a bankrupt on whom notice of the bankrupt's discharge was properly served failed for eight months after securing actual knowledge that a discharge had been granted to apply for vacation thereof, they were guilty of undue laches within Bankr. Act July 1, 1898, c. 541, § 15, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), providing that the judge may vacate or revoke a discharge on the application of parties in inter-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

est not guilty of undue laches, etc., and were therefore not entitled to such relief.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 867-871; Dec. Dig. § 417.\*]

3. BANKRUPTCY (§ 417\*)—DISCHARGE—VACATION—GROUNDS.

An application to vacate a bankrupt's discharge at the instance of certain creditors in order that they may be given an opportunity to oppose the same will not be granted without a showing of legal grounds, which, if sustained, would result in the refusal of the discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 867-871; Dec. Dig. § 417.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of Augustus S. Downing. Application by Barbara Troutwine and George F. Troutwine for an order revoking a discharge granted to the bankrupt. Application denied.

See, also, 192 Fed. 683.

Wesley H. Maider, of Gloversville, N. Y., for petitioners Troutwine.

Ainsworth & Sullivan, of Albany, N. Y., for bankrupt, opposed.

RAY, District Judge. The petitioner Barbara Troutwine is a judgment creditor of the bankrupt, Augustus S. Downing, to the extent of about \$5,024.67 on a claim from which the discharge in bankruptcy will be a release. The petitioner's claim was duly scheduled, and said Barbara Troutwine filed her proofs of claim and same were duly allowed. George F. Troutwine is also a creditor of said Augustus S. Downing, whose claim was duly scheduled, proved, and allowed. On or about December 24, 1910, Augustus S. Downing was adjudged a bankrupt, and within the time fixed by law and on or about the 19th day of June, 1911, he filed his application in due form praying for a discharge. Thereupon the court duly ordered that a hearing be had upon the said petition for a discharge on the 5th day of September, 1911, before said court at the time and place fixed in the notice, and that notice of such hearing be given by publication, and that the referee should send by mail to all known creditors copies of such order addressed to them at their place of residence as stated. The referee had such order, which was duly entered in the clerk's office of the District Court, printed on a postal card, to which was annexed a notice as follows:

"To the creditors and all persons interested in the estate of the above named bankrupt; you are hereby required to take notice of the order of which the foregoing is a copy.

"Dated Albany, N. Y., June 20, 1911.

"Edwin A. King, Referee in Bankruptcy."

This notice with the order was printed on the back of postal cards, and same was not only duly published in the Albany Evening Journal, the proper newspaper, but Jean H. Wilson, residing in the city of Albany, makes oath that she is over 21 years of age, and that on the 29th day of June, 1911, she mailed the said

order and notice contained on the said postal cards on a postpaid postal card to the various creditors of the said Augustus S. Downing, including Barbara Troutwine and George F. Troutwine, both at Gloversville, N. Y., and that on said day she deposited the same in the post office at Albany, county of Albany, and state of New York. She now makes affidavit in opposition to this motion setting forth in detail the time, place, and circumstances of mailing the said notices. She makes affidavit that she had the mailing list, directed the postal cards, and placed them on the desk of Charles B. Sullivan, one of the attorneys for the bankrupt, who examined them, and that at the close of business she with said Sullivan departed from the office, and proceeded directly to a United States mail box in the city of Albany, where she deposited the said postal cards so directed and addressed in such letter box in the presence of said Sullivan. Mr. Sullivan confirms this by his affidavit in every particular.

[1] I think the proof must be regarded as conclusive that the order and notice were duly served upon the moving parties Barbara Troutwine and George F. Troutwine on the 29th day of June, 1911. No question is made that the notice and order were not duly published.

The question of discharge came on to be heard on the 5th day of September, 1911, and no objections having been filed, and none being made, a discharge was duly granted on the 5th day of September, 1911, and the papers with proofs of such service by publication and mailing were duly filed in the office of the clerk of this court. The moving parties concede and set out that as early as the 1st day of January, 1912, the said Barbara Troutwine had actual notice that the said discharge had been granted to the said Augustus S. Downing, and it is also shown conclusively that George F. Troutwine had notice thereof shortly thereafter. The petition and affidavits to revoke such discharge were verified September 4, 1912, more than eight months thereafter. They were presented to the court September 5, 1912, and an order to show cause why such discharge should not be revoked was made and served. The said Barbara Troutwine and George F. Troutwine in the moving papers set forth and allege that they did not receive any notice of the filing of the application for a discharge or of the time and place of the hearing on such application, and that they were ignorant thereof until at least January 1, 1912. Both claim that they are creditors and have valid objections to a discharge, and that they should have their day in court, and be allowed to contest the application.

Annexed to the moving papers are specifications of objection which it is proposed to file in case the application is granted, and which read as follows:

"(1) That such application should not be granted, because of the following facts which the undersigned charge to be true, viz.: That for about 10 years and over, prior to said bankrupt's application in bankruptcy, he was an officer receiving \$5,000 a year salary. At the time of his application in bankruptcy, he was and now is an educator in the office of the state de-

partment, and that in November, 1907, he transferred his home in Albany, and his equity therein, valued at about \$5,000, to his wife, Louise B. Downing, without any cash consideration passing from Mrs. Downing to Mr. Downing.

"(2) That he kept said deed from record until May, 1908, when the bankrupt instructed his attorney to place the same on record.

"(3) That at the time of said transfer said bankrupt was insolvent, to the extent of about \$100,000, according to his own testimony and sworn statements herein.

"(4) That he claimed such transfer to have been made to his wife to pay her moneys previously loaned on notes aggregating about \$9,000, but that he had no record or dates of the amount of any note or notes covering said amount.

"(5) That he kept no books or records of his business transactions between him and his wife, showing any indebtedness to her whatever, neither did he have any notes covering said indebtedness.

"(6) That if he was, as he claimed, justly indebted to his wife in 1907, he transferred his real estate, in order to pay his indebtedness, to her only, thereby committing a fraud upon all of his other creditors who did not receive any of said money or property.

"(7) On account of the nonproductions of books or records, checks, etc., your petitioner was unable to verify any of the acts, testimony, or statements of the said bankrupt, relative to said real estate.

"(8) That ever since the transfer of the property above mentioned to his wife said bankrupt has lived in said property the same as he did prior to said transfer.

"(9) That such application should not be granted, and the discharge already granted should be opened for the reasons above stated and because the following facts constitute additional grounds which the undersigned charged to be true. That the bankrupt was indebted in 1907 to the National Commercial Bank of Albany, or liable to them as indorser on papers to the amount of about \$50,000, and that he did transfer to them all of his interest in the Opp Mining Company, and his stock therein, as collateral security, and that said stock was upon its face worth a number of thousands of dollars, the exact amount your petitioner is unable to state, and that he also agreed that provided they would refrain from pressing their obligations to pay them the sum of \$100 a month, which he did, up to the time of his adjudication in bankruptcy.

"Wherefore, objection is made to the granting of such application for discharge, and a hearing, and a judgment of the court is asked thereon."

The transfer of real estate referred to in these specifications took place more than four months prior to the filing of the petition in bankruptcy.

The bankrupt claims, first, that the petitioners here have been guilty of undue laches; second, that the moving papers do not show that the discharge was obtained through the fraud of the bankrupt; and, lastly, that the proposed specifications of objection fail to show any ground for refusing a discharge.

Section 15 of the bankruptcy act reads as follows:

"Discharges, when Revoked. a. The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge."

I cannot find as a fact from anything set out in the moving papers that the said discharge of Augustus S. Downing was obtained



through his fraud, or that of his attorneys in the proceeding. It may be that Barbara Troutwine and George F. Troutwine did not actually receive the notice. It may well be that same was lost in the mails, and it may be that such notices were lost after being delivered at and through the post office at Gloversville, N. Y., to said Troutwines or to some one for them. The law does not provide that the notices must have been actually received by the creditors and read by them. After delivery from the post office, they may have been laid aside and overlooked. As already stated, the evidence is conclusive that the notice was not only published, but mailed in the mode and manner required by law. The statute was fully complied with.

[2] But conceding for the sake of argument that actual fraud need not be shown, and that it is sufficient to revoke a discharge to show that a creditor or creditors of the bankrupt did not receive the notice, I must find that both Barbara Troutwine and George F. Troutwine were guilty of undue laches after having actual knowledge that the discharge had been granted. No reason or excuse is shown for not moving promptly to set aside and vacate the order granting the discharge after having notice thereof on or about January 1, 1912. A delay of eight months is not excused, and is not excusable. The papers show that Barbara Troutwine at least took an active part in the bankruptcy proceedings, and, if she did not desire to acquiesce in the discharge, prompt action should have been taken when actual knowledge of such discharge came to her.

[3] But the papers in this case fail to disclose that the actual facts did not warrant the discharge, and fail to disclose that should the discharge be revoked it would or could be denied on a full hearing.

There is no pretense that the bankrupt committed an offense punishable by imprisonment as provided in the Bankruptcy Act, or that with intent to conceal his financial condition he either destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained. There is no allegation that the bankrupt obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit, or that at any time subsequent to the first day of the four months immediately preceding the filing of the petition in bankruptcy he transferred, removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors. There is no claim or pretense that in voluntary proceedings the said Downing has been granted a discharge in bankruptcy within six years prior to the present discharge now under consideration, or that in the course of the proceedings in bankruptcy he refused to obey any lawful order of or to answer any material question approved by the court. These are the grounds upon which a discharge in bankruptcy may be refused as specified in section 14 of the Bankruptcy Act.

It may be that the court has power to vacate and set aside an order granting a discharge, and in that way vacate the discharge and allow a creditor who has not had notice of the proceeding to come in and oppose the discharge, but, conceding this to be so, the creditor should show that he has not only reason for opposing the discharge, but legal reason and grounds which, if sustained, would result in the refusal of a discharge.

For these reasons, the application to revoke the discharge heretofore granted must be denied. There will be an order accordingly.

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In re PERCY FORD CO.

(District Court, D. Massachusetts. December 27, 1911.)

No. 16,926.

1. BANKRUPTCY (§ 316\*)—CLAIM—MATURITY.

Where a bank at the time of a bankrupt's assignment for benefit of creditors and subsequent bankruptcy held four notes against the bankrupt none of which were due at the time of the assignment, the bank's claim on each note was a debt provable in bankruptcy proceedings, whether they were due or not when the petition was filed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 474-476; Dec. Dig. § 316.\*]

2. BANKRUPTCY (§ 164\*)—SET-OFF—BANK DEPOSIT—INDEBTEDNESS.

The bankrupt, having a deposit account with the claimant bank, and indebted to it on certain notes not yet due, applied to its creditors for an extension January 26, 1911. On January 30th, in consequence of the request for extension, it made an arrangement with the bank, providing for the issuance of cashier's checks to the bankrupt's treasurer. On February 6th it assigned for the benefit of creditors, and was petitioned into bankruptcy February 16th, on which date \$1,977.82 stood to its credit on the bank's books in the cashier's check account, there balancing certain cashier's checks which had been issued to the bankrupt's treasurer, but left by him in the bank's custody and control. This sum was part of a total amount transferred from the bankrupt's deposit account to the cashier's check account since January 30th, and made up of deposits made by the bankrupt, some of them before and some of them after January 30th. The bank had paid as usual, since January 30th, checks drawn by the bankrupt on its deposit account. *Held*, that such facts did not require a conclusion that the \$1,977.82, though not originally received by way of preference, had since been so treated by the bank as to create a preference in its favor, and thus preclude the bank from offsetting it against the bankrupt's debt on the notes.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 267; Dec. Dig. § 164.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Percy Ford Company. On petition to review a referee's order allowing a claim of National Shawmut Bank. Order approved and affirmed.

Gastin, Snow & Saltonstall, for creditor.

Harvey H. Pratt and Samuel O. Reinstein, for trustees.

DODGE, District Judge. This matter has been submitted here upon the same agreed statement of facts which was before the

referee, and without oral argument; briefs being filed by the respective parties instead.

That the referee exceeded his powers when he extended the time for filing the petition for review beyond the time limited by rule 15 of the bankruptcy rules of this court does not seem to be now contended.

[1] Nor is there now any dispute that the bank has a provable claim against the bankrupt estate. It is for \$7,500 and interest due the bank as holder of four promissory notes whereon the bankrupt company is liable. The bankrupt made an assignment for the benefit of its creditors February 6, 1911. This was charged as an act of bankruptcy in a creditors' petition filed against it on February 16, 1911, and upon this petition it was adjudged bankrupt March 6, 1911. The four notes fell due February 10, February 26, March 21, and April 19, 1911, respectively. None were due when the assignment was made. One had become due when the petition was filed. Two had become due at the time of the adjudication. The bank's claim under each note is a debt provable in these proceedings, whether the note was due or not when the petition was filed. *Germania, etc., Co. v. Loeb*, 188 Fed. 287, 289, 110 C. C. A. 263.

\$1,977.82 stood credited on the books of the bank to the bankrupt company or its treasurer when the bankruptcy petition was filed. This amount, with interest, the bank seeks to set off against its claim as holder of the notes. The referee, holding that it has the right to do so, has allowed its claim in the amount of \$5,563.15, the total claim less the set-off. The trustees in bankruptcy contend that the bank's retention of \$1,977.82 amounts to a preference, which it must surrender before it can prove any claim.

[2] The bankrupt had had a deposit account with the bank for some time before it assigned for the benefit of its creditors on February 6. Had the \$1,977.82 been simply the balance of this account to the bankrupt's credit, and had nothing further appeared, the bank's right to set it off, instead of surrendering it, would have been clear. *New York, etc., Bank v. Massey*, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380; *Lowell v. International, etc., Co.*, 158 Fed. 781, 783, 86 C. C. A. 137. If, as appears by the agreed statement of facts, the bankrupt asked its creditors on January 26, 1911, for an extension of time, and on January 30th the arrangement regarding cashier's checks was made between the bank and Hooper in consequence of the extension asked, the bank must be held chargeable on and after January 30th with knowledge of the bankrupt's insolvency as later established in these proceedings. Part of the money represented by the cashier's checks had been deposited by the bankrupt in its deposit account after January 30th, and had thus been received by the bank after it had become chargeable with this knowledge. But the bank had also honored checks drawn by the bankrupt after January 30th, and there is nothing in the agreed facts to show that any of the money came into the bank's hands from the bankrupt as a credit on its debt to the bank,

or without creating an obligation on the part of the bank to repay what it received upon the bankrupt's order. Thus far the facts are similar to those in New York, etc., *Bank v. Massey*, above cited, and do not, any more than in that case, show that the bank has received a preference.

But the \$1,977.82 here in question, though made up of amounts at one time credited to the bankrupt in the deposit account, had afterward been transferred from that account and credited to the bankrupt in the "cashier's check account." In that account it balanced the amount of sundry cashier's checks issued by the bank on various dates between January 30 and February 4, 1911, both inclusive, to Hooper, the bankrupt's treasurer, less a part of the cashier's checks so issued, which Hooper had from time to time used to meet liabilities of the bankrupt on occasions when the balance to its credit in its deposit account was insufficient for the purpose. The cashier's checks referred to, though issued to Hooper, had not left the bank's custody and control. By agreement between Hooper and the bank, they were retained in the custody of a bank official, and Hooper's use of some of them, from time to time as stated, was in each case with the bank's approval. Do these facts require the conclusion that the money thus in the bank's hands, though not originally received by way of preference, has since been so treated by the bank as to create a preference in its favor?

The arrangement between the bank and Hooper according to which cashier's checks were issued and used as Hooper directed did not, so far as appears, put the bank in any better position with regard to the bankrupt's liability to it on the notes than that which it occupied before the arrangement was made, or while the money represented by the checks remained to the bankrupt's credit in the deposit account. Though the checks were drawn to Hooper's order and his directions regarding them were followed by the bank, it was understood between the bank and Hooper that he was representing the bankrupt in all that he did. No one else is shown to have any interest in them or claim upon them or in the funds they represented, and so long as they remained in the bank's custody, no one else could acquire any such interest or claim. The obligation of the bank continued to be an obligation to repay the money upon the bankrupt's order, notwithstanding the fact that its order was to be given by Hooper. I find nothing in the agreed facts to show an intent on the bank's part to accumulate funds of the bankrupt in its possession, in whatever form, for its own ultimate security as holder of the notes, or to show any restriction imposed by it upon the bankrupt's withdrawal of such funds, or to show any appropriation of such funds by the bank, as the bankrupt's property, toward payment of the notes. Any act on the bank's part amounting to such appropriation would be inconsistent with reliance on its relations to the bankrupt as its customer, and with reliance upon its right of set-off, as in *Traders'*, etc., *Bank v. Campbell*, 14 Wall. 87, 20 L. Ed. 832, on which the trustees rely.

See, also, *Lowell v. International, etc., Co.*, 158 Fed. 781, 783, 86 C. C. A. 137. But no such act has here been shown. The refusal of the check drawn by Hooper on February 6, 1911, in favor of the persons to whom the bankrupt on that day assigned, is to be regarded, if the foregoing conclusions are right, as amounting to no more than an assertion by the bank of its right of set-off, after an act of bankruptcy whereby the debtor confessed itself insolvent. It is not to be regarded as an act inconsistent with that right. *Germany, etc., Bank v. Loeb*, 188 Fed. 285, 291, 292, 110 C. C. A. 263.

Whether or not Hooper so used any of the funds represented by the cashier's checks as to prefer any creditor other than the bank does not appear from the facts agreed, and is immaterial; the bank not appearing to have participated in any such preference.

The referee's order is therefore approved and affirmed

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In re ADAMS CLOAK, SUIT & FUR HOUSE.

(District Court, D. Massachusetts. April 25, 1912.)

No. 17,348.

1. BANKRUPTCY (§ 255\*)—LEASEHOLD—RECEIVER'S USE OF PREMISES—ALLOWANCE TO LANDLORD.

Where a bankrupt's lease provided that the landlord might enter and resume possession in case of bankruptcy, and bankruptcy having intervened, the landlord desired immediate possession, but the receivers occupied the premises for two months before surrendering possession, the landlord's claim was not for rent under the lease, but on a quantum meruit for the reasonable value of the temporary use and occupation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 352; Dec. Dig. § 255.\*]

2. BANKRUPTCY (§ 255\*)—LEASEHOLD—USE BY RECEIVERS—USE AND OCCUPATION—FORM.

Where, in bankruptcy, the landlord demanded surrender of the premises to which he was entitled under the lease, but the bankrupt's receiver remained in possession for two months, during which the landlord was delayed in reletting the premises at a higher annual rental than that reserved in the lease, he was at least entitled to an amount equal to the monthly installments of rent reserved for the time of the receiver's occupancy as compensation for use and occupation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 352; Dec. Dig. § 255.\*]

In Bankruptcy. Proceedings against the Adams Cloak, Suit & Fur House. On petition to review a referee's order allowing the landlord's claim of \$33,500 for the receiver's use and occupation of petitioner's premises. Affirmed.

Lee M. Friedman, for receiver.

James J. McCarthy, for landlord.

DODGE, District Judge. The involuntary petition upon which adjudication in this case was made was filed June 30, 1911. Receivers were appointed by the court July 1, 1911. On July 8, 1911,

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 190 F.—22

their petition for authority to conduct and continue the bankrupt's business until a trustee should be appointed was granted by the court.

The bankrupt's business was that of dealing in ready made ladies' garments. The bankrupt was conducting it at the time, and had been conducting it for a considerable time before the bankruptcy, in two stores, Nos. 507 and 509 Washington street, in Boston, at the northwesterly corner of Washington and West streets, occupying the ground floor of the two stores, a basement below them, and a floor above one of them. The bankrupt's occupation was under a lease which had three or four years more to run. The rent stipulated in the lease and which the bankrupt had been paying was \$33,500 a year, payable in equal monthly installments. On the premises the bankrupt had a stock in trade scheduled by it as worth about \$13,872.26.

The receivers did not adopt the lease, but in conducting the business they occupied the premises during the two months of July and August, 1911, after which they surrendered them to the landlord. The lease gave him the right to enter and resume possession in case of bankruptcy. He had desired possession of the premises immediately upon the bankruptcy. The receivers, however, occupied the premises during the two months mentioned, and the petitioner submitted to their occupation, without any application to the court on either side and without any order of court, upon the understanding that a reasonable compensation, to be fixed by the court if necessary, would be allowed them.

The claim made in the landlord's petition for compensation, presented to the referee September 16, 1911, and allowed by him, is for an amount equivalent to two months rent under the lease. The trustee in bankruptcy, who petitions for review of the allowance made, contends that the amount allowed is unreasonable.

There is no dispute that the location of the premises is a highly desirable one for the business carried on by the bankrupt in them. That \$33,500 was not in excess of the fair annual rental value of the premises is not and could hardly be disputed. The referee has found from the evidence before him, which is transmitted with his certificate, that if the landlord had obtained possession July 1, 1911, he could have leased the premises at a higher annual rent, and with this finding I agree. The trustee contends, however, that their rental value by the year does not furnish a fair measure of the reasonable worth of their use and occupation during the two summer months mentioned, during which, as is also undisputed, business such as is done in that part of the city is, generally speaking, at its lowest ebb.

[1] I must regard the landlord as entitled to no less compensation that would have been awarded him if the premises had been withheld from him during these two months for the benefit of the estate by an actual order of court. Under similar circumstances, the landlord's claim is not for rent under the lease, but upon a quantum meruit, yet there are several reported cases in which the

rent which would have been paid under the lease has been accepted as a fair measure of the reasonable compensation to be paid by the receiver or trustee for temporary use and occupation. See *Re Kelly, etc., Co.* (D. C.) 102 Fed. 747; *Wilson v. Trust Co.*, 114 Fed. 742, 52 C. C. A. 374; *Re Luckenbill* (D. C.) 127 Fed. 984; *Re Winfield, etc., Co.* (D. C.) 137 Fed. 984; *Re Rubel* (D. C.) 166 Fed. 131; *Id.*, 170 Fed. 1021, 95 C. C. A. 671. Also, under the Act of 1867, *Re Appold*, Fed. Cas. No. 499; *Re Merrifield*, Fed. Cas. No. 9,465.

More than rent according to the lease appears to have been allowed, under special circumstances, in *Re Grignard, etc., Co.*, 155 Fed. 699, though the amount was later reduced somewhat (*Id.*, 158 Fed. 557); it appearing that the estate was insufficient to pay all the preferred claims allowed in full.

[2] The trustee is, of course, right in trying to keep the expenses of administering the estate down to the lowest possible figure. But, for the fact that the landlord was delayed during those two months in reletting the premises at a higher annual rent than that which he had been getting under the lease, it might be possible to say that to give him compensation at the annual rate during the least valuable part of the year is to give him more than reasonable compensation. Had it appeared that no one would probably have leased the premises before September 1st, it might well have been better for the landlord to have the receiver or trustee occupy, even at a much smaller rent, than to let the premises stand vacant. In view of the fact that his premises have been in effect withheld from him against his wish, a rule of compensation can hardly be just which fails to take into account the actual result to him. Delaying him in the enforcement of his legal right to the premises was justifiable only for the purpose of avoiding unnecessary loss to others, and only upon the assumption that, if he received full and equitable compensation there would be no real loss to him. See *Re Chambers, etc., Co.* (D. C.) 98 Fed. 865, 867. In so far as the compensation awarded him leaves him less well off than he would have been if he could have got the premises earlier, it falls short of being full and equitable. In view of the fact that two months rent at the annual rate will not give him all that he might have got but for the occupation by the receiver, I do not see how I can properly give him any less.

The order of the referee is therefore affirmed and approved.

## In re REGEALED ICE CO.

## In re GREAT LAKES ENGINEERING WORKS.

(District Court, D. Rhode Island. September 19, 1912.)

No. 1,049.

**BANKRUPTCY (§ 212\*)—INDEMNIFYING BOND—CANCELLATION.**

A claimant in bankruptcy proceedings, having been granted authority to remove certain machinery contained in a building belonging to the bankrupt, was ordered to execute a bond to indemnify the trustee against damage to the realty in such removal; but, the realty having been sold, the bond, with the approval of the court and consent of the purchaser, was executed to the purchaser instead, and after removal of the machinery claimant applied for cancellation of the bond. *Held*, that the court, after removal of the machinery, had jurisdiction to order the purchaser to file any claim it might have on the bond for damages within a specified time, and, in default thereof, that the bond be canceled.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 236; Dec. Dig. § 212.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of Regealed Ice Company. On petition of the Great Lakes Engineering Works for cancellation of an indemnifying bond. Granted.

See, also, 191 Fed. 931.

Gardner, Pirce & Thornley, of Providence, R. I., for bankrupt.  
Frank Healy, for petitioner.

Mumford, Huddy & Emerson, for purchasers.

BROWN, District Judge. This court, having determined that the Great Lakes Engineering Works was entitled to remove certain machinery contained in a building belonging to the bankrupt, Regealed Ice Company, by decree made provision for the removal of the machinery within a limited time, and inserted in the decree a provision requiring of the petitioner a bond to indemnify the trustee against damage that might be caused to the building by the removal of said machinery. Subsequently the trustee in bankruptcy sold the real estate to A. L. Peck and others, trustees. The petitioner, instead of filing a bond to the trustee in conformity with the order of the court, gave its bond to A. L. Peck and others, the purchasers from the trustee. The bond recited the conveyance by the trustee in bankruptcy under the order of this court, and the condition of the bond was to indemnify said A. L. Peck and others in like manner. The said bond to the purchasers was presented to the court, with an order of approval assented to by attorneys for the purchasers of the real estate. Subsequently the petitioner filed its present petition, representing that it had removed without damage to the building the machinery in question, and praying that the bond of indemnity be canceled.

Counsel for the purchasers object that this court has no jurisdiction as a court of bankruptcy, or by reason of any inherent equity power, to cancel the bond, and also that, if the court has pow-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



er, it should not exercise it upon the showing made by the petitioner.

Upon the hearing of the reclamation petition, evidence was heard as to the ability of the petitioner to remove its property from the building, and it was determined upon a consideration of the evidence that the machinery could be removed without injury to the realty. As the petitioner offered to give bond to secure the trustee against damage, the decree provided for such a bond. This provision was inserted out of abundant caution for the protection of the trustee, and in consequence of the willingness of the petitioner to give full assurance of its ability to remove the machinery without injury to the realty. It was rather a voluntary undertaking of the petitioner, embodied in the decree, than a condition which limited its right. See *Daniell's Ch. (6th Am. Ed.) 1008*. It is quite evident that this condition was merely incidental, and was intended merely to cover possible damage to the real estate from removal of the machinery. It was rather an administrative provision than one affecting the main rights of the parties.

The machinery has been removed, and if it be true, as alleged in the petition, that no damage was done to the building, the petitioner ought not to be subjected to further expense of compensating a surety company for an unnecessary continuance of the bond. As a general principle, upon full performance of a judgment or decree by a party bound thereby, he is entitled to a record of satisfaction. This follows as a necessary incident of the power of a court to enforce its orders and to prevent an abuse of its process.

When in the exercise of its discretion a court imposes terms and conditions in injunction proceedings, the court as an incident to its jurisdiction may either cause damages to be assessed under its own direction or leave the party to his action at law. It is questionable whether, upon its findings, this court would have been justified in imposing upon the petitioner any condition which would derogate from its property right.

As a provision to guard against damages arising in the course of the exercise of its right to take possession of the property, the requirement of a bond was somewhat analogous to its requirement in injunction proceedings. See *Russell v. Farley*, 105 U. S. 433, 26 L. Ed. 1060.

The motion for cancellation of the bond seems a proper ancillary proceeding, even though the purchasers were made the obligees, instead of the trustee in bankruptcy. The purchasers appeared in the suit by their assent through their attorneys, and the variation in the form of the bond was in consequence of their assent. They thus became quasi parties to the record. 2 *Daniell's Ch. (6th Am. Ed.) 1591*. The acquirement of an interest from the trustee while the petition for reclamation was still pending did not affect the general character of the proceeding. *Root v. Woolworth*, 150 U. S. 401, 411, 14 Sup. Ct. 136, 37 L. Ed. 1123; 2 *Daniell's Ch. (6th Am. Ed.) 1061*, note 5.

I am of the opinion that the petitioner is entitled to an order requiring the obligees named in the bond to file, within 10 days from the entry of the order, any claim that they may have for damages to the real estate conveyed to them by the trustee in bankruptcy, caused by the removal of said machinery, and that, in default of such claim, said bond should be canceled; but upon the filing of a claim, with allegations of damage, the petition may stand for further hearing upon the question of damages.

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RANKIN v. MILLER et al.

(District Court, D. Delaware. September 26, 1912.)

No. 231.

*(Syllabus by the Court.)*

EQUITY (§ 385\*)—HEARING—ORDER OF PROOF—REOPENING CASE.

Where in a suit in equity through mere inadvertency of counsel there has been an omission to prove a certain fact in due course and the argument on final hearing has proceeded on both sides on the assumption and in the belief that such fact is disclosed in the pleadings and proofs, and the court is of opinion that proof of such fact probably is indispensable to the doing of justice between the parties on the merits, an application by counsel, in consequence of notice of such omission given by the court to the parties, to prove such fact by an exemplification of a record, affording conclusive evidence on the point, is included in the exceptions to the general rule forbidding the reception of evidence after final hearing, and such proof should be allowed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 822-824; Dec. Dig. § 385.\*]

In Equity. Action by George C. Rankin, receiver of the First National Bank of Alma, Kan., against Charles R. Miller and another, as executors, and others. On motion to reopen the case for further evidence. Granted.

Andrew C. Gray and John F. Neary, both of Wilmington, Del., for complainant.

Willard Saulsbury and Hugh M. Morris, both of Wilmington, Del., for defendants.

BRADFORD, District Judge. The complainant, after final hearing and before decree, has moved for leave to put in evidence a duly exemplified copy of the inventory and appraisement of the personal property of Robert H. Miller, deceased, containing and specifically mentioning one hundred and fifty shares of the capital stock of the First National Bank of Alma, and verified by his executors, Charles R. Miller and James Baily, before the register of wills April 20, 1892. On careful examination I have concluded that judicial discretion will be properly exercised by granting the application. This suit was brought to enforce the collection of an assessment made by the comptroller of the currency with respect to the above mentioned shares of capital stock under sections 5151

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

and 5152, U. S. Rev. Stat. (U. S. Comp. St. 1901, p. 3465). Miller and Baily were made defendants in both their individual and their representative capacity. They passed their final account as executors October 3, 1892, and within the space of two or three weeks thereafter paid in full the distributive balance in their hands among those entitled to receive the same. It is alleged in the bill and admitted in the answer of Miller and Baily that the decedent was the owner and record holder of the stock at the time of his death; but it does not appear from the pleadings nor from the evidence that either Miller or Baily had knowledge of that fact or knowledge that such stock formed part of the decedent's estate until after they had passed their final account and made full distribution. To charge Miller and Baily with such knowledge before they distributed the decedent's estate in their hands as executors is the object of the present application. On final hearing the argument of counsel on both sides proceeded on a tacit assumption that it appeared from the pleadings or the evidence that Miller and Baily, before final distribution, possessed that knowledge; and the defense made on their behalf rested on other and wholly different grounds than any lack of such knowledge by them. During the preparation of an opinion on the merits a careful examination of the pleadings and evidence first disclosed the omission to allege in the bill and establish by proof the knowledge on the part of the two defendants referred to which, as above stated, was assumed and understood on both sides to exist. That this omission was due to a mere inadvertence of counsel there is no room to doubt. Being so impressed and feeling that the doing of substantial justice between the parties on the facts assumed during the argument should not perchance fail through a mere slip not in the least affecting the discussion or treatment of the case on final hearing, counsel on both sides were sent for and appeared in open court. The omission to charge or prove knowledge as above mentioned was brought to their attention and was received by them with surprise; the counsel for the defendants stating that his recollection was that the point was covered by the bill and answer, and counsel for the complainant saying he certainly had thought the record was clear on that point.

It is a general though not universal rule of chancery practice that after final hearing on the merits leave will not be granted to either party to adduce evidence of any fact which existed prior to the closing of proofs, and was known or should have been known to the party or his counsel seeking the introduction of such additional evidence. The rule is based on the salutary policy of preventing perjury or fabrication of evidence. It is, however, subject to many exceptions, where the reason of the rule does not apply, or the court feels the need of the proposed additional evidence as an indispensable aid to enable it to render such a decision as will do justice between the parties according to the real merits of the case. The allowance, after final hearing, of additional evidence is not a matter of right in the party, but rests in the sound discretion

of the court, and is to be exercised cautiously and sparingly, and only where it appears that it is or probably will be indispensable to a decision according to the merits and justice of the cause. *Gresley's Eq. Ev.* 131-136; 1 *Dan. Ch. Pl. & Pr.* (4th Ed.) 857, 955, 956; *Wood v. Mann*, 2 *Sumn.* 316, *Fed. Cas. No.* 17,953; *Sharp v. Wyckoff*, 39 *N. J. Eq.* 95; *Desplaces v. Goris*, 5 *Paige* (N. Y.) 252; *Southard v. Price*, 2 *Del. Ch.* 233. It would be hard to conceive of any case more loudly calling than the present for an exercise of judicial discretion in favor of the reception of evidence after final hearing. The additional evidence here proposed is not of such character as to be attended with perjury or fabrication. It is an exemplified copy of the record of papers filed with the register of wills, and the fact of knowledge sought to be established by it has not been denied or questioned, but on the contrary practically admitted. Nor could its admission in any way operate to surprise or work legal prejudice to the defendants. Where in a suit in equity through mere inadvertency of counsel there has been an omission to prove a certain fact in due course and the argument on final hearing has proceeded on both sides on the assumption and in the belief that such fact is disclosed in the pleadings and proofs, and the court is of opinion that proof of such fact probably is indispensable to the doing of justice between the parties on the merits, an application by counsel, in consequence of notice of such omission given by the court to the parties, to prove such fact by an exemplification of a record, affording conclusive evidence on the point, is included in the exceptions to the general rule, and such proof should be allowed.

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In re A. G. CROSBY CO.

(District Court, D. Massachusetts. April 16, 1912.)

No. 16,540.

CORPORATIONS (§ 30\*)—ORGANIZATION—PURPOSE—CONTINUATION OF BUSINESS OF PARTNERSHIP—PARTNERSHIP LIABILITIES—ASSUMPTION.

Where a corporation is organized to take over and continue the business of a partnership acquiring the partnership assets and assuming its liabilities, and the partnership was solvent at the time, and the corporation continued to be solvent for a considerable time thereafter, the corporation assets were liable in bankruptcy for a note executed by it to a creditor of the firm to cover a part of the firm's debts so assumed.

[Ed. Note.—For other cases, see *Corporations*, *Cent. Dig.* §§ 97-100; *Dec. Dig.* § 30.\*]

In Bankruptcy. In the matter of the bankruptcy proceedings of the A. G. Crosby Company. On petition for review of referee's order allowing the claim of the Saginaw Milling Company. Affirmed.

Walter A. Buie, for Saginaw Milling Co.

French & Curtiss, for objecting creditor.

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\*For other cases see same topic & § NUMBER in *Dec. & Am. Digs.* 1907 to date, & *Rep'r Indexes*

DODGE, District Judge. The claim allowed is made upon two notes given by the bankrupt, one dated January 20, 1910, for \$1,250, and one dated February 8, 1910, for \$6,750. The first note was payable in six months; the second in four months from date. Adjudication in this case was on November 21, 1910, upon an involuntary petition filed November 5, 1910. Besides the amounts claimed on the notes, including interest, a balance of account is claimed for various items on various dates between February 24 and November 1, 1910, less certain credits on June 30, 1910. The petitioner for review complains, in the first place, of the allowance of the note for \$6,750.

The bankrupt company was incorporated under Massachusetts laws June 1, 1908. A note for \$6,750, on four months' time, was given by it to this creditor June 8, 1908, and of this note there have been five successive renewals by similar notes; the last being the note of February 8, 1910, which has been allowed by the referee. This note was given under the following circumstances:

The bankrupt corporation was organized for the purpose of taking over a business of dealing in hay and grain, which A. G. Crosby had previously conducted at Boston since 1905. In the course of that business, there had been transactions between him and the Saginaw Milling Company, a Michigan corporation, the creditor whose claim is now in controversy. From and after February, 1906, these transactions had been carried on under an agreement in writing between Crosby and the Milling Company to the effect that each should contribute to the capital of the business conducted by Crosby, and that the profits of the business should be equally divided between them; there being no express provisions regarding losses. While the business was being carried on under this agreement, the Milling Company made advances to Crosby on his notes, and the notes so given were renewed from time to time. When the corporation was formed, June 1, 1908, it did in fact take over Crosby's business, and carried it on until it became bankrupt as above. On June 1, 1908, the Milling Company held five of the notes above referred to, amounting in all to \$6,750, and coming due at various dates between June 12 and July 22, 1908. After its formation the corporation gave the note for \$6,750, above referred to, in exchange for the five notes mentioned. Another note held by the Milling Company for \$1,250, due June 5, 1908, was paid by the corporation June 12, 1908, and forms no part of the claim now sought to be proved. To the note included in this proof of claim, for the same amount, dated January 20, 1910, which note is admitted in the petitioner's brief to be a valid claim against the bankrupt, the petitioner's objection, below considered, to the note for \$6,750 does not apply. The main objection which the petitioner raises to the allowance of the \$6,750 note is that it was beyond the powers of the bankrupt corporation to assume a liability of A. G. Crosby, and that the note represents a liability so assumed.

That the bankrupt corporation was formed to take over A. G. Crosby's business has been stated. The arrangement that it should do so was agreed upon between him and persons connected with or representing the Milling Company. The incorporators were Crosby himself and various persons acting under the direction of him or of the Milling Company. Upon the formation of the corporation, the stock was distributed according to agreement between him and members of the Milling Company, so that there should be held for the Milling Company's benefit  $127\frac{1}{2}$  shares out of 246; the remainder being held by Crosby.

It was a part of the agreement under which the corporation was formed as above that it should acquire all the assets of Crosby's business; and, as against these, should assume certain liabilities incurred by him in connection therewith. This is what was in fact done, whether or not in doing it the requirements of the Massachusetts statutes regarding the conveyance of property to the new corporation or the payment in of its capital in cash were properly observed.

Crosby's five notes above referred to, for which the corporation's note for \$6,750, now in question, was substituted on June 8, 1908, after the corporation was formed, formed a part of the indebtedness which it had been agreed the corporation should assume in connection with the assets it acquired from Crosby.

The referee has found that the business of A. G. Crosby was solvent when the corporation took it over; or, in other words, that the assets it acquired exceeded the liabilities it assumed. I find nothing in the facts sufficient to require a different conclusion. The corporation, from and after June 1, 1908, continued the business carried on before and up to that date by Crosby under his so-called partnership agreement with the Milling Company, and, as the referee has found, it "continued to be solvent for a considerable time." This finding, also, is one which I find no sufficient reason to question. If these were the facts, there is nothing from which I can conclude that no adequate benefit to it, or no sufficient consideration in return for its assumption of Crosby's liabilities, was received by the corporation. It assumed them as part of the same transaction by virtue of which it got and has since kept its property. As against the Milling Company, which then permitted the property to pass to the corporation without asserting such claim therein or interest therein as then belonged to it because of Crosby's liabilities to it, it cannot say that its agreement to discharge those liabilities, or any of them, was one which it had no power to make. Under the circumstances, it would seem to have become bound by these liabilities, even without express assumption of them. *Du Vivier v. Gallice*, 149 Fed. 118, 80 C. C. A. 556.

A further objection raised by the petitioners for review is that the liability to the Milling Company evidenced by the note is a liability to a partner; and that a partner of a bankrupt cannot prove his claim in competition with creditors of the copartnership. This would seem to be a question relating rather to the marshal-

ing than to the mere allowance of the claim. But it depends, in any event, upon the proposition that the Milling Company and the bankrupt corporation were partners at the time of the bankruptcy. No business under the agreement of 1906 appears to have been done after the corporation was formed on June 1, 1908. The books of the business done up to that date, under the agreement of 1906, were closed, as stated in this petitioner's brief, and new books were opened by the corporation. I do not see how it can be said that the corporation was formed to continue, or did continue, the "co-partnership" previously existing between Crosby and the Milling Company. What was continued was the business which that co-partnership had been carrying on.

The petition for review raises the following further objections: "(1) That the referee's order disallowed, in set-off, the claim of said bankrupt against the Saginaw Milling Company. (2) That it disallowed the petitioner to use the name of the trustee to prosecute actions against the Saginaw Milling Company and others."

To neither of these matters is there any reference in the certificate before me. The only order transmitted with the certificate is the order indorsed on the claim itself and dated May 25, 1911, "Claim reallowed after hearings." There is nothing before me, therefore, which enables me to deal with these objections. But if, as would appear from the petitioner's brief, it is contended that the bankrupt corporation has paid to the Milling Company other items of the liabilities which it assumed, and now has the right to recover back what it has thus paid, or to set it off against the claim which has been allowed, the contention would seem to be adversely disposed of by the conclusions at which I have arrived as above.

The referee's order is approved and affirmed.

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## MACKAY TELEGRAPH & CABLE CO. v. CITY OF TEXARKANA, ARK.

(District Court, W. D. Arkansas, Texarkana Division. August 15, 1912.)

### 1. TELEGRAPHS AND TELEPHONES (§ 10\*)—STREETS—RIGHT TO USE.

Where a telegraph company had accepted in writing and complied with Act Cong. July 24, 1866, c. 230, 14 Stat. 221, and amendments, including Act March 1, 1884, c. 9, 23 Stat. 3 (U. S. Comp. St. 1901, p. 2708), regulating post roads, and was operating its business in accordance with such act, it was legally entitled to use the streets and alleys of a city for the construction of its line, subject only to the city's right to impose reasonable conditions or requirements in the exercise of its police power.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 6; Dec. Dig. § 10.\*]

### 2. TELEGRAPHS AND TELEPHONES (§ 10\*)—FRANCHISES—USE OF CITY STREETS—CONDITIONS—REASONABLENESS.

Whether the conditions attempted to be imposed on a telegraph company's right to use the streets and alleys of a city were reasonable was a question for the determination of the courts.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 6; Dec. Dig. § 10.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

### 3. TELEGRAPHS AND TELEPHONES (§ 10\*)—USE OF STREETS—ORDINANCE.

Where an ordinance, granting a telegraph company the right to use city streets and alleys on specified conditions, was not accepted by the company, it was not bound by its terms, nor could the requirements thereof be enforced, unless reasonable.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 6; Dec. Dig. § 10.\*]

Rights of telegraph and telephone companies to use of streets, see notes to *Southern Bell Telephone & Telegraph Co. v. City of Richmond*, 44 C. C. A. 155; *City of Owensboro v. Cumberland Telephone & Telegraph Co.*, 99 C. C. A. 14.]

### 4. TELEGRAPHS AND TELEPHONES (§ 20\*)—TEMPORARY INJUNCTION.

Where a suit, instituted to restrain defendant city from interfering with complainant's telegraph line, in fact involved only a controversy concerning the reasonableness of the ordinance requiring claimant to place its wires underground for a distance which claimant deemed unreasonable, and the affidavits on application for a preliminary injunction on the question of reasonableness were conflicting, and it appeared that, if a preliminary injunction were granted, the entire relief sought by the bill would be secured by complainant, and the whole case practically disposed of before trial, the preliminary injunction would be denied.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 13; Dec. Dig. § 20.\*]

In Equity. Suit by the Mackay Telegraph & Cable Company against the City of Texarkana, Ark. On application for temporary injunction. Denied.

Marshall & Coffman, of Little Rock, Ark., for plaintiff.

Richard M. Mann, of Texarkana, Ark., for defendant.

YOUMANS, District Judge. This is an application for a temporary injunction to restrain the city of Texarkana, Ark., its officers, agents, employés, and servants, from interfering in any manner whatsoever with the construction by the plaintiff of a telegraph line along the streets and alleys of said city. The bill, upon the allegations of which this application is made, further prays that, at the hearing, the temporary injunction be made permanent.

According to the allegations of the bill, the plaintiff is an Arkansas corporation, engaged in the transmission of telegraphic messages between points in Arkansas, and between points in Arkansas and points in the several states of the United States, and, in connection with other telegraphic companies and certain submarine and cable companies, is engaged also in the transmission of cable messages between points in Arkansas and other countries of the world. The bill further alleges that the plaintiff has accepted in writing the post roads act of Congress, approved July 24, 1866 (14 Stat. 221, c. 230), and amendments thereto, especially the act approved March 1, 1884 (23 Stat. 3, c. 9 [U. S. Comp. St. 1901, p. 2708]), and that it is operating its business in accordance with the provisions of those acts.

[1] Under those acts of Congress, plaintiff is legally entitled to the use of the streets and alleys of Texarkana for the construction of its line. *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, 13

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



Sup. Ct. 485, 37 L. Ed. 380. The city may impose, under its police power, reasonable requirements on the company as to the manner of construction and maintenance of its line. *Western Union Telegraph Co. v. City of Richmond* (C. C.) 178 Fed. 310; *Western Union Telegraph Co. v. City of Richmond*, 224 U. S. 160, 32 Sup. Ct. 449, 56 L. Ed. 710.

[2] It does not lie exclusively within the power of either the company or the city to determine what is a reasonable requirement. The inquiry must be open in the courts, and must depend largely on the actual state of affairs in the city. *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 105, 13 Sup. Ct. 485, 37 L. Ed. 380. In this case the plaintiff addressed a communication to the mayor and city council, asking for the privilege of entering the city with a system of poles, wires, cables, and fixtures for a general commercial telegraph and cable business. This communication was accompanied by an ordinance to be considered by the council. This ordinance was introduced, but never passed.

[3] An ordinance was passed on May 6, 1912, giving the plaintiff the right to use the streets and alleys of the city, but imposing certain conditions that were not acceptable to the plaintiff. The last section of that ordinance provides that it shall be in force from and after its passage and the filing by the company of a written acceptance thereof in the office of the city clerk. This the plaintiff has not done. On the contrary, it has notified the mayor and council that it would not accept the ordinance. That being the case, plaintiff is not bound by its terms, nor can its requirements be enforced, unless they are reasonable. The controversy between the company and the city at this time grows out of a difference of opinion between them as to the extent to which the wires of the company shall be put underground.

[4] The ordinance above referred to requires, and the officers of the city insist, that through a certain portion of the city the wires of the plaintiff shall be put underground. Plaintiff is willing to put its wires underground for a part of the distance so required by the city, but claims that the requirement for a distance further than thus conceded is unreasonable. It has introduced the affidavits of its superintendent and right of way agent. The facts stated in those affidavits tend to show that the improvements in that portion of the city, where it is required that wires be put underground, beyond the concession of plaintiff, are not such as make the requirement a reasonable one. The city has not answered. The time within which it may do so under the rules has not expired. It has appeared by counsel in opposition to the application, and has introduced affidavits in its own behalf. These affidavits state facts tending to show the reasonableness of the requirement, and the necessity of it for the protection of life and property. If a temporary injunction were granted, the entire relief sought by the bill would be secured by the plaintiff, and the whole case practically disposed of before trial. In such a case the rule is generally not to grant a temporary injunction. 22 Cyc. 740; *Kirby Mfg. Co. v. White* (C. C.) 1 Fed. 604; *Galveston*

& W. Ry. Co. v. City of Galveston (Tex.) 137 S. W. 724. This is especially true when the facts on which the application is based are controverted, as they are in this case. *Marshall v. Turnbull* (C. C.) 32 Fed. 124; *Ellis v. Bacon*, 136 Ga. 756, 71 S. E. 1050; *Gaskins v. Lovett*, 135 Ga. 368, 69 S. E. 476.

"The legitimate purpose and function of a temporary or preliminary injunction is to preserve matters in statu quo until the hearing. If it undertakes, or if its effect is, to dispose of the merits of the controversy without a hearing, or if it divests a party of his possession or rights in property without a trial, it is void." 1 *Beach on Injunction*, page 128; *Calvert v. State*, 34 Neb. 616, 52 N. W. 687; *Arnold v. Bright*, 41 Mich. 207, 2 N. W. 16.

I do not think that an injunction should issue in this case in advance of a trial and the application therefor will be denied.

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In re PEERLESS FINISHING CO.

(District Court, S. D. New York. June, 1912.)

BANKRUPTCY (§ 264\*)—RECEIVERS—PLANT OF BANKRUPT—SALE.

A bankrupt's plant, except accounts receivable and prepaid insurance, was appraised at \$240,653. It had been run at a loss for some time because of lack of working capital, and could not be continued without a new investment of at least \$100,000. The receiver obtained a bid of \$181,000 therefor, and 90 per cent. in amount of the stockholders, and all but one-twelfth or less of the creditors either openly advocated or acquiesced in the sale. *Held*, that the offer should be accepted and the sale confirmed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 368, 369; Dec. Dig. § 264.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Peerless Finishing Company. Applications for a sale of assets and for dismissal of an involuntary petition. Petition for sale of assets granted, and petition for dismissal submitted for further consideration.

James N. Rosenberg, for receiver in bankruptcy.

Benjamin G. Paskus, for purchaser.

Richards & Heald (Henry Smith, of counsel), for consenting creditors.

Merritt Lane, for objecting creditors.

Joseph M. Hartfield, for alleged bankrupt.

HOUGH, District Judge. On June 7th two orders to show cause were granted herein, both returnable June 20, 1912. By the first order creditors and all parties interested were required to show cause why all the property of the alleged bankrupt should not be sold forthwith, and by the second order all creditors were required to show cause why (inter alia) an order of dismissal of these proceedings should not be made. At the place and time stat-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ed a large number of creditors appeared, due proof of service and advertisement was made, and the report of the appraisers appointed by this court submitted.

1. As to the order to show cause why the proceedings should not be dismissed, two creditors (Saunders and Sherman), with claims aggregating \$20,000 (unsecured), and represented by Mr. Lane, appeared and objected. No other objection was made, and no decision of that application is now made; but the submission thereof to the court without objection other than above noted is recorded.

A. One bid was made to the receiver for the property, in the amount of \$181,000. The appraisers returned as the value of the alleged bankrupt's property the following:

Real estate and building.....	\$149,400
Machinery.....	56,533
Copper rolls.....	34,720
Accounts receivable.....	500
Prepaid and recoverable insurance.....	2,000
	<hr/>
	\$243,153

The bid is for all the above property, together with the good will, trade-name, etc., except the accounts receivable and prepaid insurance, making the appraised value of the property bid for \$240,653. It is obvious that the bid is as near as may be 75 per cent. of the appraised value. No other bids having been received or offered in open court, numerous counsel and creditors personally addressed the court in favor of the sale; the result thereof being (tested by the bankrupt's books) that the total unsecured indebtedness of the corporation is \$244,000, with \$96,000 additional secured by mortgage, and \$7,500 claiming the right of priority in payment.

I am satisfied that unsecured creditors, constituting a very large majority in number and representing slightly more than \$197,600 in value, are in favor of sale at the price offered. The reasons why they should be and are in favor of such sale appear to be the following:

a. The mortgage indebtedness of the company is in default. It is represented by numerous mortgages, and if any one of five of the seven real estate mortgages owing were foreclosed it would disintegrate the property of the company. There is likewise a mortgage upon the copper rolls, which are absolutely necessary in the business of this concern, of \$20,000. The appraised value is \$34,720. The rolls cost the company about \$53,000. The president of the company deposes that the appraised value is a very fair price for the rolls at the present time, and it is therefore obvious that this mortgage must be taken care of or the mill might as well be dismantled.

b. This company has been transacting a losing business for some time, and for more than two months last past, and considerably before bankruptcy proceedings were begun, efforts had been made by directors and creditors to either rehabilitate the company or sell

it out, and all efforts have failed, except in so far as this one bid represents success.

c. It is the expressed opinion of this large majority of creditors that, in order to procure anything substantial for the unsecured creditors, the sale must be of the whole plant, for its separation and partial sale is impracticable without loss.

d. The last reason is further thought a good one, because the business of the company is peculiar, the fittings of the mill are designed for that business, and the market for machinery of this class is limited.

e. While business is thought to have been bad, owing to conditions affecting the whole market for silks, nevertheless the business of this company has always been hampered by a lack of working capital. Between \$400,000 and \$500,000 have been put into the business, according to the company's books, yet the same has passed into bankruptcy without enough money on hand to meet a weekly pay roll, and with accounts receivable appraised at \$500 only. No business can live on such terms as these, and I am convinced that Mr. Behrens (who addressed the court) is right in saying that it would be useless to start the business up again without \$100,000 on hand. Mr. Behrens' firm is a stockholder to the extent of \$5,000, and a creditor, according to the company's books, of \$12,450.64. It seems to me that his opinion should carry great weight, and I think it evidently did with the body of creditors present.

The opposition to this sale comes principally from Mr. Saunders, who is a stockholder to the extent of \$10,000, and who urges that more time should be afforded to seek out a purchaser, or sell—insisting that a sale at the price offered can be made at any time. It is, however, admitted that for at least two months every effort has been made, both by creditors and directors, to dispose of this property or get money wherewith to start it again. Such efforts have failed, and all the officers of the company except Mr. Saunders have given up hope, and through counsel signified in open court their acquiescence in the sale proposed. Every shareholder has been notified of this application, and none appears to object except Mr. Saunders.

Under circumstances such as these a sale is lawful, if with the consent of the alleged bankrupt. It is, indeed, but a form of composition. The duty of the court is to ascertain what is for the benefit of the estate, and in my judgment that means whatever is for the benefit of the creditors. If there was serious opposition, the application should be denied.

If the company itself asked time for further efforts at rehabilitation, the same result should follow; but I am unable to see that there is any opposition to this sale, except that flowing from two gentlemen, who can do nothing themselves, or at least have accomplished nothing themselves for upwards of two months, and who are of the opinion that, if more time passes and more expense is incurred, somebody else will do what is needed. But who are the persons who will accomplish anything? Obviously only shareholders and creditors, and they prefer to acquiesce in this sale.

The public has been given far greater information about this matter than is required by bankruptcy procedure. A full hearing has been had at a largely attended meeting, and when of the stockholders but one-tenth in amount objects, and of the creditors all but one-twelfth or less in value either openly advocate the sale or by silence acquiesce therein, I think the duty of the court is plain. An order will pass directing sale as prayed for.

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FIRTH STERLING STEEL CO. v. BETHLEHEM STEEL CO.

(District Court, E. D. Pennsylvania. October 8, 1912.)

No. 431.

1. EVIDENCE (§ 154\*)—EVIDENCE WRONGFULLY OBTAINED—EFFECT.

The illegality of the method by which evidence has been obtained does not affect its admissibility.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 443; Dec. Dig. § 154.\*]

2. TRIAL (§ 89\*)—STRIKING OUT EVIDENCE—PUBLIC POLICY—MILITARY SECRETS.

Where original drawings of armor-piercing projectiles, made by the Bureau of Ordnance of the Navy Department, were delivered to defendant steel company in conformity with the requirements of a requisition, under a contract prohibiting their disclosure and providing that they should be treated as confidential, copies of such drawings, illegally obtained, when offered in evidence, were privileged, though the witness did not claim the privilege, and the court was properly authorized to sustain a motion to strike them from the record, on the ground of public policy, to prevent the disclosure of military secrets.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 228-234; Dec. Dig. § 89.\*]

In Equity. Suit by the Firth Sterling Steel Company against the Bethlehem Steel Company. On motion to expunge certain exhibits from the record. Granted.

Melville W. Church, of Washington, D. C., for complainant.

James A. Watson, of Washington, D. C., for defendant.

THOMPSON, District Judge. It appears from the papers filed in support of the motion that the blueprints known as Complainant's Exhibits Nos. 2 and 3 are copies made by the defendant from original drawings which were made under a contract with the United States of June 22, 1909, for the manufacture and delivery of armor-piercing projectiles for the Bureau of Ordnance of the Navy Department; that the original drawings were made by the defendant, under the terms of its contract, in conformity with the requirements of "requisition" drawing of the Bureau of Ordnance No. 32,362, and that the latter drawing embodied military secrets of such importance to the government that their disclosure was prohibited by the Navy Department. The complainant's patent was granted on January 4, 1910, when requisition drawing No. 32,362 had been in existence for some

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 199 F.—23

time. Under the contract the defendant was required to consider all drawings furnished by the bureau as confidential, and for the use of the contractors in the prosecution of the government work only. This requirement had also been contained in the notification to the defendant to submit a bid for the manufacture of the projectiles prior to entering into the contract. It appears that the blueprints made from requisition drawing No. 32,362 embody all of the information contained in that drawing, and considerable additional information relating to projectiles designed by the Bureau of Ordnance of the Navy Department, with the assistance of the ordnance officers of the Bethlehem Steel Company. "Complainant's Exhibit, Drawing Defendant's Shell," was produced from the two blueprint exhibits Nos. 2 and 3, and likewise contains information in relation to requisition drawing No. 32,362.

The blueprints, Exhibits Nos. 2 and 3, are the property of the Bethlehem Steel Company, and were in some manner unlawfully and surreptitiously taken from their plant by some undisclosed person, and delivered to an employé of the complainant, and were offered in evidence in connection with the testimony of one of complainant's witnesses on December 10, 1910. At the time no objection was made to their introduction; but subsequently, on January 10, 1911, defendant's counsel having ascertained the nature of the drawings, gave notice of his intention to make the present motion. About the same time the complainant endeavored by subpoena duces tecum to obtain from the defendant's officers the original drawings, and called as a witness under subpoena the government inspector in charge of the work at the defendant's plant to testify in relation thereto. The witnesses having declined to produce the drawings or to answer, complainant moved to compel them to do so, whereupon Judge Holland held that they were privileged to refuse to answer or to produce the drawings by reason of the military secrets embodied therein.

The Secretary of the Navy has uniformly and consistently declined to permit any information to be given to the complainant in relation to the drawings, and has not permitted copies thereof to be filed in the office of the Secretary of the Interior, where they would be open to public inspection, taking the position throughout that the drawings embodied military secrets. The attitude of the secretary is well defined in the following excerpt from a communication to the complainant's counsel:

"It is believed that the researches and developments made by the Bureau of Ordnance and communicated to the Bethlehem Steel Company, for the purpose of fulfilling its contracts, embody secrets of military value to the government that could not be disclosed without detriment to the public interests. The department must, therefore, in view of the necessity for secrecy as to the operations of the government affecting matters of such vital importance, adhere to its former conclusion in the premises."

[1] At the request of the Navy Department, an Assistant United States Attorney appeared, by direction of the Attorney General, in support of the present motion. At the argument, counsel for the complainant contended that, inasmuch as the witness through whose testimony the exhibits were introduced had not claimed the privilege,

the rule of privilege did not apply, and that the method by which the evidence had been obtained did not affect its admissibility. In the latter contention counsel is undoubtedly correct. As Wigmore says (section 2183):

"The illegality of the act of obtaining the evidence is by no means condoned, but is merely ignored."

[2] I think the method by which the papers were obtained has no bearing upon the question now before the court. The disposition of the present motion is not, however, to be based upon the personal privilege of the witness through whom it is sought to introduce the drawings in evidence, but upon the ground that the topic or subject-matter of the information contained in the drawings is privileged, as constituting secrets of the government in military affairs. Wigmore, §§ 2367, 2375.

Most of the cases in which the rule of public policy forbidding the disclosure of military secrets has been applied have dealt with the right of a witness to refuse to answer, and not with the power of the court to strike out the testimony. In the case of *Totten v. United States*, 92 U. S. 105, 23 L. Ed. 605, however, it was held that an action could not be maintained against the government, based upon a contract made between the President and the claimant for secret services during the war, upon the ground that:

"The secrecy which such contracts impose precludes any action for their enforcement."

To sustain the complainant's position in this case, the court must hold that, although it may upon grounds of public policy dismiss a suit based upon military secrets, it may not upon those grounds prevent the disclosure of military secrets in a pending suit, except through the privilege of a witness, who may or may not claim the privilege, and that parties are therefore free to effect the disclosure of matters of the utmost importance to the national defense and welfare, if the possession of papers containing such information can be obtained. I have no doubt that in a trial at common law the court might, upon grounds of public policy, strike out evidence of this nature. The case at bar is somewhat analogous to that of *Kessler v. Best* (C. C.) 121 Fed. 439, where a witness was being examined in the Southern district of New York under section 863, Compiled Statutes, in an action at issue in the United States Circuit Court for the Eastern District of Wisconsin. The witness claimed that certain documents about which he was interrogated were part of the archives of the German consulate, and therefore privileged. Counsel for the German government moved that the witness be excused from answering certain questions with regard to documents belonging to the German consulate, and also that some answers which the witness had already incautiously made, purporting to give the contents of part of such documents, be stricken out. Judge Lacombe in his opinion said:

"The 'privilege' was that of the German government, not of the witness, and inasmuch as the witness attended under the compulsion of the subpoena

issued out of the Circuit Court, Southern District of New York, and answered under constraint of an apprehension of commitment by the same court, should he refuse, it was assumed to be within the power of this court to strike out any part of the testimony which violated the 'privilege' of the German government."

In the case at bar the evidence sought to be introduced, which was excluded by the court's former order, must, in my opinion, independently of the privilege of the witness, or the manner in which the drawings have been secured, be excluded for reasons of public policy which attach to the contents of the papers.

An order will be made expunging the exhibits in question from the record, and directing that they remain in the custody of the clerk pending their further disposition.

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In re BROWN.

(District Court, N. D. New York. September 2, 1912.)

**BANKRUPTCY (§ 409\*)—GROUNDS FOR REFUSING DISCHARGE—FAILURE TO KEEP BOOKS.**

The mere failure of a bankrupt to keep books in his business does not authorize the court to refuse him a discharge under Bankr. Act July 1, 1898, c. 541, § 14b(2), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797, and Act June 25, 1910, c. 412, § 6, 36 Stat. 839 (U. S. Comp. St. Supp. 1911, p. 1496), but the burden rests on an objecting creditor to further show that such failure was "with intent to conceal his financial condition," and, in the absence of any declaration or statement by him tending to show his intent, where his acts were as consistent with an honest as with a dishonest intent, a finding by a referee in favor of his honesty of purpose will not be reversed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 739, 752-757; Dec. Dig. § 409.\*]

In the matter of Samuel Brown, bankrupt. On motion to confirm report of R. B. Fish, referee, in favor of granting bankrupt a discharge. Report confirmed and discharge granted.

C. J. Heffernan, of Amsterdam, N. Y., for bankrupt.

Chas. E. Hardies, of Amsterdam, N. Y., for objecting creditors.

RAY, District Judge. Samuel Brown was adjudicated a bankrupt on or about the 16th day of December, 1911. The bankrupt has no assets unless there be a trifling equity in his real estate which is subject to a mortgage of \$3,000. There has been an effort to sell this real estate, but no offer in excess of the mortgage has been made. The liabilities are about \$9,000, substantially all incurred within the six months prior to bankruptcy. The specification of objection to the bankrupt's discharge pressed is that the bankrupt, "with intent to conceal his financial condition, \* \* \* failed to keep books of account or records from which such condition (financial) might be ascertained." For about four years preceding his bankruptcy Brown was engaged in business of slate roofing; that is, taking and execut-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



ing contracts for slating the roofs of buildings in the execution of which contracts he purchased slate and other material on credit. The bankrupt testifies, and there is no evidence to the contrary, that he never kept any books of account, or memorandum books of any kind. He also says that, while he can write, he never attended school a day in his life. The evidence shows that he is an illiterate man. He also says that bills received by him for goods purchased were thrown in the wastebasket. He says that, when a roof was slated, he would count up the number of squares, and make out a bill accordingly, etc. From the fact that Brown failed to keep any books or memoranda of account while doing quite a large business, and the fact that he incurred this large indebtedness within the six months prior to bankruptcy, and the fact that shortly before bankruptcy he sold some slate in quantities, and the manner of Brown in giving his evidence before the referee, and alleged evasions in answering, the referee was asked to find and this court is now asked to find, the referee having refused so to do, that the failure to keep books of account was an act done, or omitted rather, by the bankrupt for the purpose of concealing his financial condition; that in failing to keep such books his intent was to thereby conceal his financial condition. There is no evidence that his attention was ever called to the necessity or propriety of keeping books, or that he has made any declarations or statements of any description as to his intent or purpose, if he had any, in not keeping books. It is true that Brown, when examined before the referee, did not speak with the frankness he ought to have spoken, but he finally answered all questions. There is no charge or evidence that he has concealed property or failed to obey all orders of the referee. It is not incredible that this illiterate man like many others relied on his memory, the results of his labor and expenditure of material before him on the completion of a job or contract, as evidence of what work he had done and the material furnished in carrying on his business. His doing business in this way, taking into account his ignorance and illiteracy, is not inconsistent with honesty of purpose, and does not point with any certainty to an intent on his part to "conceal his financial condition." A mere failure to keep books is not enough to justify the refusal of a discharge. In *re Blalock* (D. C.) 9 Am. Bankr. Rep. 266, 118 Fed. 679; In *re Keefer* (D. C.) 14 Am. Bankr. Rep. 290, 135 Fed. 885; In *re Prager*, 13 Am. Bankr. Rep. 527, 134 Fed. 1006; In *re Brockman*, 21 Am. Bankr. Rep. 251, 168 Fed. 1015. In the absence of any declaration or statement by Brown showing or tending to show his intent, if he had any, in failing to keep books, we must look to his acts. I find no evidence that he made any false statement for the purpose of obtaining credit, or that he purchased unreasonable amounts of merchandise. A person is presumed to intend the natural and known consequences of his voluntary acts, but I do not think it can be said that the natural and known consequences of a failure to keep books of account are to conceal the financial condition of the one omitting to keep books. The Bankruptcy Act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517), as does the English law, made the mere failure to keep books a ground for refusing a discharge,

but the Bankruptcy Act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), as amended (Act Feb. 5, 1903, c. 487, 32 Stat. 797 and Act June 25, 1910, c. 412, 36 Stat. 839 [U. S. Comp. St. Supp. 1911, p. 1493]), explicitly states that the omission must have been accompanied by the specific intent to conceal the true financial condition, and hence the burden of proving this intent is on the objecting creditors. So, when from certain acts or omissions two inferences may be drawn the one pointing to a guilty or bad intent and the other perfectly consistent with honesty and absence of a bad purpose, it is the duty of the court to find in favor of honesty of purpose and intent. In this case the referee had the bankrupt before him and heard him give his testimony and noted his manner, etc. The appellate court should be slow to interfere with the finding of a jury or referee when the evidence will justify a finding either way. I think the ignorance of this bankrupt and his illiteracy and want of training in business methods account for his failure to keep books and quite likely all combined accounts for his failure in business.

The order of the referee overruling the specification of objection is affirmed.

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SCHUMERT & WARFIELD, Limited, et al. v. SECURITY BREWING CO.

(District Court, E. D. Louisiana. October 8, 1912.)

No. 1,668.

1. BANKRUPTCY (§ 60\*)—ACT OF BANKRUPTCY—ADJUDICATION.

Where a receiver of a corporation was appointed, not for the corporation's insolvency, but because of the failure of a bank with which the corporation had done business, the appointment of such receiver did not constitute an act of bankruptcy for which the corporation could be adjudged a bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. § 60.\*]

2. WITNESSES (§ 71\*)—COMPETENCY—JUDGE OF COURT.

Where an order appointing a receiver for a corporation did not specify the ground for such appointment, the judge making the order was a competent witness to testify that the receiver was appointed owing to the failure of a bank with which the corporation did business, and not because of insolvency.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 184; Dec. Dig. § 71.\*]

In Bankruptcy. Petition by Schumert & Warfield, Limited, and others for an adjudication in bankruptcy against the Security Brewing Company. Verdict having been rendered for defendant, petitioners move for a new trial, and to enter judgment non obstante. Denied.

Lazarus, Michel & Lazarus, of New Orleans, for plaintiffs.

Walter L. Gleason and Meyer S. Dreifus, both of New Orleans, for defendant.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

FOSTER, District Judge. In this matter certain creditors of the Security Brewing Company filed a petition to have it adjudicated a bankrupt, alleging as its acts of bankruptcy, first, that the said company while insolvent applied to the civil district court for the parish of Orleans for the appointment of a receiver; and, second, that because of insolvency receivers were appointed by said court to take charge of its assets and to administer its affairs. The corporation answered, denying insolvency and denying that the receivers had been appointed on the ground of insolvency, and alleging that the receivers were appointed to facilitate the operation of its business because of the suspension of the Teutonia Bank & Trust Company with which it did its banking business.

[1] The question as to the insolvency of the corporation on the 17th day of April, 1912, on which day the receivers were applied for, was tried to a jury and resulted in a special finding that the corporation was not then insolvent. I am not disposed to set aside this finding. While the evidence was conflicting, the jury was competent to determine the controversy before it, and there was ample evidence to sustain the verdict.

But plaintiffs urge that the question presented by their petition, that receivers were appointed to the corporation because of insolvency, was not before the jury, and has not been passed upon by the court. They contend that it is immaterial as a matter of fact whether the corporation was insolvent or not if the record of the state court shows that insolvency was the ground, or one of the grounds, upon which the receivers were appointed; and that, as allegations of insolvency were made in the petition and not denied, this court must conclusively presume that one of the grounds for the appointment of receivers was that of insolvency. The petition in the state court to provoke the appointment of a receiver was by the Teutonia Bank & Trust Company through the State Bank Examiner, engaged in liquidating its affairs. It alleges the said bank to be the creditor of the brewery in large sums, but does not allege a final executory judgment to have been rendered on same. It contains, among others, these averments:

"That the said Security Brewing Company is insolvent, and that the petitioner believes that it is to the interest of the stockholders and creditors that a receiver be appointed to wind up and liquidate the affairs of the said corporation according to law. That the board of directors of the Security Brewing Company has declared by resolution that the corporation is unable to meet its obligations and that a receiver is necessary to preserve and administer its assets for the benefit of all concerned."

The brewery answered as follows:

"Now into court comes the Security Brewing Company, made defendant herein, and for answer to the demands of plaintiff admits that the board of directors of the said corporation have passed a resolution, declaring that the said corporation is unable to meet its obligations as they mature and that a receivership is necessary. Wherefore they pray that a receiver be appointed and for general relief."

The court entered judgment as follows:

"In this matter submitted to the court for adjudication, the court considering the law and the evidence, and, for the reasons orally assigned, it

is ordered, adjudged, and decreed that there be judgment appointing T. Walter Danziger and John Legier, Jr., coreceivers of the Security Brewing Company, with full authority to take charge of its assets and administer its affairs as a going concern."

For the sake of argument it may be conceded that the failure to deny insolvency conclusively admitted it, but it does not follow that insolvency should necessarily be considered as one of the grounds upon which the receivers were appointed. Formerly the state courts of Louisiana appointed receivers to corporations much the same as does a court of general equity jurisdiction, presumably by virtue of article 21 of the Civil Code, which provides for proceedings conformably to equity in the absence of specific law, but since 1898 the appointment of receivers is authorized and regulated by Act 159 of the General Assembly of that year. This act provides specifically numerous grounds upon which a receiver may be appointed, one of which is when the board of directors shall have declared by resolution that the corporation is unable to meet its obligations as they mature, but it does not provide for the appointment of a receiver at the instance of a creditor on the ground of insolvency unless he has a final and executory judgment. Considering the act, it is at least doubtful that the court had jurisdiction to appoint a receiver on the ground of insolvency in the proceedings then before it, but again considering, for the sake of argument, that it did have jurisdiction, on the face of the record, it is not certain that the receivers were appointed because of insolvency, as the corporation might be solvent though unable to meet its debts as they matured.

[2] Fortunately the matter is not in doubt. On the trial the judge of the state court was sworn as a witness, and testified that the parties in interest appeared before him, and stated that the corporation was solvent, but, owing to the failure of the Teutonia Bank & Trust Company the day before, the corporation was deprived of its banking facilities, and could not meet its obligations as they matured, and that he appointed receivers on that ground, for the purpose of preserving its assets and conducting its business as a going concern, and not because of insolvency.

It is contended by plaintiffs that the judge was incompetent as a witness, that his evidence should be expunged, and the grounds upon which the receivers were appointed determined exclusively from the record in the state court. It is well settled that extrinsic evidence cannot be received to alter or explain a judgment, but it is equally well settled that competent evidence can be received to show upon which of several grounds appearing in the record the verdict was rendered or judgment entered. In *re Kennedy Tailoring Co.* (D. C.) 175 Fed. 871, and authorities there cited. For that purpose a member of a jury is considered competent. If the jury are competent witnesses, I can conceive of no reason why the judge should be incompetent when the case was not tried to a jury.

In view of these facts, especially the verdict of the jury in this court, the motions for a new trial and to enter judgment will be denied.

## In re TRUM.

(District Court, W. D. Missouri, W. D. October 2, 1912.)

No. 412.

## 1. ALIENS (§ 60\*)—CITIZENSHIP—TERMS.

Every state in general has the right to prescribe the terms on which it will admit aliens to citizenship, and compliance with those terms is a condition precedent to the power of the court to enter its decree.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 117, 118; Dec. Dig. § 60.\*]

## 2. ALIENS (§ 62\*)—NATURALIZATION—CITIZENSHIP—"GOOD MORAL CHARACTER."

Petitioner's application for citizenship was verified by a saloonkeeper, and declared on oath that petitioner's occupation was that of clerk. An investigation disclosed that he was a bartender for one of the witnesses verifying the application. Petitioner admitted that in 1908, within five years prior to the filing of the petition, he had been convicted in Kansas of violating the liquor law, and was arrested for selling liquor illegally in violation of an injunction; that he was sentenced to 30 days in jail and to pay a fine of \$100, but that he was paroled; and that the parole had terminated. *Held*, that such conduct showed a willful disregard, not only of the laws of the state, but of the orders of the court, and that he was therefore not entitled to citizenship, under Naturalization Act June 29, 1906, c. 3592, § 4, 34 Stat. 596 (U. S. Comp. St. Supp. 1911, p. 529), requiring that the applicant for five years shall have behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 123-125; Dec. Dig. § 62.\*]

For other definitions, see Words and Phrases, vol. 4, p. 3124.

Citizenship under state and federal laws, see note to *City of Minneapolis v. Reum*, 6 C. C. A. 37.]

In the matter of the petition of William Trum to be admitted as a citizen of the United States. Application denied, and proceeding dismissed.

Hugh C. Smith, Asst. U. S. Atty., of Kansas City, Mo., for the United States.

VAN VALKENBURGH, District Judge. February 6, 1912, the applicant, William Trum, filed his petition for naturalization in the United States District Court at Kansas City, Mo. The petition was verified by Herman Trum, saloonkeeper, and John Trum, a retired saloonkeeper. Therein Mr. Trum declared on oath that his occupation was that of clerk. The investigation made in his case showed that he was at the time of the filing of his petition, and is now, a bartender for his witness, Herman Trum.

This petition came on for hearing July 1, 1912, when its dismissal was moved by the United States on the ground that the applicant had not behaved as a man of good moral character for the period of at least five years prior to the date of his application. It was shown

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

at the hearing, and admitted by the applicant, that Trum was convicted during the year 1908, at Leavenworth, Kan., and within five years of the filing of his petition herein, of violating the liquor laws of that state. Under the laws of the state of Kansas an injunction had previously been granted by proper judicial authority against the sale of intoxicating liquor in the building in which Trum was doing business. This injunction was in force at the time of the alleged violation and the subsequent arrest. For his offense Trum received a sentence of 30 days in jail and a fine of \$100. All this was admitted by the applicant at the hearing, but he suggested in avoidance that he had been paroled following his conviction, and, as the parole had now terminated, such conviction could not now be urged against him.

The fourth subdivision of section 4 of the Naturalization Act requires, among other things, that:

"It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he had resided continuously within the United States five years at least, \* \* \* and that during that time he had behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same."

[1, 2] It is fundamental that every state has, in general, the right to prescribe the terms upon which it will admit aliens to citizenship, and compliance with these terms is a condition precedent to the power of the court to enter its decree. As governing this case, Congress has provided that it shall be made to appear to the satisfaction of the court that during the five years immediately preceding the date of application the applicant shall have behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. What, then, constitutes good moral character, within the meaning of the Naturalization Act? The question has been infrequently discussed by the courts. Cases involving conduct evil in itself would present little difficulty. Discussion arises where the offense is merely *malum prohibitum*. In the case of *In re Spenser*, 5 Sawyer, 195, Fed. Cas. No. 13,234, perjury is cited as falling within the former class, and an isolated case of the prohibited sale of spirituous liquors as belonging to the latter. Concerning this, however, the court says:

"And yet it is clear that anything like habitual gaming or vending of liquors under such circumstances would constitute bad behavior—immoral behavior—and be a bar under the statute to admission to citizenship."

(Such, I think, must be the thoughtful view of any court. The laws of the state of Kansas prohibit the local sale of spirituous liquors. The courts of that state, when appealed to, enjoin such sales upon specific premises. The applicant, by engaging in such business in that state and upon such premises, exhibited a willful disregard, not only for the laws of the state, but the orders of the court. His act was that of the lawbreaker—not of one well disposed to the good order and happiness flowing from attachment to the principles of the Constitution of the United States. The court is not satisfied that such is

the behavior of a man of good moral character. Defiance of the established order, and of the mandates of legal tribunals declaratory thereof, constitutes bad citizenship, bad behavior, and, if willfully persisted in, indicates a perverted moral character. It may well be doubted if a tendency in this direction would not menace the public welfare more than individual cases of immoral conduct as commonly understood. No court would directly set the seal of its approval or condonation upon such behavior, nor should it do so by indirection. A subsequent parole, like a subsequent pardon, does not obliterate the offense, but merely abates the penalty imposed under the law that has been violated.

I am therefore of the opinion that this application should be denied; but, inasmuch as the law does not impose a permanent disability, but only for the five-year period expressly stated, the denial is without prejudice to another application when time has removed the disqualification. An order will be entered accordingly.

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In re FOLKSTAD.

(District Court, D. Montana. October 4, 1912.)

No. 811.

1. **BANKRUPTCY (§ 67\*)—ACT OF BANKRUPTCY—EXCEPTED PERSONS.**

Under Bankr. Act July 1, 1898, c. 541, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3418), excepting certain persons from adjudication, such persons cannot commit an act of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 17, 18, 86, 87; Dec. Dig. § 67.\*]

What persons are subject to bankruptcy law, see note to *Mattoon Nat. Bank of Mattoon v. First Nat. Bank of Mattoon*, 42 C. C. A. 4.]

2. **BANKRUPTCY (§ 56\*)—ACT OF BANKRUPTCY—TIME.**

An act of bankruptcy is such when it is committed, or not at all; and if the act is committed by one who then is not of the class that the law permits to be adjudicated an involuntary bankrupt, it can furnish no subsequent basis for involuntary proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 61-65, 67, 68; Dec. Dig. § 56.\*]

3. **BANKRUPTCY (§ 68\*)—ACT OF BANKRUPTCY—EXEMPT OCCUPATIONS.**

One who contracts debts while engaged in a nonexempt occupation, and thereafter changes to an exempt occupation, and commits an act which in a nonexempt occupation would be an act of bankruptcy, is not subject to adjudication as an involuntary bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 18, 86, 87; Dec. Dig. § 68.\*]

In Bankruptcy. In the matter of Charles L. Folkstad, alleged bankrupt. On involuntary petition for adjudication. Dismissed.

Wight & Pew, of Helena, Mont., for petitioning creditors.

Charles L. Folkstad, of Culbertson, Mont., pro se.

BOURQUIN, District Judge. This is a proceeding for an adjudication of involuntary bankruptcy against Charles L. Folkstad.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The petition in usual form was filed May 13, 1912, alleging an act of bankruptcy on May 10, 1912, and debts incurred by respondent prior to December, 1911, while engaged in the mercantile business. Respondent's answer is that in November, 1911, he executed a trust deed of his mercantile business, and delivered said business to the trustee named in said deed, who at all times hitherto was and is in charge and possession thereof, and that he (respondent) at all times since November, 1911, was and is engaged chiefly in farming and tillage of the soil. The proceedings were set down for final hearing on the petition and answer.

Petitioners contend that, since it appears the debts involved were incurred while respondent was engaged in the mercantile business, his subsequent change of occupation and his occupation when the alleged act of bankruptcy was committed are immaterial, and he is still subject to be adjudicated a bankrupt—citing *In re Burgin* (D. C.) 173 Fed. 726; *In re Crenshaw* (D. C.) 156 Fed. 638. *In re Burgin* clearly so holds, but it would seem that therein it is not justified by the cases on which it relies. *In re Crenshaw* merely determines that one who incurs debts in an occupation subject to adjudication of bankruptcy cannot escape by changing to an exempt occupation. It does not hold, however, that, if the alleged act of bankruptcy is committed only after such change, involuntary proceedings will lie; and the cases therein relied on merely decide that a change to an exempt occupation *after* an act of bankruptcy is committed affords no defense to involuntary proceedings.

[1] The law of bankruptcy is what Congress has made it, and not what expediency and convenience might desire it. The statute is clear and unambiguous. It declares that certain persons, having committed an "act of bankruptcy," may on petition filed within four months thereafter be adjudged involuntary bankrupts. It expressly excepts persons engaged chiefly in farming or tillage. The effect is that these excepted persons cannot commit an "act of bankruptcy." An act is an "act of bankruptcy" for the reason that he who commits it can because thereof be adjudicated an involuntary bankrupt.

[2] It is an "act of bankruptcy" when the act is committed, or not at all. If the act is committed by one who then is not of the class that the law says may be adjudicated an involuntary bankrupt, it is not an "act of bankruptcy," and furnishes no foundation for involuntary proceedings.

No former occupation can make the act of an exempt person an "act of bankruptcy." No subsequent change of occupation can deprive the act of a nonexempt person of its quality as an "act of bankruptcy." The act takes color only from the bona fide occupation of the actor at the time it is committed, and not from his occupation prior or subsequent thereto. Otherwise, a farmer of ten years' standing might be adjudicated an involuntary bankrupt because of debts incurred prior thereto in the vocation of merchant.



By analogy, in reference to the time when insolvency is material, see *West Co. v. Lea*, 174 U. S. 598, 19 Sup. Ct. 836, 43 L. Ed. 1098.

[3] One who incurs debts in a nonexempt occupation, changes to an exempt occupation, and thereafter commits an act that in a nonexempt occupation would be an "act of bankruptcy," is not subject to adjudication of involuntary bankruptcy because thereof, and of such debts still existing, or at all. It was so determined in *Flickinger v. Bank*, 145 Fed. 162, 76 C. C. A. 132, and certiorari was denied in same case, 203 U. S. 595, 27 Sup. Ct. 783, 51 L. Ed. 332.

Decree will be entered in usual form, dismissing the petition, with costs to respondent.

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Ex parte YABUCANIN.

(District Court, D. Montana. October 19, 1912.)

No. 109.

1. HABEAS CORPUS (§ 55\*)—PETITION—EVIDENCE.

Where a petition for habeas corpus for the discharge of an alien from detention under a deportation warrant was based on insufficient or illegal evidence to authorize a decree of deportation, the evidence should be made a part of the petition.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 52; Dec. Dig. § 55.\*]

2. HABEAS CORPUS (§ 85\*)—DEPORTATION—FINDINGS—EVIDENCE.

On habeas corpus to secure an alien's discharge from detention under a deportation warrant, because of alleged insufficient or illegal evidence, the findings of the acting Secretary of Commerce and Labor will be presumed correct, where the evidence at the hearing, certified and filed, is not made a part of the petition.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. §§ 77, 78; Dec. Dig. § 85.\*]

3. ALIENS (§ 54\*)—DEPORTATION—WARRANT.

A deportation warrant, ordering deportation to the "country whence came," but not naming it, did not order the deportation to any country, and was therefore fatally defective.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. § 112; Dec. Dig. § 54.\*]

4. ALIENS (§ 54\*)—DEPORTATION—WARRANT.

A warrant ordering deportation of an alien should clearly state whether the alien is being deported under Immigration Act Feb. 20, 1907, c. 1134, §§ 3, 20, 21, or 35, 34 Stat. 899, 904, 908 (U. S. Comp. St. Supp. 1911, pp. 502, 511, 518).

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. § 112; Dec. Dig. § 54.\*]

5. HABEAS CORPUS (§ 111\*)—DEPORTATION—DEFECTIVE WARRANT.

Where an alien was held under a defective deportation warrant, but had been legally sentenced and was subject to deportation, he would not be discharged on habeas corpus until an opportunity had been afforded the United States to issue a sufficient warrant, and detain and deport petitioner thereon.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 100; Dec. Dig. § 111.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Petition for writ of habeas corpus by Dusan Yabucanin. Writ granted. Petitioner discharged, unless a new warrant is issued within 10 days.

John G. Skinner, of Red Lodge, Mont., for petitioner.

James W. Freeman, U. S. Atty., of Helena, Mont., for respondent.

BOURQUIN, District Judge. The petitioner, an alien, filed a petition herein, alleging unlawful detention for deportation on a warrant therefor issued by the acting Secretary of Commerce and Labor. The petition alleges that the findings and statements in said warrant are not based on legal evidence, and that the said warrant is illegal, in that it orders deportation "to the country whence came," not naming it. It also alleges facts contrary to the findings. A copy of said warrant was attached to the petition, but not the evidence and report of the proceedings upon which said findings were made and warrant issued.

The writ issued. On the return day the detaining officer made return that he holds petitioner for deportation by virtue of the warrant aforesaid, that petitioner had been arrested and given a hearing on proper charges for deportation, whereat he consented to deportation, that the charge and evidence were legally sufficient, and that said warrant thereupon issued. The defect in said warrant was not denied. The return was not traversed, but upon the hearing thereon certain carbon printed sheets were filed in or by way of evidence by the petitioner, purporting to be of that taken before the inspector who presided at the hearing after arrest.

[1] In so far as the allegations of the petition are based on insufficient or illegal evidence, the evidence should have been made a part of the petition. This is in furtherance of good faith in pleading, that the court may know the facts, and not merely the petitioner's conclusions, and that perjury may be assigned on his allegations, if false. See *Low Wah Suey v. Backus*, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165, 9 Ency. P. & P. 1020.

[2] Purported evidence, uncertified, and filed at the hearing, ordinarily will not suffice. Hence the findings of the acting Secretary are presumed correct, and are final here.

[3] It would seem, however, that the warrant of deportation is defective, in that it does not name the country from whence petitioner came and to which he is to be deported. For this reason it is uncertain, and authorizes deportation nowhere. It must contain specific directions for the protection of the party to be deported, and for the information of the deporting authorities and agencies.

[4] And it ought to be clear whether the alien is being deported under section 3, 20, 21, or 35 of the Immigration Act of February 20, 1907 (34 Stat. 898 [U. S. Comp. St. Supp. 1911, p. 499]). Otherwise, great abuses might be possible. This defect, however, cannot be availed of to unconditionally break custody and effect an escape.

[5] Under the findings, petitioner is legally sentenced and subject to deportation. A proper warrant can yet issue. In the interest of justice, and to prevent its defeat, it is ordered that the petitioner be

discharged by the officer detaining him, but not until 10 days herefrom, and without prejudice to the right of the United States to issue a sufficient warrant and detain and deport petitioner thereon. See *In re Bonner*, 151 U. S. 244, 14 Sup. Ct. 323, 38 L. Ed. 149; 9 Ency. P. & P. 1066.

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In re KREUGER.

(District Court, E. D. Kentucky. March, 1912.)

**BANKRUPTCY (§ 140\*)—RIGHTS OF TRUSTEE—PROPERTY HELD UNDER CONTRACT OF CONDITIONAL SALE.**

Under Bankr. Act July 1, 1898, c. 541, § 47a (2), 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500), which provides that trustees "as to all property in the custody or coming into the custody of the bankruptcy court shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon," a seller of property to a bankrupt by an unrecorded contract of conditional sale, which under the law of Kentucky operates as a chattel mortgage, cannot recover the property from the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 221, 225; Dec. Dig. § 140.\*]

In the matter of one Kreuger, bankrupt. On review of order of referee. Affirmed.

See, also, 197 Fed. 124.

Helm Bruce, for petitioner.

R. A. Chiles and C. L. Williamson, for trustee.

COCHRAN, District Judge. This cause is before me on petition for review, filed by the Kentucky Wagon Manufacturing Company, of an order of the referee denying its claim to a lien on certain wagons sold by it to the bankrupt, and which came into the trustee's hands as a part of his estate.

The sale of the wagons was a conditional sale. In Kentucky this creates a mortgage in favor of the seller for the unpaid purchase price. The petitioner, therefore, was the holder of an unrecorded lien on the wagons at the time of the institution of these proceedings.

If the law was now as it was prior to the amendment of June 25, 1910, it would have to be held that the petitioner is entitled to a lien as against the trustee. In the case of *In re Ducker* (C. C. A., 6th Cir.) 13 Am. Bankr. Rep. 760, 134 Fed. 43, 67 C. C. A. 117, the appellate court of this circuit, affirming a decision of Judge Evans in 133 Fed. 771, held otherwise. This decision was in effect overruled by the decision of the Supreme Court in the case of *York v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, 15 Am. Bankr. Rep. 633. Thereafter the appellate court for this circuit, in pursuance of the decision of the Supreme Court in *York v. Cassell*, yielded the position taken by it in the *Ducker* Case, and held that the holder of the unrecorded lien was entitled to priority over the trustee. This it did

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in the case of *In re Doran* (C. C. A., 6th Cir.) 18 Am. Bankr. Rep. 760, 154 Fed. 467, 83 C. C. A. 265; *Crucible Steel Co. v. Holt* (C. C. A., 6th Cir.) 23 Am. Bankr. Rep. 302, 174 Fed. 127, 98 C. C. A. 101. I had so held in the case of *In re Sewell* (D. C., Ky.) 7 Am. Bankr. Rep. 133, 111 Fed. 791, my decision therein being disapproved by Judge Severens in the *Ducker Case*.

The ground of this position was that under the rulings of the Kentucky Court of Appeals, in order for a creditor to avail himself of section 496 (Ky. St.), he had to fasten a lien on the property. This a trustee, like an assignee for the benefit of creditors, did not do. He simply stepped into the bankrupt's shoes. But, as I construe the amendment of June 25, 1910, the law is in this particular not now as it was prior thereto. It expressly provides that the trustee shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings. Had bankruptcy not ensued, a creditor holding a lien by legal or equitable proceedings on the wagons in questions here would be entitled to prior claim over the unrecorded lien of the petitioner, and by the express terms of the amendment the trustee herein is vested with the same right.

There is no question as to the applicability of the amendment to this case, as the lien of petitioner was created long after its enactment. There was a question as to its application in the case of *In re Lausman* (D. D., Ky.) 25 Am. Bankr. Rep. 186, 183 Fed. 647, decided by Judge Evans, though he seems to have been of the opinion that the amendment made no change in the law in the particular involved here. A recent case in which this decision has been disapproved is that of *In re Williamsburg Knitting Mill* (D. C., Va.) 27 Am. Bankr. Rep. 178, 190 Fed. 871.

The action of the referee is affirmed.

## LUSK v. BUSH.

(Circuit Court of Appeals, Ninth Circuit. October 14, 1912.)

No 2,108.

## 1. CONTRACTS (§ 28\*)—EVIDENCE OF MAKING.

Evidence *held* to warrant a finding that there was an agreement between the two principal members of a firm that plaintiff should receive a certain percentage of the net profits made by the firm on certain firm contracts for railroad construction in Montana.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 133-140, 1755, 1782-1784; Dec. Dig. § 28.\*]

## 2. EQUITY (§ 327\*)—BILL—VARIANCE.

A fatal variance did not exist between the pleading and proof, where defendant was not misled by the allegations of the bill, and the evidence adduced was the same that would have been presented under an allegation alleging a different relation of the parties from that specified in the bill, which the evidence tended to prove.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 651, 652; Dec. Dig. § 327.\*]

## 3. EQUITY (§ 335\*)—BILL—CLEARNESS.

Equity will regard a bill as stating the facts with sufficient clearness to justify the decree which the court below rendered on the pleadings and evidence.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 673; Dec. Dig. § 335.\*]

## 4. EQUITY (§ 335\*)—OBJECTIONS—WAIVER—VARIANCE.

Plaintiff's failure to plead estoppel was waived by defendant's failure to object on that ground to the introduction of evidence which established it.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 673; Dec. Dig. § 335.\*]

Ross, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Montana.

Action by Charles M. Bush against Frank S. Lusk. Judgment for plaintiff, and defendant appeals. Affirmed.

The substance of the appellee's bill against the appellant is that early in the year 1907 D. D. Streeter and the appellant, Lusk, entered into a copartnership under the name of Streeter & Lusk, with a view to performing contracts in railroad construction in Montana, one portion of which was the construction of a line between St. Regis and the St. Paul Pass tunnel, which work is referred to in the record as the "St. Regis work," and another was the construction of tunnels in association with Winston Bros. Company, a corporation, which tunnels were to be located east of Missoula in Montana; that the agreement between Streeter & Lusk and the Winston Bros. Company provided for an equal distribution between said firm and said corporation of the profits accruing from the work; and the bill alleges that there has been a final adjustment and settlement between said firm and said corporation, that the copartnership agreement between Streeter and Lusk was oral, that each partner was to advance and contribute equally to the capital necessary to be invested therein, and that out of the moneys received on the contracts such advances were to be first repaid. The bill alleges that the appellee was a railroad contractor and the son-in-law of Streeter; that he was to render to said firm such aid and assistance in the said work, and in purchasing and

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
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forwarding supplies for said work as he might be called upon from time to time to render; that each partner was to receive 45 per cent., and the appellee was to receive 10 per cent. of the net profits of the St. Regis work, and that as to the other work each partner was to receive 47½ per cent., and the appellee was to receive the remaining 5 per cent. of the net profits; that the said copartnership of Streeter & Lusk, at the time when the copartnership was formed, entered into an agreement with the appellee that he should perform such services and receive such compensation as above set forth; that afterwards, in June, 1908, by mutual consent, the compensation of the appellee for his services was enhanced and enlarged by an allowance and credit to him of wages at \$200 per month, for the time during which he should render his services while actually in the state of Montana; that in April, 1907, at the instance and request of said copartnership, the appellee took charge of certain railway work near Milwaukee, Wis., known as the "St. Francis cut-off," under contract with the Chicago & Northwestern Railway Company; that the appellee took charge of and looked after and managed and conducted said work at the request of both members of said firm until it was completed in May, 1908, and at the same time he rendered aid and assistance to the firm in respect to its Montana contracts, and that the work which the appellee so did in Wisconsin was, by agreement with said firm, taken and considered as part and parcel of, or in lieu of, the services and assistance which he might or would have rendered in said Montana work, but for the request of said firm, and the appellee was not to be allowed any additional compensation for his said work in Wisconsin; that in the latter part of May, 1908, the appellee was by said firm instructed to go to Montana to perform services in the work of the firm there, and in obedience thereto he went to Montana about June 1, 1908, and performed such services, and in the month of June, 1908, by mutual consent of the copartnership and the appellee, it was agreed that the latter was to be credited and paid by said firm, in addition to said compensation by way of percentages of net profits, a salary at the rate of \$200 per month for the time during which he should render his services in Montana, and that he was paid such salary; that he continued on said work in Montana from June 1, 1908, until July, 1909, with the exception of two short trips which he made to Michigan in December, 1908, and April, 1909; that on September 28, 1909, Streeter died intestate, leaving a widow and two daughters; that on November 1, 1909, by an order made and entered in the probate court of Kalamazoo county, in Michigan, where Streeter was domiciled, letters of administration were issued upon his estate, and all the property thereof and the claim of the decedent against Lusk were within the jurisdiction of said probate court; that on July 18, 1910, said court entered its order and decree adjudging that the widow and daughters of the intestate were his only heirs, and were entitled to his estate, and by said order the court assigned and distributed to them the claim which said decedent had at the time of his death against Lusk, and that the said widow and heirs have duly assigned and transferred to the appellee, for his own use and benefit, the said claim, interest, and right of action against Lusk, and all moneys due or owing, and their right to an accounting, settlement, and payment of the moneys, credits, and assets, of the alleged copartnership; that Streeter owed no debts in Montana, and there has been no application in that state for distribution of his estate. The bill alleges that the net profits of the copartnership were more than \$410,000, of which the appellee is entitled to 10 per cent., and Streeter was entitled to 45 per cent.; that the net profits of the contract jointly performed by the firm and Winston Bros. Company were more than \$58,000; that on April 3, 1909, the copartnership paid to the appellee \$25,000 on account of his share of such profits, and that \$19,000 is still due and unpaid. The bill prays for an accounting and for a decree in accordance with the appellee's demands.

The answer denies that any contract of any character was entered into between the appellee and the firm, except the contract by which the appellee was to render services upon a salary, and denies that the copartnership paid the appellee the sum of \$25,000, and alleges the fact to be that on April 3, 1909, in the absence of the appellant, Streeter, the father-in-law of the appellee, delivered to the appellee the check of the firm of Streeter & Lusk for

the sum of \$25,000; that the payment was made, as the appellant was informed and believed, on account of some partnership agreement existing between Streeter and the appellee; that immediately upon learning of this appropriation of \$25,000 of the funds of the copartnership, the appellant caused entry to be made on the books of said copartnership, by which Streeter was charged with the receipt of \$25,000 of the funds of the copartnership.

By the final decree the court found that the total profits which accrued to the copartnership of Streeter & Lusk from the contracts referred to in the bill were \$374,659.84, of which Streeter and Lusk were each entitled to receive \$168,596.92, and the appellee, Bush, was entitled to receive \$37,465.98, his percentage of 10 per centum upon the net profits of a portion of the work, and five per centum upon the remainder thereof, and the court found the balance due, after crediting certain payments to the respective parties, and directed the sale of certain personal property thereafter to be divided in the same ratio.

Charles S. Wheeler and John F. Bowie, both of San Francisco, Cal., H. H. Parsons, of Missoula, Mont., and Walsh & Nolan, of Helena, Mont., for appellant.

William T. Pigott, of Helena, Mont., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The single question presented on the appeal is whether the court below erred in finding that there was an agreement between the firm of Streeter & Lusk whereby the appellee, Bush, was to receive a certain percentage of the net profits on the Montana contracts which were performed by the copartnership. There is no material conflict in the testimony. As to whether or not there was such an agreement, the contentions of the respective parties on the appeal involve only the construction that should be placed upon the testimony and the correspondence and dealings between the parties, and the legal conclusions that should be drawn therefrom. The material facts are in brief as follows:

Streeter and Lusk had for 20 years been friends, and from time to time copartners in various contracts connected with the construction of railroads. On February 1, 1907, Streeter telegraphed to Lusk from Kalamazoo, Mich., saying:

"Will you meet me in Montana early next week? Winstons propose some joint work; prices seem good."

The Winstons referred to were Winston Bros., a corporation engaged also in railroad construction. On March 22, 1907, Streeter wrote to Lusk, stating that the Winstons had proposed doing the Montana work on joint account:

"This matter came to me personally. I asked to have you considered with me. They assented without hesitation. \* \* \* I wish you would wire me their c/o Minneapolis, if you want, or I will wire you, so that you can meet me there on my return about the 13th or 12th."

Early in March Lusk and Streeter went to Montana, examined the ground, and made their figures, and, while their negotiations with the Winston Bros. were pending, Streeter and Lusk held a conference at the Florence Hotel at Missoula. Lusk's version of the conversation is as follows:

"There had been several interviews, and Mr. Streeter came into the room in the hotel that we used for a sort of an office, after coming directly from the Winston Bros.' office. He said: 'Frank, we are going to get that work on shares. If we get that work, I would like to have Charley Bush in on it.' He says: 'Charley is an experienced railroad man, and a good office man, and would make us a valuable man.' And he says: 'He is not a pauper. He can put up his share of the money, and we are going to need every bit of the money before we get through, because that is a big job.' Q. What, if anything, did you say after that? A. Not a word. Q. Was there any talk at any time with regard to the percentage? A. Yes; but I overlooked that. After saying this, he says: 'I would like to have Charley have 10 per cent—like to have him have 5 per cent. of the tunnel work and 10 per cent. of the other.' Q. You say you made no reply to that? A. Absolutely, I did not, upon my head. Q. Why didn't you, Mr. Lusk, reply or say something when he made that remark to you? A. Well, we hadn't got the work. I didn't really believe we were going to get it. We had made what I thought pretty hard conditions; and we were good friends. We had quit our business in Wisconsin on a friendly basis. He tried two or three times—suggested two or three times previously, that it would be a good thing to get Mr. Bush on the work, and I had not agreed with him on Mr. Bush's value, and I thought it was no occasion for arguing or disputing on the subject, when quite likely there would never anything more come of it."

Streeter having died, his version appears through the testimony of one of his attorneys of what was stated by another of his attorneys (Col. Marshall) to Lusk in July or August, 1909, as follows:

"That Mr. Streeter had said to Mr. Lusk substantially: 'We are going to get this work, or this contract, and I want Charley,' meaning Mr. Bush, 'to be in on it.' I don't know that those were the exact words, but that was the substance of it; but, at any rate, he stated to Mr. Lusk what Mr. Streeter had said as to the extent he desired Mr. Bush to have an interest in the matter. Q. What was the extent? A. West of Missoula 10 per cent. and east of Missoula 5 per cent. That when he so stated that Mr. Lusk had said to him, 'Has Charley got the money?'—or Mr. Bush. The substance of Mr. Lusk's response to that statement of the desire of Mr. Streeter, and as stated to Mr. Lusk by Col. Marshall in my presence was, 'Has Charley got the money, or means to carry his part?' and to that Mr. Streeter replied that Charley was no pauper; 'he will carry his part,' or substantially that; of course, I don't undertake to quote the exact words, but that was the substance of it—and that Mr. Lusk did not make any response to that statement by Mr. Streeter. \* \* \* Q. What, if anything, did Mr. Lusk in that talk say to you, or Mr. Marshall, or both of you, with respect to the effect of the conversation related at the Florence Hotel as to whether it constituted a partnership, or entitled Mr. Bush to any share in the profit—did he say anything about that? A. Yes, sir; he did. Q. What did he say? A. Well, he expressed himself, as I might say, and I believe he stated that he did not consider that that created the relation, so far as Mr. Bush was concerned, that Mr. Streeter claimed. He clearly gave us to understand that."

It will be observed that there is no material conflict between these two versions of the conversation. The only difference is that in Lusk's version the remark that the appellee was no pauper and could put up his share of the money was not suggested by a question from Lusk, and in Streeter's version it would appear that it was made in response to a question from Lusk. Both versions agree that Lusk made no answer whatever to Streeter's proposition. Streeter & Lusk soon thereafter got the contracts, but the question of Bush's interest or employment in connection with the contracts was not again discussed between them. There was no written contract of copartnership be-



tween Streeter and Lusk, and there was no entry of Bush's name as a copartner or employé, upon a percentage basis or otherwise, upon the books of the firm. It is very clear that Streeter's proposition to Lusk was that Bush be taken into the copartnership as a member thereof, and that he be paid a certain percentage out of the net profits. The discussion of his ability to carry his part and of his possession of means to do so could have had no other meaning. It seems clear, also, that the suggestion of Streeter, which was not assented to, but was received in silence, did not, under the circumstances, constitute an agreement between Streeter and Lusk for the admission of Bush as a copartner, or for his employment for the firm upon a percentage basis. There was no meeting of the minds of Streeter and Lusk upon that proposition.

The record contains no findings of fact nor opinion of the court below, and in view of the nature of the testimony just considered we must assume that the decree of the court was based upon transactions which occurred subsequently to the time of the conversation at the Florence Hotel, and upon the conduct of the appellant and the circumstances which indicated that he knew that his copartner, Streeter, understood that his proposition to take Bush into the firm had been assented to, and his own silence and his failure to express his dissent to that understanding. It is evident from the testimony that Streeter's understanding of the Florence Hotel conversation was that in what he said he was offering terms of copartnership to Lusk in case the contract should be secured, one of the terms of which was that he and Lusk should be equally interested, and another that Bush was also to be a partner and to receive a designated percentage of the profits. Two days later the contract was secured, and there being no further conversation in regard to Bush's interest, Streeter apparently took it for granted that the terms on which he had proposed to take Lusk in were assented to. We are not convinced that the evidence is insufficient to sustain the conclusion that Lusk was aware that Streeter so understood the terms and scope of the copartnership, and that Streeter believed that Lusk had agreed that Bush should be interested in it, and that, possessing that knowledge, he, by his silence, when he was under a duty to speak, and by his conduct, induced Streeter to believe that he acquiesced in his understanding of the agreement.

Soon after the conversation at the Florence Hotel, Streeter directed Bush, who had been working at Schenectady, N. Y., to go to Kalamazoo, and there he informed Bush, so Bush testified, that he was to be considered as interested in the contemplated Montana work on a percentage basis. On April 6, 1907, Streeter wrote Lusk:

"Charley Bush will be here Monday. I shall keep him here, and leave him behind me, when I go out there, to take care of anything that may develop between here and Minneapolis, so that we can reach him; also he and Pat Connelly will be available, if anything develops in the way of steam shovel works for the Northwestern."

Soon after that Streeter and Lusk entered into a contract for some work in Wisconsin, designated in the record as the "St. Francis cut-off." On April 18th Lusk wrote Streeter:

"Your telegram indicates that the Northwestern gave us the St. Francis work. \* \* \* I think the way that should be handled is for you and Charley and Pat to sub the whole thing from S. & L. 10% less than our price. That makes a clean deal, and does away with any question of personal equipment, that will of necessity have to be taken into consideration. If this is done, you and Charley and Pat can handle that as you please. So far as Charley is concerned, we could get along without him here very easily, and, if he could do well there, it would be better all around."

Both the parties to this suit point to the last sentence of the letter as furnishing support to their respective contentions. On the one hand, it is said that Lusk therein indicated that Bush was not needed in the Montana work, and that it would be better for him to engage in the subcontract suggested, thereby eliminating him from the consideration in the Montana contracts. On the other hand, it is said that the words "we could get along without him here very easily" are to be taken as conceding that Bush was identified with Streeter & Lusk in the Montana work, and that Lusk so understood. Thereafter Bush and Connolly and Streeter organized a concern called the Western Construction Company and took the subcontract. The work was not completed until a year later—about May 18, 1908. During that period Bush received, not only his proportion of the profits of that contract, but a salary of \$150 per month from the Western Construction Company. On May 18, 1908, Streeter wrote Bush from Montana, urging him to come there at once to straighten out the accounts of Streeter, Lusk & Winstons. Bush went to Montana, and he was paid \$200 per month by Streeter, Lusk & Winstons. During the years 1907 and 1908, Streeter & Lusk had difficulty in obtaining money to finance their contracts. Lusk advanced to the firm about \$38,000, and Streeter about \$25,000. No money was demanded of or received from Bush. Prior to September 3, 1908, Streeter and Lusk, after the repayment to them of their respective advances, had each drawn out, as dividends, on June 1st \$5,000, and on July 23d \$10,000; and thereafter in November, 1908, they each drew out \$30,000, on December 11th \$5,000, on December 23d \$45,000, and on February 8, 1909, \$45,000. On September 3, 1908, Streeter wrote Lusk from Kalamazoo:

"If you think best, from the size of your accumulation, to make any dividend after paying Streeter & Lusk back all the money they advanced for capital to Streeter & Lusk, and Streeter, Lusk & Winstons, give Charley Bush his share."

To this letter Lusk made no reply, but on the letter which he received he indorsed:

"C. M. B. has no interest in the firms of S. & L. or S. L. & W., unless D. D. S. gives it to him out of his 1/2 in S. & L. or his 1/4 in S. L. & W."

By the terms of that letter Lusk received the distinct and express information from Streeter that the latter understood that Bush was interested in the profits of the Montana contracts. If Lusk had not in fact assented to that understanding, the observance of the duty of honest and candid dealing that one partner

owes to another required that he immediately notify Streeter that he had not agreed to the proposition that Bush be interested in the contract. On September 18, 1908, Streeter wrote Bush:

"If Mr. Lusk makes a dividend, you may send mine here in New York exchange. I wrote him some time ago that, when Streeter & Lusk were reimbursed for the moneys advanced in both companies, you should be paid your share of the dividends whenever any were disbursed. If there should be a disbursement, and you are not considered, I would like to have you ask him the reason, although I hardly expect there will be any occasion."

Lusk paid no attention to Streeter's letter of September 3, 1908, and he ignored the suggestion of a division of profits. Bush never at any time had any conversation with Lusk about a division of profits. About two months after Streeter's letter, Bush overheard, so he testified, a conversation between Mr. Streeter and Mr. Lusk.

"Mr. Streeter asked Mr. Lusk why I hadn't been included in the dividends. Mr. Lusk replied, because he didn't think it was fair. Mr. Streeter said it was not a question of fairness; that it was an agreement. Mr. Lusk made no reply to that, and about that time I left the office. They were there together after that, but I do not know how long or what the conversation was after that."

Lusk did not deny that the conversation occurred as stated by Bush, but he testified that the conversation was as follows:

"Mr. Streeter came to my room, and asked me if I had given Charley any check for his share, and I told him I had not. Then he wanted to know if I didn't intend to give him any, and I said I did not, and with that he wanted to know why, and I recited to him the fact that on some Chicago & Northwestern contracts, which were under negotiations by me some years before that, and which had been dropped temporarily, and while they were dropped I went away to Arizona, with some gentlemen about some work, was gone a year, and he had meantime gone ahead, started these negotiations again—the company had—or called us in again, and he took that work and completed that work, took another contract from the Chicago & Northwestern—and I may say that the Chicago & Northwestern was counted my work all the time—I got Mr. Streeter into it, and he acknowledged I was entitled to participate in any work he had. And I learned after getting back from Arizona about this matter, and I said, 'How did they turn out?' He said, 'You are not interested.' And I said, 'Why?' He said, 'You didn't contribute any money, and you don't get any share of the profits,' and we had some little more of that talk at that time, and I said, 'That is not right; that is not fair, and some day you will be sorry for this.' And I said, 'Now, I had this talk with you, Mr. Streeter, and you made that rule on me at that time,' and I said, 'Now is the time that it has come home to you. Charley Bush didn't contribute any money, he didn't contribute any services, and he don't get any share of these profits.' Q. What did Mr. Streeter say with reference to that? A. I don't think he said anything. I don't think either of us said anything—another word about it. I think I said I hoped he had dropped it; I hoped it wouldn't make a rupture; \* \* \* that I hoped it wouldn't make a break in our friendship, but that I could not, in justice to myself, and to be fair to myself and maintain my self-respect, concede the demand, and I hoped he would drop it, \* \* \* and he never spoke to me of it again."

Now, it was not true, as Lusk claims to have stated to Streeter in that conversation, that Bush "didn't contribute any services" for Streeter & Lusk. The evidence is that during the whole of the time during which Bush was engaged in the Wisconsin work he performed occasional services for Streeter & Lusk, and that Lusk

was aware of that fact. The letter of April 6, 1907, which Streeter wrote to Lusk, contained the statement that Streeter would leave Bush behind him when he went to Montana, "to take care of anything that may develop between here and Minneapolis." In the letter of June 4, 1907, Streeter wrote Lusk that he would send Bush to inspect certain cars and rails to be used in the Montana work, and two days later wrote again referring to the same matter. Lusk himself sent letters and telegrams to Bush at Milwaukee, calling for the performance of services for the Montana work of Streeter & Lusk, such as the hiring of laborers, buying machinery, and the securing of free transportation for laborers to go to Montana; and Bush testified to many other acts of service rendered by him, one item of which was his service in looking out for the interests of Streeter & Lusk in their contract with the Chicago & Northwestern, which had been sublet to Streeter, Bush & Connelly. Bush inspected cars, tools, rails, and machinery, and saw to their shipment. He made trips to Chicago and into Michigan for Streeter & Lusk, and that firm furnished him with rubber stamps for use in his correspondence.

The fact that on coming to Montana Bush received a salary of \$200 a month for his services while there is not inharmonious with his contention that he was to receive a percentage of the profits on the contract. During the life of the partnership agreement between Lusk and Streeter, each partner was allowed, and was paid in addition to his share of the profits, the sum of \$10 a day for every day devoted to the work of the firm in connection with the Montana contracts. The payment to Bush of a salary of a less amount than that which was allowed to the partners was evidently regarded, by Streeter and Bush at least, as in line with the allowances to Streeter and Lusk.

[2-4] The appellee understood that he was an employé upon a percentage of the profits, and his bill in the present suit was framed upon that theory. Streeter understood that the appellant was a partner, and Lusk so understood Streeter's proposition. There is not a fatal variance, however, between the pleading and the proof. The appellant has been in no way misled by the allegations of the bill. The evidence which has been adduced is the same which would have been presented under an allegation that the appellee's relation was that of a copartner, and the relief which has been accorded is the same as that which would have been accorded upon proof that the appellee was a partner. Equity will regard the bill as stating the facts with sufficient clearness to justify the decree which the court below rendered upon the pleadings and the evidence. The appellee's failure to plead estoppel was waived by the appellant's failure to object on that ground to the introduction of the evidence which established it.

The decree is affirmed.

ROSS, Circuit Judge, dissents.

## LUCID v. E. I. DU PONT DE NEMOURS POWDER CO.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1912.)

No. 2,106.

**1. NEGLIGENCE (§ 121\*)—RES IPSA LOQUITUR—SCOPE OF DOCTRINE.**

Since the doctrine of *res ipsa loquitur* involves an exception to the general rule that negligence must be affirmatively shown, and is not to be inferred, it is applicable only when the nature of the accident itself, not only supports an inference of defendant's negligence, but excludes all others.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 217-220, 224-228, 271; Dec. Dig. § 121.\*]

**2. MASTER AND SERVANT (§ 265\*)—INJURY TO EMPLOYÉ—RES IPSA LOQUITUR—APPLICABILITY OF DOCTRINE.**

Generally, but not always, the *res ipsa loquitur* doctrine is inapplicable to an action against an employer for injury to an employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908; Dec. Dig. § 265.\*]

Application of doctrine of *res ipsa loquitur* in actions for injuries to servants, see note to *Carnegie Steel Co. v. Byers*, 82 C. C. A. 121.]

**3. MASTER AND SERVANT (§ 265\*)—INJURY TO EMPLOYÉ—PLEADING—RES IPSA LOQUITUR.**

In an action for personal injury to an employé, a complaint charging that defendant negligently and carelessly had and kept stored in a building, in which it was engaged in manufacturing dynamite, a great quantity of dynamite and other high explosives, approximately 30,000 pounds, is sufficient to invoke the *res ipsa loquitur* doctrine where assumption of risk is required to be, but is not, pleaded; the complaint excluding any assumption that the negligence might have been the act of a fellow servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.\*]

**4. MASTER AND SERVANT (§ 262\*)—ASSUMPTION OF RISK—PLEADING.**

Under the California practice, assumption of risk must be pleaded.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 855-859; Dec. Dig. § 262.\*]

Assumption of risk incident to employment, see notes to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

**5. PLEADING (§§ 192, 367\*)—INDEFINITENESS—REMEDY.**

Objection that allegations of a complaint are indefinite should be raised by a motion to make more definite and certain, and not by demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 408-427; Dec. Dig. §§ 192, 367.\*]

**6. MASTER AND SERVANT (§ 256\*)—INJURY TO EMPLOYÉ—COMPLAINT—SUFFICIENCY.**

The complaint in an action against an employer for personal injury sufficiently stated a cause of action, as against demurrer, where it alleged that on a specific date plaintiff was employed by defendant, a manufacturer of explosives as a track foreman on a tramway; that, while plaintiff was so employed, defendant negligently had and kept stored in a building which it used dynamite and other high explosives, approximating 30,000 pounds; that, through such negligence, such explosives were permitted to and did explode, causing an explosion of other dyna-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mite and high explosives belonging to defendant; and that plaintiff was injured by the second explosion, etc.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 809-812, 815; Dec. Dig. § 256.\*]

In Error to the District Court of the United States for the Second Division of the Northern District of California.

Action by John Lucid against the E. I. Du Pont De Nemours Powder Company, a corporation. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

The plaintiff in error, in his complaint to recover damages for personal injuries, alleged that on February 20, 1908, he was employed by the defendant in error, a corporation engaged in manufacturing and storing acids, powder, dynamite, and other high explosives, as a track foreman on a certain tramway connected with said business; that on that date, while engaged in such business, the defendant in error negligently and carelessly had and kept stored, in a building which it used for such manufacturing purposes, a great quantity of dynamite and other high explosives, approximately 30,000 pounds thereof; that by reason of the negligence and carelessness of the defendant in error in storing such dynamite and other high explosives the said great quantity thereof and other high explosives so stored was permitted to and did explode; that the explosion caused an explosion of other dynamite and high explosives, belonging to the defendant in error and in its possession, loaded on four cars approximately 500 feet distant from the building, which cars were at the time of the second explosion passing along a tramway on which the plaintiff in error had been put to work by the defendant in error; and that by the second explosion the plaintiff in error was injured. The defendant in error demurred to the complaint, first, on the ground that the facts stated were insufficient to constitute a cause of action; and, second, that the complaint is uncertain, in that it cannot be ascertained therefrom whether the alleged negligence consisted in the manner in which the dynamite was stored, or whether it consisted in storing such a quantity of dynamite as therein set forth, or whether it consisted in keeping dynamite stored in a building where it was engaged in the manufacture of dynamite and other high explosives. The court below sustained the demurrer, and, the plaintiff in error failing to file an amended complaint, it was ordered that the cause be dismissed, and that judgment be entered for the defendant in error.

Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, Cal., for plaintiff in error.

Pillsbury, Madison & Sutro, of San Francisco, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] It is contended that upon the statement of the facts alleged in the complaint a cause of action arises in favor of the plaintiff in error, and a presumption of negligence on the part of the defendant in error, or, in other words, that *res ipsa loquitur*. The doctrine of *res ipsa loquitur* involves an exception to the general rule that negligence must be affirmatively shown, and is not to be inferred, and the doctrine is to be applied only when the nature of the accident itself, not only supports the inference of the defendant's negligence, but excludes all others.

[2] It is the general rule that in actions by employes against their employers for injuries sustained through negligence, the mere fact

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the injury creates no presumption of negligence on the part of the employer, and that the doctrine of *res ipsa loquitur* does not apply. *Chicago & N. W. Ry. Co. v. O'Brien*, 132 Fed. 593, 67 C. C. A. 421; *Northern Pac. Ry. Co. v. Dixon*, 139 Fed. 737, 71 C. C. A. 555; *Shandrew v. Chicago, St. P., M. & O. Ry. Co.*, 142 Fed. 320, 73 C. C. A. 430; *Omaha Packing Co. v. Sanduski*, 155 Fed. 897, 84 C. C. A. 89, 19 L. R. A. (N. S.) 355; *Patton v. Illinois Cent. R. Co. (C. C.)* 179 Fed. 530; *Midland Valley R. Co. v. Fulgham*, 181 Fed. 91, 104 C. C. A. 151; *Montbriand v. Chicago, St. P., M. & O. Ry. Co. (C. C.)* 191 Fed. 988. The reason of the rule is that ordinarily it cannot be known with reasonable certainty that the injury did not result from the negligence of some fellow servant, or that it did not result from a risk of the employment which the employed assumed, including that of the negligence of his fellow servants. In *Patton v. Texas & Pacific Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, the court said:

"Where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion."

In *Texas & Pacific Ry. Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136, the foreman in charge of a switch engine was injured by the explosion of another engine near by. The Supreme Court approved the charge to the jury:

"That the mere fact that an injury is received by a servant in consequence of an explosion will not entitle him to a recovery, but he must, besides the fact of the explosion, show that it resulted from the failure of the master to exercise ordinary care, either in selecting such engine or in keeping it in reasonably safe repair."

But the rule is not inexorable, and there are cases in which the maxim "*res ipsa loquitur*" should be held to apply even to actions brought by employes against their employers. Such a case was recognized by the Circuit Court of Appeals of the Sixth Circuit in *Byers v. Carnegie Steel Co.*, 159 Fed. 347, 86 C. C. A. 347, 16 L. R. A. (N. S.) 214, in which it was held that when the character of an accident, and the circumstances under which it occurred are such as to point strongly to an abnormal and dangerous condition of machinery, and to its long-continued existence under circumstances which indicated that the employer by reasonable care should have known of such condition and that the employe assumed no risk thereof, the relation of employer and employe does not forbid an inference of the employer's negligence from the fact of the accident.

In *Westland v. Gold Coin Mines Co.*, 101 Fed. 59, 41 C. C. A. 193, the defendant had constructed a stull for the use of its employes in a narrow and dark fissure in a mine, 900 feet beneath the surface of the earth, knowing that it would be weighted at times with tons of earth and rock; but the stull was of insufficient strength or improperly constructed, and gave way, causing the death of plaintiff's intestate. Judge Thayer, in delivering the opinion of the court, said:

"The fact that the stull fell demonstrates that it was insufficient to support the load with which it was burdened at the time it fell. The case in hand, then, is not of that kind of which it may be said that the occurrence of the accident affords no evidence of negligence."

In *Sullivan v. Rowe*, 194 Mass. 500, 80 N. E. 459, the accident was held to be of itself evidence of negligence of the employer in his failure to give the employé a safe place in which to work, in that the machinery was defective, and its defect should have been discovered by proper inspection. In *Hemphill v. Buck Creek Lumber Co.*, 141 N. C. 487, 54 S. E. 420, it was held that a presumption of negligence arose from the fact that a brakeman was injured because of the derailment of a car on which he was riding, which occurred through the spreading of the track which rested on rotten cross-ties; and in *Sackewitz v. American Biscuit Mfg. Co.*, 78 Mo. App. 144, where the plaintiff, while working in a factory, was struck by the falling of a piece of timber, it was held that the circumstances were such as to create a presumption of negligence. Similar cases are *Moynihan v. Hills Co.*, 146 Mass. 586, 16 N. E. 574, 4 Am. St. Rep. 348; *Gorman v. Milliken*, 42 Misc. Rep. 336, 86 N. Y. Supp. 699.

[3, 4] The substance of the complaint in charging negligence in the present case is that the defendant negligently and carelessly had and kept stored, in the building in which it was engaged in manufacturing dynamite, a great quantity of dynamite and other high explosives, approximately 30,000 pounds. From the very nature of the allegations, the assumption that the negligence may have been the act of a fellow servant is excluded, and it would seem, therefore, that the maxim "*res ipsa loquitur*" should apply; for the defense of assumption of risk is one that under the practice in California must be pleaded by the defendant. *Magee v. North Pac. C. R. Co.*, 78 Cal. 430, 21 Pac. 114, 12 Am. St. Rep. 69.

[5, 6] But, irrespective of any presumption that should be indulged upon the allegations of the complaint, we are of the opinion that, while those allegations may be open to objection for want of definiteness, an objection which should have been presented by a motion to make them more definite and certain, they are sufficient as against a demurrer for want of facts to constitute a cause of action. In *Stephenson v. Southern Pac. Co.*, 102 Cal. 148, 34 Pac. 620, the court said:

"It is held in this state, and nearly all of the United States, that it is sufficient to allege the negligence in general terms, specifying, however, the particular act alleged to have been negligently done."

In *Sante Fé, P. & P. Ry. Co. v. Hurley*, 4 Ariz. 259, 36 Pac. 217, the plaintiff was employed by the defendant as a brace or spud holder about a certain pile driver. The complaint alleged that the—

"said pile driver, at which plaintiff was so placed as said employé of said defendant as such brace or spud holder in operation of the same, was, as it was then used and managed by the defendant by and through its superintending foreman and managing agent, unsafe, defective, and insecure, of which the defendant at the time had notice; \* \* \* that the weight used in connection with the operation of said pile driver escaped from its fastenings and fell with such force," etc.



The court said, in construing the language of the complaint:

"We should make every reasonable intendment, and read and apply the terms in their natural and usual sense, and sustain the pleading, if possible. Now, taking the words in their ordinary and usual sense, their meaning is that the injury was the immediate result of the weight escaping from its fastening and falling upon the plaintiff's hand and arm. The reasonable intendments are that it escaped because it was insecurely fastened, and that for that reason it was defective and unsafe, and, being so, the defendant used it."

In *Rathbun v. White*, 157 Cal. 248, 107 Pac. 309, the plaintiff alleged that the defendants—

"did negligently keep and store on said premises Hercules, dynamite, giant powder, gunpowder, and nitroglycerine and other similar highly explosive substances, and also a large quantity of gunpowder, sporting powder, and blasting powder, to wit, more than 50 pounds, and not in a box with its top or side exposed to view, nor as near the main entrance of said building as practicable."

It was further alleged that the said dynamite, etc., so stored and kept in said building, exploded. Certain of the allegations of negligence pointed to a violation of an ordinance regulating the method of storage. The contention was made that the complaint was framed on the sole theory that the defendants had violated the ordinance, and that there was no issue concerning any other negligence. But the court pointed to the fact that the complaint alleged that the defendants—

"negligently kept and stored Hercules, dynamite, giant powder, and gunpowder, and that the explosive so kept exploded."

Said the court:

"It is sufficient, under the rule well settled in this state, to charge negligence by the general averment that the defendant negligently did the particular act which resulted in damage to plaintiff."

In *Wild v. O. S. L. R. Co.*, 21 Or. 159, 27 Pac. 954, the allegation of negligence was that the defendant failed to provide a safe place for the plaintiff to work—

"but negligently and carelessly caused and permitted a locomotive and cars then upon its tracks to run up against the car, upon which the plaintiff was working as aforesaid, with great violence."

The court held that the allegation was broad enough to admit evidence of all kinds and degrees of negligence on the part of the defendant, which resulted from causing or permitting the locomotive to run down upon the place where the plaintiff was at work, and quoted with approval the language of the opinion in *Hildebrand v. Railroad Co.*, 47 Ind. 399, where it was said:

"No authority can be found, where negligence has been directly charged against the defendant, that a demurrer for want of sufficient facts has been sustained."

In *O'Brien v. Corra-Rock Island Min. Co.*, 40 Mont. 212, 105 Pac. 724, the complaint alleged that:

"The defendants had negligently and wrongfully stored and were keeping negligently a large and dangerous quantity of dynamite, about 500 pounds."

And it alleged that the death of O'Brien—

"was caused proximately by the said defendants having thus stored negligently said large and dangerous quantity of dynamite."

The appellate court sustained the judgment which the plaintiff recovered, but no question was raised as to the sufficiency of the allegations of the complaint.

In *Tissue v. Baltimore & O. R. Co.*, 112 Pa. 91, 3 Atl. 667, 56 Am. Rep. 310, it was held that whether or not there was negligence in placing a dynamite magazine where its explosion killed an employé engaged in the ordinary discharge of his duty in no way connected with the magazine, or whether the explosion was the result of an accident which no ordinary human foresight could provide against, was a question for the jury. The court said that the inquiry was—

"as to the negligence of the company in permitting so great a quantity of dynamite to be placed in such position that an accidental explosion of it might result in death or injury to its servants."

In *Lykiardopoulo v. New Orleans & C. R. Light & Power Co.*, 127 La. 309, 53 South. 575, Ann. Cas. 1912A, 976, the plaintiff's intestate, an employé of the defendant, was killed by the explosion of a boiler. The complaint alleged that the explosion—

"was caused by defendant's negligence and want of skill and attention; that defendant failed to care for said boiler, and by its negligence and want of skill and attention the boiler was weakened and unable to carry the steam pressure to which the defendant negligently subjected it."

The complaint was excepted to on the ground of vagueness, and for failure to specify the particulars out of which arose the negligence charged against defendant. The court held the complaint sufficient, in that it attributed the explosion to no inherent defect in the boiler, but to the defendant's want of care and skill in its operation. The court said:

"Ordinarily, where only the ultimate facts are alleged, and particulars are called for, the court should require the pleader to give the particulars intended to be relied upon; but cases readily suggest themselves which ought to be an exception to that rule, and the present case would seem to be one of them, for the reason assigned by the learned trial judge, namely, that the manner of the operation of this boiler was peculiarly within the knowledge of the defendants. In cases where the plaintiff cannot be expected to have any information as to the causes of the accident, whereas the defendant, on the contrary, must be assumed to be fully informed on the subject, and where the accident is of the kind which ordinarily do not occur when due care has been exercised, the rule of evidence is that the accident speaks for itself—*res ipsa loquitur*; that is to say, that a presumption of negligence arises from the fact itself of the accident. In such cases, the plaintiff not only need not allege the particular acts of omission or commission from which the accident has resulted, but need not even prove them. The accident itself makes out a *prima facie* case, and the burden is on defendant to show absence of negligence. *Res ipsa loquitur*. That rule is of peculiar applicability in cases of boiler explosions."

In *Brown v. West Riverside Coal Co.*, 143 Iowa, 662, 120 N. W. 732, 28 L. R. A. (N. S.) 1260, the plaintiff charged the defendant with negligence in failing to provide the deceased with a safe

place in which to work, in storing and keeping powder, dynamite, and caps in a building which was the only place provided for the workmen to deposit their tools, clothing, and lunches, and in bringing into said shanty where such explosives were kept a telephone connected with wires upon which electric currents were admitted, or liable to be conducted, without due regard to the danger of such wires becoming overcharged and causing an explosion, such as did in fact result. The court said:

"The negligence charged in this case is not founded upon the use of explosives in the prosecution of the defendant's work, but in the alleged lack of care in keeping and storing them. This, under all ordinary circumstances, is a question of fact. \* \* \* It is also argued that, even if the defendant was negligent in keeping the explosives in the shanty, we are wholly without evidence from which to find that this failure of duty was the proximate cause of the disaster. 'Who can tell,' counsel ask, 'what was the cause of the explosion—whether lightning, or some reckless or thoughtless act of the workmen?' \* \* \* The argument is a plausible one, but we think it cannot prevail. It is very true that it is not within human power to discover and make known with certainty all of the immediate circumstances attendant upon this tragedy, but such exact and detailed proof is not required."

The judgment is reversed, and the cause is remanded for further proceedings.

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### THE NYACK.

CROSBY TRANSP. CO. v. SAUTTER.

(Circuit Court of Appeals, Seventh Circuit. April 23, 1912.)

No. 1,848.

#### 1. ADMIRALTY (§ 118\*)—APPEAL—REVIEW.

Act Feb. 16, 1875, c. 77, 18 Stat. 315 (U. S. Comp. St. 1901, p. 525), which provided that Circuit Courts in admiralty cases on their instance side might impanel a jury, whose verdict, unless set aside, should be conclusive on the issues of fact submitted, on review by the Supreme Court, has no application to appeals from the District Court to the Circuit Court of Appeals in admiralty, in which the decree is reviewable both as to the law and facts; and where in such cases the District Court has directed a jury trial under Rev. St. § 566 (U. S. Comp. St. 1901, p. 461), their verdict is not conclusive on the appellate court, although as a general rule it will not be reversed when the evidence is conflicting.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 758-775, 791; Dec. Dig. § 118.\*]

#### 2. SEAMEN (§ 29\*)—INJURY IN SERVICE—LIABILITY OF VESSEL.

Libellant, who was chef on a lake steamer, was injured by slipping and falling in a passageway, the floor of which was wet because of leakage from pipes and water spilled by seamen when washing their clothes on the deck, as they were permitted to do. The vessel had recently been inspected and given a certificate of seaworthiness by a federal inspector, and there was no rule nor custom which required her to furnish equipment for washing clothes other than that used in this case. So far as shown by the evidence, the leakage from pipes may have been due to the negligent failure to close faucets, and not to any defect in the pipes. *Held*, on the evidence, that the injury was caused by the negligence of members of the crew, who were libellant's fellow servants; and it ap-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

pearing that the vessel was in no way unseaworthy, or lacking or defective in equipment, she was liable in rem only to the extent of furnishing to libelant maintenance and proper treatment for his injury, and for his wages to the end of the voyage.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 186, 188-194; Dec. Dig. § 29.\*]

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

Suit in admiralty by William F. Sautter against the steamer Nyack; Crosby Transportation Company, claimant. Decree for libelant, and claimant appeals. Reversed.

Libel in rem against the passenger steamer Nyack, filed November 29, 1909. Hearing before the District Court and a jury, December 15, 1910. Verdict and decree for appellee for \$1,041.45, damages and costs. Appellant claimed as owner of the steamer. At the time of the accident, June 4, 1909, the libelant was chef on the steamer Nyack, a passenger vessel engaged in interstate commerce on Lake Michigan, properly enrolled and licensed. The steamer was owned by the Crosby Transportation Company, claimant and appellant herein. About 1 o'clock p. m. of that day, a fire drill was held, and in such drill the utmost haste is required of every member of the crew. At the first sound of the fire signal, the libelant started on a run from his kitchen to his post at the first gangway. In the passageway leading from the kitchen to the first gangway, libelant slipped and fell, while engaged in his duty in answer to the fire call, by reason of the wet and slippery condition of the floor. In falling, he slid and struck his left knee upon an ash bucket, breaking the kneecap, which injury is permanent. The injury has, and will continue to greatly reduce libelant's earning capacity. Libelant charges that the wet and slippery condition of the passageway was due to the defective and insufficient appliances in the forecabin, in consequence of which enough water was allowed to flow from the forecabin to the scupper hole of the first gangway to keep the floor constantly wet and slippery. This wet and slippery condition of the floor was the proximate cause of the accident. The libel, as amended, covers all the facts and issues in the case, and charges that the steamer Nyack was insufficient and unseaworthy, and that the accident resulted from this insufficiency and unseaworthiness. The theory of the case was given to the jury by the charge, substantially as follows:

"This is an action in admiralty, instituted by a libel against the boat and against the owners of the boat. The owner of this boat is a corporation known as the Crosby Transportation Company. The theory upon which the libel is based is that the libelant, while in the exercise of ordinary care and in the discharge of his duty as an employé, was injured by a fall in the narrow passageway of the steamer Nyack, on the port side of the boat, which fall was caused by the wet and slippery condition of the floor of the passageway; that that condition was brought about by water, some of it soapy, and some of it dirty, and some of it the leakage of the pipes that came from the place which had been assigned by the respondent company to the deck hands where they might wash their clothes, on the main deck, just forward of the cook's galley. The theory upon which this libel is based is that the master is bound to exercise reasonable care to provide a safe place for his employé to work in; and the theory is that, by instituting the appliances and granting the privilege to the deck hands to wash their clothes with the facilities there furnished, the respondent was not able to furnish, and did not furnish, the reasonably safe place for this plaintiff, as an employé of the boat, to discharge his functions and to obey the orders of the officers of the boat. You have seen this boat, and therefore no description of mine could make it any more plain or vivid than your own recollection of what you saw.

"Now, gentlemen, when you are called upon to pronounce upon a question of negligence, as you are here, it being contended that the act of the respondent in furnishing these appliances was negligent, the court instructs you that

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the test and standard of what in law amounts to negligence is the conduct of a man of ordinary care and prudence. You are asked to find that the respondent company was guilty of negligence. You square the conduct of this company with the conduct of a man of ordinary care and prudence, and you inquire whether under the identical circumstances a man of ordinary care and prudence would have done as the respondent corporation did in regard to this matter of appliances for washing clothes on the main deck. You have been instructed by the evidence that there is nothing in the inspection laws of the government that requires the respondent to furnish this place to the deck hands to wash their clothes. That is outside of the governmental inspection. But the court charges you that that circumstance did not prevent the respondent, if it chose to do so, from furnishing these appliances for the deck hands. The inspector says the steamboat 'is not a laundry.' That is true. But if the defending company in its own wisdom saw fit to furnish facilities to the deck hands to wash their clothes on the main deck, that is a right they have, and the law is that, if they undertake to furnish such appliances, they must do so in such a manner as a man of ordinary care and prudence would do under the same circumstances.

"The contention of the libelant here is that the appliances which were furnished by the defendant company for the deck hands for the purpose of washing were crude and imperfect and inadequate. They consisted, as you know, of a barrel into which water ran through a hose, and another pipe conducting steam for the purpose of warming the water, and then the deck hands would take buckets or tubs, or whatever they could get, butter tubs or anything else, and dip into this barrel and get the water out, throw their clothes in, and wash them right there. Now you saw that boat. You noticed that there was an incline from the bow going aft, quite a sharp incline. You noticed the two passageways, one on the port and the other on the starboard side. The evidence is—but it would require little evidence where you have seen the situation—that this water that was spilled by the deck hands in the process of washing, and the water that leaked from the various pipes, the pump and the cold water pipe and the steam pipe, that whatever water was thrown upon the floor of the main deck in front of the cook's galley, would necessarily run down one or the other of these passageways; and it is contended that there was a crown in those passageways which was sufficient, if the boat was on an even keel, to keep the water on one side of the passageway until it could escape through the scupper hole. The contention of the libelant is that this was a clumsy and inadequate appliance to allow that water to escape and run down that distance along the boat, almost to the main gangway where the scupper hole was; that there ought to have been some nearer escape for this water, nearer to the tubs, so that it would not run down there and keep the deck wet and slippery. That will be for you to decide."

Libelant demanded a jury trial, alleging that through inadvertence at the time of pleading he neglected to demand a jury trial, that the claimant has controverted several issues of fact alleged in the libel, properly triable by jury. Claimant objected to a jury trial, save as advisory to the court, for the reason that the jurisdiction of the court, as a court of admiralty, was exclusive.

M. C. Krause, of Milwaukee, Wis., for appellant.

W. B. Rubin and A. W. Foster, both of Milwaukee, Wis., for appellee.

Before KOHLSAAT and MACK, Circuit Judges, and SANBORN, District Judge.

SANBORN, District Judge (after stating the facts as above). [1] 1. It is urged by counsel for libelant that this court is bound by the act of 1875, quoted below, and cannot examine the evidence for itself; at the very least, that it must appear that the verdict is against the

decided preponderance of the evidence. It is therefore necessary to examine the statute, and decisions thereon, to ascertain the properly applicable rule of procedure on this appeal.

The first provision in respect to trial by jury in admiralty cases is found in the act of February 26, 1845, part of which was retained in Revised Statutes, § 566. This act originally purported to give the district courts jurisdiction—

"In matters of contract and tort, arising in, upon or concerning steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed in the coasting trade and employed in the business of commerce and navigation between ports and places in divers states and territories, *upon the lakes and navigable waters connecting the same*, as is now possessed by the said courts in cases of like steamboats and other vessels employed in navigation and commerce upon the high seas."

At the time this statute was adopted the admiralty jurisdiction was held to extend only to tide waters, so that it could not have been sustained if the admiralty jurisdiction had not been enlarged to apply to all waters navigable in fact, since the constitutional grant of admiralty jurisdiction could not have been extended by Congress. The Genesee Chief, 12 How. 443, 13 L. Ed. 1058; The Eagle, 8 Wall. 15, 19 L. Ed. 365. By the latter case the portion of the act of 1845 above quoted was held to have become inoperative as a grant of jurisdiction, because that jurisdiction was granted by the Constitution, and because the constitutional grant would otherwise be narrowed by that statute; but that the portion of the statute providing for a jury trial on request of either party was still in force. This part of the statute was preserved in section 566 of the Revised Statutes, and reads as follows, in its original form as adopted in 1845:

"Saving, however, to the parties the right of trial by jury of all facts put in issue in such suits, where either party shall require it."

The only other provision for jury trial in admiralty ever adopted by Congress is Act Feb. 16, 1875, 18 Stat. 315, 4 Fed. Stat. Ann. 557, which reads:

"That the Circuit Courts of the United States, in deciding causes of admiralty and maritime jurisdiction on the instance side of the court, shall find the facts and the conclusions of law upon which it renders its judgments or decrees, and shall state the facts and conclusions of law separately. And in finding the facts, as before provided, said court may, upon the consent of the parties who shall have appeared and put any matter of fact in issue, and subject to such general rules in the premises as shall be made and provided from time to time, impanel a jury of not less than five and not more than twelve persons, to whom shall be submitted the issues of fact in such cause, under the direction of the court, as in cases at common law. And the finding of such jury, unless set aside for lawful cause, shall be entered of record, and stand as the finding of the court, upon which judgment shall be entered according to law. The review of the judgments and decrees entered upon such findings by the Supreme Court, upon appeal, shall be limited to a determination of the questions of law arising upon the record, and to such rulings of the Circuit Court, excepted to at the time, as may be presented by a bill of exceptions, prepared as in actions at law."

With practically substantial unanimity it has been held by the Circuit Courts of Appeals that the last-mentioned statute has no

application to those courts. This provision was intended to relieve the Supreme Court of the labor of looking into the facts found by the Circuit Court on appeals to that court from the District Court in admiralty cases. All jurisdiction of the Circuit Court in admiralty having been taken away by the Evarts Act in 1891 (Act March 3, 1891, c. 517, 26 Stat. 826 (U. S. Comp. St. 1901, p. 547), creating the Circuit Court of Appeals, the act of 1875, relating wholly to the Circuit Court, was impliedly repealed. No Circuit Judge could thereafter make findings or do any other act in an admiralty case. *Munson S. S. Line v. Miramar S. S. Co.*, 167 Fed. 960, 93 C. C. A. 360.

In connection with rulings of this kind it has also been quite generally decided that there is a trial de novo in the Circuit Court of Appeals, where there may be new pleadings and new evidence. This was provided for by admiralty rule 49 (29 Sup. Ct. xlv), adopted pursuant to the act of August 23, 1842, by which it was enacted that:

"The mode of proof in causes of equity and of admiralty jurisdiction shall be according to rules now or hereafter prescribed by the Supreme Court, except as herein specially provided." Section 862, R. S. (U. S. Comp. St. 1901, p. 661).

A departure from this rule by the Circuit Court of Appeals of the Second Circuit led to the protest from many leading admiralty lawyers, shown in *Re Hawkins*, 147 U. S. 486, 13 Sup. Ct. 512, 37 L. Ed. 251. It is evident that a trial de novo, or a new hearing in the appellate court, necessarily excludes any and all binding effect of the verdict of a jury of the District Court.

In the First circuit the act of 1875 was held inapplicable to the Circuit Court of Appeals in *The Philadelphian*, 60 Fed. 423, 9 C. C. A. 54, also deciding that there might be new evidence in the appellate court. See, also, *The Alijandro*, 56 Fed. 621, 6 C. C. A. 54. Like decisions in the Second circuit are *The Havilah*, 48 Fed. 684, 1 C. C. A. 77, and *The E. A. Packer*, 58 Fed. 251, 7 C. C. A. 216, both holding the act of 1875 inapplicable to the Circuit Court of Appeals. In *The Western States*, 159 Fed. 354, 86 C. C. A. 354 (certiorari denied 210 U. S. 433, 52 L. Ed. 1136, 28 Sup. Ct. 762), the question is fully examined by Judge Ward, both with reference to the act of 1845 and of 1875. The opinion is expressed that the Supreme Court, in cases decided shortly after the adoption of the act of 1845, substantially held that verdicts under the act of 1845 are conclusive. However, the action of the District Judge in cutting down the verdict one-half was affirmed. And in *Munson Steamship Line Case*, cited above, the Circuit Court of Appeals of the Second Circuit held that the latter act of 1875 was repealed by the Evarts Act.

In the Third circuit the question has not been decided. In the Fourth the rule above expressed is adopted by the District Court in *The City of Toledo*, 73 Fed. 220, and by the Circuit Court of Appeals in *The Brandywine*, 87 Fed. 652, 31 C. C. A. 187, *The Anaces*, 106 Fed. 742, 45 C. C. A. 596, and *Baker-Whiteley Coal Co.*

v. Neptune Nav. Co., 120 Fed. 247, 56 C. C. A. 83. In *The Glide*, 72 Fed. 200, 18 C. C. A. 504, leave to take evidence pending appeal had been previously granted by the Court of Appeals. 68 Fed. 719, 15 C. C. A. 627. The District Judge declined to certify the new evidence to the Court of Appeals. The latter court refused to hear the case de novo, but remanded with instructions to grant a new trial. The rule in the Fifth circuit is not so clearly established, although the cases of *The Edward H. Blake*, 92 Fed. 202, 34 C. C. A. 397, and *The Trefusis*, 98 Fed. 314, 39 C. C. A. 96, seem to apply substantially the same theory. The latter case adopts a stricter rule than that of other circuits, with a narrower review.

An exceedingly clear statement of the rule is found in the opinion of Judge Lurton, then of the Sixth circuit, in a case before Judges Taft, Lurton, and Clark. *City of Cleveland v. Chisholm*, 90 Fed. 431, 33 C. C. A. 157, sustaining the right of retrial in the Court of Appeals, and holding that the act of 1875 has no application to that court. Judge Lurton says:

"Notwithstanding this right of retrial here, the rule prevails that the judgment of the District Court will not be reversed when the result depends alone upon questions of fact depending upon conflicting evidence, unless there is a decided preponderance against the judgment, where the trial judge saw and heard the witnesses, and had an opportunity of weighing their intelligence and candor. This was the rule applied in the Circuit Courts when the appeal was from the District to the Circuit Courts."

A similar rule was applied in *The Edward Smith*, 135 Fed. 32, 67 C. C. A. 506.

Our own circuit, the Seventh, has adopted the principle in question, in several well-considered cases. In the first of these, decided in 1894, Judge Seaman says:

"In an appeal in admiralty from a District Court, this court is not reviewing 'a question of discretion, but is hearing an appeal which is a new trial,' and must deal with the questions involved 'as though they were original questions'"—citing several of the above decisions. *Clark v. Five Hundred and Five Thousand Feet of Lumber*, 65 Fed. 236, 242, 12 C. C. A. 628.

The same question arose in *Gilchrist v. Chicago Ins. Co.*, 104 Fed. 566, 44 C. C. A. 43, before Justice Harlan and Judge Woods. In delivering the decision of the court Justice Harlan said:

"An admiralty appeal by the libellant in the Circuit Court of Appeals, under the act of 1891, is to be heard and determined under substantially the same rules and limitations that regulated the determination of admiralty appeals in the circuit courts prior to the passage of that act. It results that this court may properly consider and determine every issue raised by the pleadings, and, without regard to the decree below, direct such a decree to be entered here as is consistent with law. If, in our judgment, the libellants are not entitled to a decree in any amount—and such is the contention of the underwriters—we may dismiss the libel, notwithstanding the underwriters did not themselves directly appeal from the decree."

The case was followed in *Chicago Ins. Co. v. Graham & Morton Trans. Co.*, 108 Fed. 271, 47 C. C. A. 320, opinion by Judge Jenkins.

One case only has arisen in the Circuit Court of Appeals of the Eighth Circuit, that of *Pioneer Fuel Co. v. McBrier*, 84 Fed. 495,



28 C. C. A. 466, opinion by the late Justice Brewer. Whether the act of 1875 applies to the Court of Appeals is doubted, but it is held that the case goes to that court for review, rather than for trial. In the Ninth circuit many cases have come up, all of them squarely supporting the principle generally adopted in the most of the other circuits. *The State of California*, 49 Fed. 172, 1 C. C. A. 224; *The Coquiltam*, 77 Fed. 744, 23 C. C. A. 438; *Nelson v. White*, 83 Fed. 215, 32 C. C. A. 166; *Jacobsen v. Lewis Klondike Expedition Co.*, 112 Fed. 73, 50 C. C. A. 121; *Pauhau Sugar Plantation Co. v. Palapala*, 127 Fed. 920, 62 C. C. A. 552; *Stimson Mill Co. v. Moran Co.*, 175 Fed. 38, 99 C. C. A. 54; *Reed v. Weule*, 170 Fed. 660, 100 C. C. A. 212.

Following the settled rule of this circuit, therefore, the questions of fact and law involved in an admiralty appeal come to us substantially as they do to the District Judge. He may order a jury trial in cases on the Great Lakes and connecting waters, under the act of 1845, when either party so requests, provided the vessel be engaged in interstate commerce. Whether the verdict shall be treated by the District Court as advisory only, or as binding, may be doubtful; but, however this may be, it is entirely settled that the Circuit Court of Appeals may review the whole case as if it were originally brought there, except that it will not reverse where the evidence is conflicting, as a general rule. From the decisions of the Supreme Court in *The Genesee Chief*, 12 How. 443, 13 L. Ed. 1058, and *The Eagle*, 8 Wall. 15, 19 L. Ed. 365, it would appear that the verdict of a jury is binding on the trial court, unless set aside under some rule applying generally to jury trials. This view is taken by the Circuit Court of Appeals of the Second Circuit in *The Western States*, *supra*. At all events the district court had power to adopt the verdict, as it did by its decree, although it is not binding on appeal, except in the limited sense referred to.

[2] 2. We are thus brought to consider the case on its merits. The responsibility of a ship, or its owner in a suit in rem like this, for injuries to a seaman, or other person employed on the boat, is quite different from the common-law liability of the master for the act of a servant. The following rules are in force governing the liability in rem: (1) The ship is liable, as well as its owner, for the maintenance and cure of a seaman wounded, or taken sick; also for his wages as long as the voyage, if any, continues. (2) Both ship and owner are liable for indemnity for injuries received by a seaman in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. (3) All the members of the crew are, as between themselves, fellow servants; and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of maintenance and cure. (4) Seamen cannot recover for the negligence of the master, or of any member of the crew, but are entitled to maintenance and cure, whether the injury was received by negligence or accident. These rules are laid down in *The Osceola*, 189 U. S. 158, 175, 23 Sup. Ct.

483, 47 L. Ed. 760, and have ever since been followed and applied by the federal courts. It has further been held that the libelant must establish his case with reasonable certainty. *Johnson v. Frederick Leyland & Co.*, 153 Fed. 572, 82 C. C. A. 526. If the evidence leaves the case in uncertainty a decree for libelant is not justified. *Id.* If an appurtenance is not properly used the ship is not liable. *The Drumelton* (D. C.) 158 Fed. 454. The master is not a fellow servant of the crew. *Fallon v. Cornell Steamboat Co.* (C. C.) 162 Fed. 329, a case of collision, where the vessel was held liable. Nor is the master a fellow servant with the cook, the stewardess, or other inferior members of the crew. *The Hamilton*, 146 Fed. 724, 77 C. C. A. 150, affirmed 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264; *Trauffer v. Detroit & Cleveland Nav. Co.* (D. C.) 181 Fed. 256. The ship is not liable for an injury caused by the negligence of the mate, beyond maintenance and cure. *The Charles H. Klinck* (D. C.) 172 Fed. 1019. Ship and owner are liable for the negligence of the master in not giving a sick seaman proper medical treatment and cure. *The M. E. Luckenbach* (D. C.) 174 Fed. 265, affirmed 178 Fed. 1004, 101 C. C. A. 663; *The Fullerton*, 167 Fed. 1, 11, 92 C. C. A. 463. It follows from the *Osceola* Case that a reasonably safe working place is furnished when the ship is seaworthy and suitable appliances are furnished and kept in order. *The P. P. Miller* (D. C.) 180 Fed. 288.

Libelant was hurt on a warm day in June, about 1 o'clock in the afternoon, some four hours after the deck had been scrubbed, and when it would have dried off from the scrubbing. Running to answer the fire call, he slipped and fell in the passageway near the front end of the boat, striking his knee against an ashpan negligently left there by some one and breaking his kneecap. The cause of his injury was found by the jury to have been slipperiness of the passageway, partly by reason of soapy, dirty water from certain tubs used by the seamen in washing clothing, and partly from leaky water pipes, and a sink under these pipes being allowed to run over when used by the deck hands. They also found there was no negligence on the part of libelant, and that the vessel was not provided with proper or sufficient appliances for the use of the hands for washing. In other words, the jury decided that the shipowner put in or allowed the use of a barrel to hold water for washing purposes, and granted the privilege to the deck hands to wash their clothing in tubs, from which they allowed soapy and dirty water to escape, thus making the working place unsafe and dangerous.

One of the elements of liability found by the jury was that part of the water making the slippery deck came from leaky pipes. However, the evidence is not only unsatisfactory on this point, but also fails to disclose that the water came from defects in the pipes. The testimony is entirely consistent with the inference that the faucets might have been left open by the deck hands. No defect in any pipe was described. One witness only testified that water was running or leaking from the pipes, though his statement is

not entirely satisfactory; but he seemed to regard the main cause of the injury the slopping over of soapy water from the tubs used by the seamen. Libelant says he did not particularly examine the pipes before his accident. Other witnesses testify that the water pipe was disconnected long before the injury, and that the steam pipe was in good condition. Moreover, as already stated, the evidence does not disclose why the water ran from the water pipe or the steam pipe. If this is the fact, it might as well have been from the careless leaving open of the faucets, as from any other cause.

The steamer was inspected April 22, 1909, and found to be in seaworthy condition, except a section of hose replaced and a section of pipe tightened. It was equipped according to the federal inspection laws. Mr. Van Patton, United States steamboat inspector, testified he never heard of a vessel being required to have any equipment for washing clothes. There is no such requirement, nothing in the law on the subject. It would, however, be a simple matter to have a stationary appliance for washing clothes, with a drain pipe, much superior to the use of tubs, and safer.

What is there, then, in the foregoing summary of the testimony, to show that the water pipe, or the steam pipe, were not in perfect condition, and that the constantly running water was not caused by their being left open by those using them? There was no apparent effort made by counsel for libelant on the trial to distinguish between the negligent use of appliances and defects in such appliances. It seems clear, also, that it was the negligent use of the washing tubs by the deck hands which caused the injury. The theory that washing tubs or other appliances for washing clothing are a necessary part of the equipment of a lake steamer seems a novelty. Mr. Van Patton, steamboat inspector of the Milwaukee district for 6 years, master for 22 years, testified that he never found any appliances other than those on the Nyack for washing purposes, never noticed any on the Goodrich or other boats. Certainly the seamen could have made a proper use of these tubs, instead of letting them boil over and slop over as they did.

An injured seaman is entitled to his wages and maintenance, and to a cure, if reasonably possible. The ship is liable for the master's neglect to give him proper care or medical treatment; but further than this the liability in rem does not go. From the whole evidence it is reasonably clear that the libelant was injured through the negligence of the crew, and that he should recover only for wages, maintenance, and proper care. He has had all these, except wages, which respondent alleges in its answer were offered him for a month, or \$70.

The decree appealed from is reversed, with costs, with direction to enter a decree for libelant for \$70, with costs against libelant.

Reversed.

VALENTINE v. HYNES, Public Adm'r, et al.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1912.)

No. 2,016.

ADJOINING LANDOWNERS (§ 9\*)—ENCROACHMENTS—RIGHT OF RECOVERY—DEFENSES.

A defendant in an action of ejectment, who has encroached upon the land of another with a building, under circumstances which create no estoppel against the owner, cannot compel such owner to convey the title to the ground so appropriated to him on payment of its value.

[Ed. Note.—For other cases, see Adjoining Landowners, Cent. Dig. §§ 67-73; Dec. Dig. § 9.\*]

In Error to the District Court of the United States for Division No. 1 of the District of Alaska.

Action at law by Emery Valentine against M. J. Hynes, Public Administrator of the City and County of San Francisco, as administrator of the estate of J. J. McGrath, deceased, and S. Hirsch. Judgment for defendants, and plaintiff brings error. Modified.

See, also, 167 Fed. 473, 93 C. C. A. 109.

J. H. Cobb, of Juneau, Alaska, for plaintiff in error.

R. F. Lewis, of San Francisco, Cal., for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

ROSS, Circuit Judge. The plaintiff in error brought this action in the court below against one J. J. McGrath and his tenant, Hirsch, to recover the possession of certain lots of land, and damages for their detention, stating in his complaint three causes of action—the first relating to lot 1 of block 3 in the town of Juneau, Alaska; the second relating to lots 2 and 3 of the same block; and the third to a specifically described portion of lot 1 of block G in the same town. McGrath answered the complaint, putting in issue its allegations, and also setting up an affirmative defense, in which, among other things, he alleged the patenting by the government of the town site of Juneau on September 4, 1897, and that, long before the entry of the town site under the act of Congress providing therefor, his grantor took possession of certain lands, including the lots sued for by the plaintiff, and was in the actual and exclusive possession thereof at the time the town site was entered; that the trustee of the town site gave notice, pursuant to the regulations of the Secretary of the Interior, that he would, on November 15, 1897, set apart lots and parcels of land in the town site to the occupants thereof, and that thereafter, and on the 20th of July, 1898, the plaintiff falsely and fraudulently represented to the trustee that he and his grantors were the owners and entitled to the possession of the land described in his complaint, and that the trustee on that date did "actually hear and determine, on said false and fraudulent statements, the said questions of said occupancy and ownership of said lots, and, acting under the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

belief that said statements were true, executed to the plaintiff a trustee's deed" conveying to him lots 1 and 3 in block 3, and that portion of lot 1 in block G described in the complaint; that upon a contest between the plaintiff and McGrath before the trustee concerning lot 2 in block 3, the trustee made a decision on the 28th of March, 1899, awarding McGrath a portion of that lot, and that upon the plaintiff's appeal therefrom the trustee's opinion was affirmed by the Commissioner of the General Land Office, and also by the Secretary of the Interior, and that the trustee accordingly deeded the same to the defendant McGrath.

The plaintiff moved the court to dismiss the action as respects that portion of lot 1 of block G claimed by him, which was done, and moved for judgment on the pleadings in respect to the other lots sued for, which motion was also granted, and judgment given accordingly, which judgment was reversed by this court for the reasons stated in its opinion reported in 167 Fed. 473, 93 C. C. A. 109. The retrial was to the court, which made findings of fact and entered judgment thereon, from which the present appeal was taken.

As respects the portion of lot 1 of block G constituting the third cause of action contained in the original complaint, it is sufficient to say that the action of the plaintiff and of the trial court referred to eliminated that particular piece of property from the suit, and therefore there is nothing in the first assignment of the plaintiff in error, which is as follows:

"The court erred in not awarding to the plaintiff, Emery Valentine, that portion of lot No. 1 in block G of the town of Juneau, described in the third cause of action in the complaint, and in the second amended answer of the defendant McGrath."

The second assignment of error is this:

"The court erred in not awarding to the plaintiff, Emery Valentine, that portion of lot No. 1 in block No. 3 of the town of Juneau, described in the first cause of action in the complaint, and further erred in awarding the same to the defendant McGrath, conditioned upon his paying any judgment that might be recovered against him for the value of said premises, together with damages for withholding the same, in any suit that said Emery Valentine might bring within 60 days against the said McGrath."

The portion of lot 1 of block 3 referred to in this assignment is a small wedge-shaped piece of ground 3 feet 6 inches by 3 feet 6 inches by  $1\frac{1}{2}$  feet in dimension, concerning which McGrath alleged in his cross-complaint that he purchased it in December, 1889, and was in the actual possession thereof at the time of the entry of the town site by the trustee, and was then its sole owner and occupant; that, nevertheless, on the 3d of December, 1897, while he was in such possession, and after he had made valuable and permanent improvements thereon, the plaintiff falsely and fraudulently, with intent to deceive and mislead the trustee into believing that the plaintiff was and had been, prior to and at the time of the entry of said town site, the actual occupant of that piece of ground and was entitled to a deed therefor, and with the intent of defrauding McGrath, and depriving him of his property, represented that he, the plaintiff, was at the time of such entry the actual occupant and owner of the premises, and by reason

of such representation the trustee did, on July 13, 1898, deed all of lot 1, block 3, to the plaintiff; that he, McGrath, had no notice or knowledge of the plaintiff's application, or of the fact that a deed had been issued to him, for a long time thereafter; that no time was ever fixed by the Secretary of the Interior, or any other officer, within which parties were required to file their applications for deeds with the trustee, and that no such notice had been given by the latter, and that the deed referred to is void and constitutes a cloud upon McGrath's alleged title.

The trial court found, among other things, as follows:

"(8) The failure of the defendant McGrath to file a contest over the application of the plaintiff for deeds to lots 1 and 3 in block 3 was due to no act or omission on part of the plaintiff, but appears to have been due solely to the negligence of the defendant McGrath.

"(9) The contest between McGrath and the plaintiff Valentine, over lot 2 in block 3 was fairly and fully heard, and there is no evidence of a mistake on part of the trustee in the conclusions arrived at.

"(10) The court further finds that there is a two-story building, costing about four thousand dollars (\$4,000.00), standing upon the defendant's ground, and which encroaches upon and covers that portion of lot 1 in block 1 in controversy herein; that at the time of the erection of the building no notice was given by the owner of this small encroachment, but the building was permitted to be completed without objection. Under these circumstances the court finds it inequitable to award this ground to the plaintiff, and allow him to chop a hole in the side of a valuable building, and materially damage and disfigure it; but plaintiff is entitled to recover the value of this piece of ground, and upon the payment of such value by the defendant he is entitled to an injunction against plaintiff, or a conveyance."

In respect to the small wedge-shaped piece of ground referred to in the finding last quoted, the court, in its opinion, said:

"It appears by the evidence that at the time the defendant erected the two-story frame building upon his land, which is proven to have cost upwards of \$4,000, the foundation was laid to include this corner of land, and the matter was called to the attention of the agents of the owner, and the question then considered of notifying the defendant and preventing his building the same so far to the westward as to include this ground, but no such steps were taken, and plaintiff's predecessor in interest permitted the building to be completed without so doing. Under these circumstances, it appears inequitable to award this ground to the plaintiff, and allow him to chop a hole in the side of a valuable building, and very materially damage and disfigure it. In fact, it would not appear to be any abuse of discretion to ignore the encroachment upon this small fraction of ground under the maxim *'de minimis non curat lex'*.

"The order of the court will be that the plaintiff will be enjoined from entering into the possession of this ground or recovering the same from the defendant, but will be allowed 60 days within which to institute a suit for the recovery of its value and damages, if any, to the remainder of the tract, which issue may be framed in this suit, and jurisdiction retained for that purpose, or an independent suit, as plaintiff shall upon consideration deem advisable, such injunction to remain in effect until 60 days after execution upon any money judgment obtained in such suit shall be returned unsatisfied, and until the further order of this court."

We are unable to see any ground upon which the decision of the court in respect to this piece of land can be sustained. There was no plea of estoppel of any character interposed in the case, nor does

it appear that either the plaintiff or his predecessors in interest in any way misled the defendant McGrath in regard to the extent of their claim, or that he was in fact misled in any respect. On the contrary, his own pleadings show that he contested with the plaintiff his alleged right to it, before the town trustee and before the Land Department of the government, and that the plaintiff was there successful. Becoming the owner under the conveyance from the government, the plaintiff was entitled to recover the possession of the property from McGrath. We know of no principle upon which the latter can compel the owner to convey the title to him upon paying the former the value of the property. We therefore hold that the judgment of the court below in respect to the wedge-shaped piece of ground referred to is erroneous.

The third assignment of error relates to the action of the court in allowing the plaintiff nominal damages only, and the fourth to the matter of costs. The proof in respect to the value of the land in controversy, either for rental or for other purposes, was not such as to enable us to say the court erred in its findings in the matter of damages; and, as to the question of costs, the fact that the cross-complaint of the defendant McGrath, which was answered and contested by the plaintiff, brought the case within the equity jurisdiction of the court, made the matter of costs within the sound discretion of the court, no abuse of which appears.

The cause is remanded to the court below, with directions to modify the judgment, so as to award the plaintiff recovery of the wedge-shaped piece of land referred to, and, as so modified, the judgment will stand affirmed—each party to pay his own costs on this appeal.

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## GREAT NORTHERN RY. CO. v. THOMPSON.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1912.)

No. 2,120.

### 1. RAILROADS (§ 356\*)—PERSONS ON TRACK—LICENSE—REVOCATION—SUFFICIENCY.

That a railway company posted "No Trespass" signs along a section of its track used by inhabitants in passing from the business portion to the residence district of a town did not absolve the company from its duty to use reasonable care in handling its trains, if it knew that persons still walked along the tracks, as had been their custom before the notices were posted.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1228-1234; Dec. Dig. § 356.\*]

### 2. RAILROADS (§ 356\*)—USE OF TRACK BY PEDESTRIANS—LICENSE.

License from a railway company to pedestrians to use the company's tracks cannot be implied, unless the use by the public has been definite, open, and continued for a considerable period of time.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1228-1234; Dec. Dig. § 356.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

3. NEGLIGENCE (§ 136\*)—CONTRIBUTORY NEGLIGENCE—NATURE OF QUESTION.

Contributory negligence is a question of fact, to be passed upon by the jury, whenever the undisputed facts are such that different minds might reasonably come to different conclusions as to the reasonableness of the injured party's conduct.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.\*]

4. NEGLIGENCE (§ 71\*)—CONTRIBUTORY NEGLIGENCE—ACTS CONSTITUTING.

Contributory negligence is not always established by showing that the plaintiff might have used a safe way, since whether a reasonably prudent person would have taken the safe way may depend upon the particular situation and the surrounding circumstances, etc.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 98; Dec. Dig. § 71.\*]

5. RAILROADS (§ 400\*)—INJURY TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

In an action against a railroad company for injury to a pedestrian, who was struck by a car while walking along a track, whether he was guilty of contributory negligence *held*, under the evidence, a jury question.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1365-1381; Dec. Dig. § 400.\*]

In Error to the Circuit Court of the United States for the Western Division of the Western District of Washington.

Action by T. C. Thompson against the Great Northern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The defendant in error recovered a judgment against the plaintiff in error for damages for personal injuries received on October 16th in the town of Leavenworth, Wash. At the time of the accident Leavenworth had a population of 1,200 or 1,300. The town was divided into two sections; the business portion of the town being on the east side, and the residence portion being on the west side, the distance between being about a quarter of a mile. Between the two divisions of the town run the tracks of the terminal yard of the plaintiff in error. For a number of years it had been the notorious and constant custom of the residents of the town to pass between the east and the west sides by walking, both in the daytime and at night, along the main railway track, from 200 to 300 persons passing each day, to the knowledge of the railroad company, and without its objection. Some three or four months before the accident, a "No Trespass" sign was posted somewhere on the right of way, and thereafter, a month or six weeks before the accident, two or three other such notices were posted. Aside from posting the notices, the plaintiff in error took no steps to prevent the use of its track as it had been used before, and the use continued as before, notwithstanding the notices. The defendant in error, while walking between the rails of the main line track at about 10:45 o'clock at night, was struck down and injured by a caboose, which was coming from the direction towards which he was walking. He testified that the night was dark; that he took the usual course, walking on the beaten path between the rails of the main track; that, after proceeding a short distance, he was met by an engine drawing several cars; that he stepped off from the track to allow the engine and cars to pass; that after they passed he stepped back on the track, and was proceeding on his way, when he discovered close upon him the car which struck him, approaching at a speed of eight or nine miles an hour and carrying no lights; that said car, a single truck caboose, was being switched by means of a flying switch onto a side track near by.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



F. V. Brown and F. G. Dorety, both of Seattle, Wash., for plaintiff in error.

Bates, Peer & Peterson and Sullivan & Christian, all of Tacoma, Wash., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] Error is assigned to the refusal of the trial court to sustain the objection of the plaintiff in error to testimony offered to show the common use of the tracks by pedestrians at and before the time of the accident. It is contended that, whatever may have been the implied license to pedestrians to walk on the main track prior thereto, the license had been revoked some two or three months before the accident by the posting of "No Trespass" signs. The theory of the plaintiff in error seems to be that by posting such notices the plaintiff in error was absolved from all duty to observe reasonable care in the handling of its trains, notwithstanding that it knew that the inhabitants of the town still walked along the tracks, as had been their custom before the notices were posted. That contention cannot be sustained. The record does not show us what was the language of the notices. We may assume that it was a notice forbidding trespass on the right of way. The evidence is that such notices were disregarded by the public, and that no effort whatever was made by the plaintiff in error to enforce the prohibition against trespass, and that no warnings of any kind, other than the notices, were ever given. By simply posting such a notice, which it knows is disregarded, a railroad company cannot wholly shift its responsibility. It is still obliged to move its trains with reasonable regard to the personal safety of those whom its officers know are likely to be found on its tracks. In *Ft. Worth & D. C. R. Co. v. Longino*, 54 Tex. Civ. App. 87, 118 S. W. 198, the court said:

"We take it to be well settled that railroad companies are charged with the duty of exercising ordinary care to discover the presence of persons on their tracks, and to avoid injuring them at those places where, under all the circumstances, they are reasonably chargeable with knowledge that such persons are liable to be; and in our judgment it can make no difference so far as the duty of the railroad is concerned, whether such persons are technically to be classed as trespassers, licensees, or persons using the company's tracks as of right. In all such cases the duty is imposed because of the broad rule of humanity that one engaged in so dangerous a business is required to exercise ordinary care to avoid injuring another, when the presence of and danger to such other person is reasonably to be anticipated."

In *Conley v. Cincinnati, N. O. & T. P. Co.*, 89 Ky. 402, 12 S. W. 764, it was held that the detaching of part of the train and allowing it to run into the town unattended on a dark night, with no lights in front and no signal, was such a departure from the defendant's duty to the public as to entitle the plaintiff to recover, though his intestate was a technical trespasser. Said the court:

"By being technically a trespasser he does not forfeit all right to protection. \* \* \* Why is he not ordinarily required to look out for trespassers in running his train? It is not because the trespasser has forfeited his right

to protection, but it is because he has the right to presume that he will not trespass upon the track."

In *Murrell v. Missouri Pac. R. Co.*, 105 Mo. App. 88, 79 S. W. 505, the evidence was that for many years people had used the right of way and the tracks as a passway, and that this was with the consent of the company; for while a sign was shown to have been put up, warning people away, it was never obeyed, and the defendant knew that for many years it had been altogether ignored. The court said:

"It follows that plaintiff was not a trespasser when walking along the track on the right of way. *Morgan v. Railway Co.*, 159 Mo. 262, 60 S. W. 195. It was the duty of defendant's servants in charge of the engines to keep a lookout for persons on the track, and this liability is not limited to want of care after discovery of the danger."

In *International & G. N. R. Co. v. Brooks* (Tex.) 54 S. W. 1056, it was held that where a street which crossed a railroad track and ascended a bluff was used by pedestrians as a highway for many years, and the railroad company maintained steps where the street ascended the bluff, and the track was used as a thoroughfare at all hours, one who passed along the track to ascend the steps is not a trespasser, although the company had put up signs forbidding all persons except employes to go upon the tracks.

[2] The trial court did not err, therefore, in refusing the instruction requested by the plaintiff in error on the subject of the notice, the substance of which was that the plaintiff had no right to disregard such signs and go upon the right of way in spite of them, that if he did so he was a trespasser, and could not recover, unless he was wantonly or recklessly injured, and that this would be true, even if the public had been accustomed to use the right of way as a footpath for several years past, "as the placing of signs should be considered to revoke any permission that might previously have been given." The instructions so requested ignored the facts in the case, among which was the continued use of the property without objection or interference on the part of the plaintiff in error, and that the posted notices were habitually disregarded to such an extent as to raise a presumption of acquiescence. In this connection the court properly charged on the subject of license, and said:

"Such a license cannot be implied, unless the use by the public has been definite, long, open, and has continued for a considerable period of time. \* \* \* In other words, you must find that the use has continued for a considerable period of time by a considerable number of persons and has been acquiesced in by the defendant company."

The case of *Anderson v. Northern Pac. Ry. Co.*, 19 Wash. 340, 53 Pac. 345, cited by plaintiff in error, is not in point. In that case the railroad company had used a certain tract of land in a town as a yard and site for railroad shops. The shops were destroyed by fire, leaving exposed a pit, into which the plaintiff fell on a dark and stormy night. The evidence was that, immediately after the fire, the railroad company posted notices warning tres-

passers off the premises, and that it gave personal warning to the plaintiff. Under those circumstances the court properly held that the notice was effectual to rebut the presumption of a license.

[3-5] The question of contributory negligence is a question of fact, to be passed upon by the jury whenever the undisputed facts are such that different minds might reasonably come to different conclusions as to the reasonableness and care of the injured party's conduct. If the evidence is such as to leave the mind in a state of doubt on the subject, the case should not be withdrawn from the jury. These principles are so well established as to require the citation of no authority. It may be added that the question whether or not the person injured is guilty of contributory negligence may often depend upon a variety of considerations. The question is not always answerable by pointing to the fact that the injured party might have used a safe way. Whether a reasonably prudent person would have taken the safe way may depend upon the situation and the circumstances, the accessibility and the proximity of the safe way, the difficulties and obstructions to the use of the safe way, the extent of the public travel on the chosen way, the frequency of the passage of trains over it, and alertness in looking out for passing trains. There was evidence tending to show that there was not a perfectly safe and equally convenient path at the side of the track; that, while there was a pathway between the track and the ravine, it was a very rough pathway, made of loose cinders, which were being dumped on it at that time; and that at places the width of the path between the track and the gulch was very narrow, and that at one place it was obstructed by a pile of timbers. There was also at one side a wagon road, but it went down into the gulch to a distance of 100 yards from the railroad, and then ascended a steep hill to the town, and it was not used by foot passengers.

In *Thompson v. Northern Pac. R. Co.*, 93 Fed. 384, 35 C. C. A. 357, we said:

"It was equally the duty of the plaintiff in error to keep his eyes open and a careful watch in both directions. Manifestly he could not look in opposite directions constantly. Whether or not he exercised the degree of care required of him by the law ought, we think, to have been left to the jury under appropriate instructions in respect to contributory negligence."

In *Northern Pac. R. Co. v. Baxter*, 187 Fed. 787, 109 C. C. A. 635, a case in which a flying switch was made, and a box car was allowed to run on the downgrade unattended and without a lookout, and without signal or warning, whereby the plaintiff was hurt, the latter having testified that he had looked back twice to ascertain if the engine was approaching, and that he had seen it previously beyond the switch, and supposed there was no danger, we held that the evidence required the submission to the jury of the question of his contributory negligence. In view of all the evidence in the present case, we find no error in the refusal of the trial court to take the case from the jury on the ground of the contributory negligence of the defendant in error.

The judgment is affirmed.

## THE FEARLESS.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1912.)

No. 1,985.

## TOWAGE (§ 11\*)—STRANDING OF TOW—LIABILITY OF TUG.

While a dredge operated by a contractor was engaged in government work near the west side of the harbor at Honolulu, with a pontoon bridge and pipe line extending to the eastern side, the tug Fearless, with the schooner Foster in tow, left the inner harbor. She gave the understood signal for the dredge to open a passage through the pipe line, but, receiving no answer, proceeded without repeating it until near the obstruction, and then repeated the signal, which was at once answered. Without waiting for the pipe line to be opened, however, which would have been done in 10 or 15 minutes, the tug undertook to take her tow between the dredge and the west side of the channel, which was unsafe and improper navigation, and resulted in stranding the schooner. After she floated at night, the tug again took her in tow, and again negligently stranded her. The tug was engaged in working around the harbor, and her master knew all the conditions and channels. *Held*, that she was in fault, and liable for the injury to the schooner, without reference to any fault on the part of the dredge.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11-23; Dec. Dig. § 11.\*]

Appeal from the District Court of the United States for the Territory of Hawaii.

Suit in admiralty by Pope & Talbott, a corporation, and others, owners of the schooner Mary E. Foster, against the tug Fearless; J. D. Spreckels & Bros. Company, claimant. Decree for libelants, and claimant appeals. Affirmed.

The appellees were libelants in the court below, bringing the original libel against the tug Fearless and the dredge Pacific to recover damages alleged to have been sustained by the schooner Mary E. Foster while in tow of the tug in Honolulu harbor. The dredge was at the time working near what is called the Ewa, or western, side of the harbor, with a pontoon bridge and pipe line extending from the dredge across to the Waikiki, or eastern, side of the harbor, making it necessary to open the bridge and pipe line to enable vessels to pass over that portion of the channel. When the tug, with the schooner in tow, approached the place where the dredging operations were going on, the tug gave four whistles, and the dredge answered with a signal which the tug understood to indicate that it should pass with its tow to the west of the dredge, which it undertook to do, and, in passing, the schooner went upon the reef, where she remained for several hours; the tug Fearless, with the aid of the government tug Manning, being unable to pull her off. At high water, about 10:45 in the evening, she floated off, when the Manning released her hawser, and the tug Fearless, after making a short and sudden pull to prevent the schooner from colliding with the dredger, proceeded with its towing, but with the stern of the schooner first, and the latter was soon aground on the eastern side of the channel, and in the second grounding was seriously damaged.

The original libel alleged that the damage was the result of the negligence of both the dredger and the Fearless. Both of the respondents filed exceptions, which were sustained, and an amended libel was filed, in which it was, among other things, alleged that the act of the dredger in signaling the tug to pass upon the Ewa side of the channel was one of the proximate causes of the injury, and was an act of negligence, in that the channel on that side of the dredge was not wide enough to permit the passage of the Fearless

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and her tow, which fact the dredge should have known, and that it was, for the same reason, negligence on the part of the Fearless to attempt the passage, and that the act of that tug in so doing was another proximate cause of the grounding. It was further alleged that the second grounding was due to the fact that the Fearless was compelled to tow the schooner stern foremost away from the dredge and towards the eastern side of the channel, making such tow a matter of great difficulty, and making the danger of grounding the schooner on the east side of the channel great, and that the second grounding was due in part to the negligent towing by the Fearless and in part to the negligence of the dredge in indicating that the passage should be made on the Ewa side of the channel, from which side it became necessary for the Fearless to tow the schooner stern first under conditions "that made the operation a dangerous and difficult one, and one which was likely to result in the grounding of the said Mary E. Foster, even though proper care and skill were exercised by those in charge of her and of the said Fearless."

Exceptions were filed to this amended libel, and sustained, whereupon the libel was again amended, omitting the alleged cause of action against the dredger, and the libel as against the latter was dismissed. The last amended libel also omitted the former allegation to the effect that the schooner, when she floated from her first grounding, was in a position that "was likely to result in grounding, even though proper care and skill were exercised by those in charge of her and of said Fearless," and instead thereof alleged that the schooner was then in a dangerous position, with her stem towards the harbor, "but not in such a position that she might not have been towed safely away therefrom; that said Fearless, however, instead of keeping said Mary E. Foster in deep water, as she might have done by the exercise of due and proper care, despite the difficulties of the situation (which difficulties had been caused by said Fearless herself), so negligently towed said Mary E. Foster by heading her towards said reef and running her in dangerous proximity thereto, which she might have avoided doing by the exercise of due and proper care, as to cause said second grounding of said Mary E. Foster."

A decree was rendered in favor of the libelants, from which the claimant of the Fearless appealed.

Nathan H. Frank and Irving H. Frank, both of San Francisco, Cal., and R. W. Breckons and Holmes, Stanley & Olson, all of Honolulu, Hawaii, for appellant.

Kinney, Prosser, Anderson & Marx, of Honolulu, Hawaii (S. H. Derby, of San Francisco, Cal., of counsel), for appellees.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

ROSS, Circuit Judge (after stating the facts as above). We quite agree with the proctors for the appellant that "in applying rules of law to a given case the controlling facts of that case must not be ignored," and therefore we cannot agree in their contention that the cases of *The Swan* (D. C.) 19 Fed. 455, *Potter v. Pettis*, 2 R. I. 487, and *McCord v. Tiber*, 6 Biss. 410, Fed. Cas. No. 8,715, establish the law to be, *in such a case as the present*, that an obstruction to navigation is necessarily "in itself a plain and undeniable fault"; for here the dredge in question was placed in the harbor for the distinct purpose of improving the navigation thereof, under the supervision and direction of a government officer. It was not stationed there for the purpose of directing the navigation of outgoing or incoming vessels. It is true that while the work was going on navigation was obstructed

in that part of the harbor covered by the dredge and its pontoon bridge and pipe line; but among the specific instructions given the dredger by the government officer, as the record shows, was the instruction that no ship should be compelled to go within 50 feet of the edge of the channel, and that every ship should be allowed 200 feet of channel for passing, and that the pipe line should be broken for all passing ships.

That officer, Capt. Slattery, testified, among other things, that as considerable friction had been taking place between pilots and masters, and the captain of the dredger and the contractor, he issued these and other instructions to facilitate proper navigation of the channel on the one hand, and to prevent undue interference with the dredging operations on the other; that he was waited on by a committee of the Pilots' Association, and also by three inter-island captains, and in respect to the opening of the pontoon line he gave these further instructions:

"I instructed all captains, I instructed this committee, these two committees, that when leaving their wharves they were to blow four whistles, so that the contractor would have at least 15 minutes before they reached them, before the ship reached the dredge, during which time to break their pipe line. I instructed them that I would instruct the contractor to answer their whistle by four whistles, which would mean that by the time they arrived they would have the channel clear for them. I instructed them that, if in any case the contractor failed to allow sufficient space for them to pass with safety, they were to break right through the pipe line."

The record further shows that, about 2:20 p. m. of the day of the accident in question, the pipe line extending from the dredger was opened for the passage of three ships. About two hours later the tug Fearless, with the schooner Foster in tow, approached. According to the testimony, when first starting with the tow from the wharf in the inner harbor for the open sea, the tug blew four whistles, which were not answered by the dredger. Without repeating her whistles, the tug proceeded with her tow, and when near the light-house blew four more whistles, which were immediately answered by the dredger with four whistles, when the Fearless, at a speed of from 6 to 7 knots an hour, and with a towline from 40 to 50 fathoms in length, proceeded to tow the schooner through that portion of the channel left between the dredger and the westerly edge of the channel—a space, according to the evidence, not exceeding 100 feet in width; one or more of the witnesses stating it to have been not more than from 70 to 100. The narrowness of the channel on the westerly side of the dredge is conclusively shown by the fact that in passing it the schooner struck the dredge on one side, and almost immediately grounded on the other, being at the time almost parallel with the channel. Besides, the channel was not straight at the point in question.

The captain of the tug testified that the four whistles of the dredger meant "everything all clear," and that accordingly he undertook to pass with his tow west of the dredge. The testimony of Capt. Slattery, the government engineer, in respect to that undertaking, is, in effect, that it was neither safe nor proper for the tug to take the schooner west of the dredger, but, on the contrary, that "it was the

height of imprudence for the captain of the tug Fearless to attempt to take any tow through such a narrow passage." The tug undertook to do that in broad daylight, with nothing to obstruct its view. Not only so, but she was in her home port, where she was engaged in towing vessels in and out and about the harbor. Under such circumstances it is well-settled law that she was bound to know the channel, and, conceding that the dredger signaled the tug to pass on the westerly side of her, the tug should have refused to proceed that way under the circumstances disclosed, and with the knowledge with which the tug is properly chargeable. *The Margaret*, 94 U. S. 494, 497, 24 L. Ed. 146; *The Lady Pike*, 21 Wall. 1, 22 L. Ed. 499; *The Inca* (D. C.) 130 Fed. 36.

The tug was also negligent in not repeating its first signal, upon finding that it was not answered by the dredger, which would have afforded the latter ample time within which to open its pipe line, as it had done two hours before for the passage of other ships. Moreover, the tug was authorized, as has been seen, to open the pipe line itself, and could readily have done so within a few minutes; so that, even if the last signal of four whistles given by the tug, and which was responded to by the dredger, was correctly interpreted by the tug to mean that it should pass with its tow westerly of the dredger, instead of waiting for the dredger to open the pipe line or to do so itself, still the tug was clearly in fault. The testimony is that the contractors doing the dredging only required 15 minutes' notice to break the line, and that the actual work in breaking and restoring it only consumed about 10 minutes.

As if to add negligence to negligence, the captain of the tug lengthened his hawser, and, according to his own testimony, steered the tug in passing within 15 feet of a barge (7 or 8 feet wide) which lay alongside the dredger, and when the tug was abreast of the latter ordered "starboard slowly," the direct effect of which was to turn his bow toward the other side of the channel, and when the tug was abreast of the dredger ordered "starboard a little more," which brought the tug to pulling at an angle of from about 40 to 50 degrees from the schooner's bow, the direct tendency of which was to bring the latter against the dredge. In order to avoid such a collision and keep in the channel, the master of the schooner put his helm hard-aport and then immediately put it to starboard again; but the effort was not successful, the schooner struck the dredge, and was then thrown against the edge of the channel, where she stuck. When she floated at high water, about 10:45 in the evening, the master of the tug had become very much intoxicated, and his handling of his tow from that point to the time of her grounding on the opposite side of the channel was too clearly negligent to call for a description of it.

In the circumstances of the case, we think the point made on behalf of the appellant that the schooner assumed the risk of the tug master's intoxication is without merit.

Even if the appellant's contention that the dredger was also liable in damages to the libellant be correct, the action of the trial court in

dismissing the libel as to the dredger was not assigned as error, and as, in our opinion, the appellant is clearly liable for the injuries sustained by the appellee, we affirm the judgment.

The judgment is affirmed.

### THE BAINBRIDGE

(Circuit Court of Appeals, Ninth Circuit. October 7, 1912.)

No. 2,112.

1. SEAMEN (§ 26\*)—SUIT FOR WAGES—EVIDENCE.

In a suit in rem against a gasoline launch to recover wages, brought a year after the vessel had been sold by the corporation which owned her when the services were rendered, of which libelants were stockholders, where the only evidence offered in support of their claims was a statement purporting to have been copied from the company's books, which were not produced, the court properly excluded such statement, and dismissed the libel for lack of competent evidence to support.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 131-156; Dec. Dig. § 26.\*]

2. ADMIRALTY (§ 79\*)—HEARING—REOPENING CASE FOR FURTHER EVIDENCE.

It is not error to deny an application to reopen a case in admiralty to admit further evidence, where there was no showing that competent evidence would be produced.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 592-594; Dec. Dig. § 79.\*]

3. ADMIRALTY (§ 79\*)—RIGHT OF LIBELANT TO DISMISS—DISCRETION OF COURT.

The denial by a court of admiralty of a motion by libelants to dismiss without prejudice after a hearing, and the filing of an opinion directing a decree for respondent, *held* not an abuse of discretion.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 592-594; Dec. Dig. § 79.\*]

Appeal from the District Court of the United States, for the Northern Division of the Western District of Washington.

Suit in admiralty by Alex Zugehoer and K. J. Johannson against the gasoline launch Bainbridge; the Inland Navigation Company, claimant. Decree for respondent, and libelants appeal. Affirmed.

Million & Houser and Geo. Friend, all of Seattle, Wash., for appellants.

Ira Bronson, of Seattle, Wash., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The launch Bainbridge, owned by the Sound Motor Company, a corporation, was operated between Seattle and Kingston during a portion of the year 1907, all of 1908 and 1909, and in 1910 until about the end of March. In March she was traded for the Columbia. Thereafter she was purchased by the Inland Navigation Company, the appellee herein. In February, 1911, the appellants Zugehoer and Johannson, brought a libel against the launch, claiming liens thereon for services. Zugehoer

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



alleged that from June 9, 1909, to April 10, 1910, he rendered services on board the launch, at the agreed wages of \$90 per month, and thereby earned the sum of \$900, no part of which had been paid, except \$188. Johannson alleged that from May 10, 1909, to April, 1910, he performed services on said boat at the instance of the owner, for which he was to receive \$110 per month, and that he earned \$1,100, no part of which had been paid, except \$240. The Inland Navigation Company, as claimant and owner, answered, denying knowledge of the matters alleged in the libel. The action was dismissed by the court below for want of competent evidence that any amount of money was owing to either of the libelants.

[1] The appellants urge that it was error to hold that the evidence was not sufficient to establish their claims, and that the court erred in denying their application to take further testimony after the cause was submitted, and they renew that application in this court. The evidence given by the appellants varied materially from the allegations of the libel. Zugehoer testified that his services were rendered as mate and purser between June, 1908, and March, 1910, a period of some 21 months, that he was not paid his full wages in any one month, and that there was still due him about \$765, "something like that." Johannson testified that his agreed wages as pilot were \$100 a month, instead of \$110, as alleged in the libel; that he began working when the boat was built in 1907, and worked on her three months; that in the middle of March, 1908, he again went to work on her, and worked continuously until the last of March, 1910. When asked how much was owing him, he said somewhere about \$860, "I think it is. I am not sure without looking at the books."

The appellants had the books of the Sound Motor Company in court; but, instead of offering them in evidence, their proctor produced and offered a statement purporting to be taken from the books. To this the appellee objected, and the court excluded the statement, saying:

"The most that can be claimed is that Exhibit A was made up from the books, and it is therefore but secondary evidence of the contents of unidentified books."

So far it is clear that no error was committed by the court below. The appellants were stockholders of the Sound Motor Company at the time when their services were alleged to have been rendered; Zugehoer owning one-eighth of the stock, and Johannson owning a little more than one-fourth thereof, and occupying the office of treasurer of the corporation. Instead of bringing their libel at the time when the boat was traded for the Columbia, the appellants waited nearly a year, and until after the boat had been sold to the appellee, a corporation which disclaims all knowledge of any lien or claim of lien for wages when it purchased the launch. It behooved the libelants to state clearly and correctly their claims in their libel and thereafter to present to the court def-

inite and competent evidence of the amounts due them. This they failed to do.

[2] But it is urged that the court below erred in denying their application to open the case and produce the books after the decision had been announced. Ordinarily such an application, upon proper showing of inadvertence or mistake, should be allowed; but the affidavits on which the application was based failed to show that competent record evidence could be produced. Zugehoer deposed that the statement which had been submitted to the court, showing the amounts due the libelants, was made up, "in so far as payments were concerned, from the books of the Sound Motor Company, which books were not the books of original record, but were the journal entries of the Sound Motor Company"; that affiant had never been able to find the book of original entries; and that the payments so shown were taken from various and divers checks issued by the company to the libelants. Johannson's affidavit was similar. He deposed that he had not attempted to keep in his head the details of the payments which had been made to him, but that he had always been clear as to the amount owing to him.

It is to be observed that it is not stated in the affidavits that, if the case is reopened, any books of original entry will be offered to the court, or that any books showing the condition of the accounts of the appellants with the Sound Motor Company will be produced, or that there are any such books. All that is to be offered is a book or books containing, not original entries, but entries posted therein, of checks made by the company to the order of the appellants. It is not claimed that that statement of checks so issued and paid covers all payments made, or that the books contain a full statement of the amounts paid. There is no showing that the evidence so sought to be introduced would have been of any value as proof of the account between the libelants and the company. No proper showing was made, therefore, for reopening the case.

[3] On September 7, 1911, after the cause had been submitted on final hearing, the court filed a "memorandum decision on the merits" with the clerk, stating the grounds of decision against the appellants, and closing with the words:

"Let a decree be entered, dismissing the suit, with costs."

On the following day the appellants filed a motion to dismiss without prejudice. The denial of that motion is assigned as error. "Except where the right to a dismissal or nonsuit is absolute, the court is vested with a large discretion, and its action in regard to an application for dismissal or nonsuit will not be disturbed, unless there has been an abuse of such discretion." 14 Cyc. 451. The complainant in a suit in equity has the right to dismiss the suit without prejudice at any time before hearing, on payment of the costs, if the dismissal will deprive the defendant of no right accrued since the suit was commenced, and there is no cross-bill.

seeking affirmative relief. *Houghton v. Whitin Mach. Wks. (C. C.)* 160 Fed. 227; *Morton Trust Co. v. Keith (C. C.)* 150 Fed. 606; *Pennsylvania Globe Gaslight Co. v. Globe Gaslight Co. (C. C.)* 121 Fed. 1015; *C. & A. R. R. Co. v. Union Rolling Mill Co.*, 109 U. S. 702, 3 Sup. Ct. 594, 27 L. Ed. 1081. In the case last cited, the court said:

"It may also be conceded that as a general rule a complainant in an original bill has the right at any time, upon payment of costs, to dismiss his bill. But this latter rule is subject to a distinct and well-settled exception, namely, that after a decree, whether final or interlocutory, has been made, by which the rights of a party defendant have been adjudicated, or such proceedings have been taken as entitle the defendant to a decree, the complainant will not be allowed to dismiss his bill without the consent of the defendant."

The court quoted the rule stated in *Daniell's Chancery Practice* (5th Am. Ed.) p. 793, as follows:

"After a decree or decretal order, the court will not allow a plaintiff to dismiss his own bill, unless upon consent; for all parties are interested in a decree, and any party may take such steps as he may be advised to have the effect of it."

In *Folger v. Robert G. Shaw Co.*, 2 Woodb. & M. 531, Fed. Cas. No. 4,899, a case in admiralty, it was said:

"The true test seems to be the progress in a case, so that the court have means to decide on the merits. The defendant then has rights, and may well insist on a final judgment to avoid further expense and litigation."

The opinion in that case conceded that even after a case is ready and open for trial, and some pertinent evidence has been offered, so that the merits could be decided, there may be a dismissal without prejudice for sufficient reason presented to the court, such as surprise or unexpected absence either of witnesses or counsel. No such reason, however, was presented in this case, and we find no abuse of discretion in the order of the court below denying the dismissal.

The application to take further testimony in this court, being based wholly on the record in the court below, is denied, and the decree is affirmed.

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CALEDONIAN INS. CO. et al. v. LEVY.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1912.)

No. 2,113.

MASTER AND SERVANT (§ 73\*)—CONTRACT OF EMPLOYMENT—ENFORCEMENT.

Plaintiff contracted with certain insurance companies to turn over all his insurance business, in consideration of receiving from them as full compensation for his services \$1,000 for each month, which the contract provided should cover plaintiff's services and also the clerical services of plaintiff's employes. Soon after the contract was made it was repudiated by defendants, owing to the San Francisco earthquake and fire, and at the end of the first year plaintiff sued for and recovered a judgment for the total amount then due under the contract which was paid. During

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the second year, however, he continued to deliver business to defendants under the contract, but retained 15 per cent. of the premiums for alleged "office expenses." *Held*, that the retention of such percentage constituted a breach of the contract by plaintiff, and precluded him from recovering the contract compensation for the second year.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 90-102; Dec. Dig. § 73.\*]

In Error to the District Court of the United States for the Second Division of the Northern District of California.

Action by S. W. Levy against the Caledonian Insurance Company and others. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

T. C. Van Ness and Otto Irving Wise, both of San Francisco, Cal., for plaintiffs in error.

Goodfellow, Eells & Orrick, of San Francisco, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. In the spring of 1906 the plaintiffs in error were carrying on the business of fire insurance in the city and county of San Francisco, occupying a common office there, and with a common manager of such business, duly authorized to make the contract upon which the present action is based. The contract was made on the 1st day of April, 1906, and by its terms was to continue for a period of two years thereafter. It was made in the form of a letter addressed by the manager of the insurance companies to the defendant in error, S. W. Levy, and by him accepted in writing. The letter (stating that portion of the contract pertinent to the present case and accepted as the contract by the defendant in error, plaintiff below) is as follows:

"Referring to our verbal understanding of recent date, have now to confirm same as follows: For and in consideration of the sum of one thousand dollars (\$1,000) payable to you monthly, you agree to place in the companies represented in this office, or through them, any and all fire insurance business which you may be able to secure or control. \* \* \* That the consideration above expressed shall cover any and all compensation for services rendered by yourself and clerical service of your employes to the companies represented in this office and its management."

Shortly after the making of the contract, and in the same month, the earthquake and fire occurred which destroyed the main portion of the business district of the city of San Francisco, after which the insurance companies notified Levy that they elected to rescind the contract upon the ground that the destruction of property in San Francisco, upon which they claimed the great bulk of his business was obtained, resulted in a failure of the consideration for the contract in material part. In response to that notice Levy, on the 22d of June, 1906, wrote the companies as follows:

"Gentlemen: Referring to your note of June 21, 1906, in which you declare that my contract with you, dated March 31, 1906, by which you undertook to pay me \$1,000 monthly for two years from April 1, 1906, is 'rescinded,'

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

I beg to reply that I do not recognize your right so to terminate the contract, and that I insist on its performance. I have in all respects kept this contract on my part, and am now doing so, and I intend to keep it, fully and fairly, during its term; and I shall expect to be paid by you the stipulated consideration. You are now in arrears for April and May, and unless full payment is made to me by July 1st I shall be compelled to bring suit against you, jointly and severally, for the sum then due.

"Very truly yours,

S. W. Levy."

The evidence shows without conflict that Levy from the time of the making of the contract placed all insurance procured by him or through his office with the companies, and that he made a demand monthly on them for the payment of \$1,000, which demand was refused. He then commenced an action in one of the superior courts of the state to recover the amount alleged to be then due him under the contract, which action was tried in the month of April, 1907, and resulted in a judgment in his favor for \$12,000, being \$1,000 a month for the first 12 months covered by the contract. From that judgment the companies appealed to the Supreme Court of the state, which appeal was not determined until November 23, 1909, when the judgment was affirmed (156 Cal. 527, 105 Pac. 598), and the amount of the judgment was thereafter duly paid.

In the meantime, to wit, April 27, 1907, Levy, through his attorneys, wrote to the companies the following letter:

"San Francisco, Apr. 27—07.

"Office of Goodfellow & Eells, San Francisco, Cal.

"Thomas J. Conroy, Esq.,

"Caledonian Insurance Company,

"Rochester German Insurance Company,

"Caledonian-German Insurance Co., and

"The Scottish Underwriters.

"Dear Sir: We are instructed by Mr. S. W. Levy to inform you of his intentions respecting the contract which he made with you dated March 3, (31) 1906, to wit: He will continue to render his services under the contract until the end of the present month, at which time he will make demand upon you for his compensation, according to the contract. If you still refuse payment, and still persist in claiming that the contract has been rescinded, he will consider that you have committed a breach of the contract, and will sue you once and for all for damages. Mr. Levy is, and always has been, ready and willing to carry out the contract on his part, and to continue it to the end of the term of two years. He hopes that you will conclude to abandon the position which he considers and is advised to be utterly untenable, to wit, that the contract has been terminated by the destruction of property in the burned district.

"We are, yours very truly,

Goodfellow & Eells.

"P. S.—We beg to notify you also that we have advised Mr. Levy, for his protection, to issue a writ of attachment in each of the cases pending, which writ will be issued on Monday next. We give you this notice in order that you may be prepared to furnish the necessary bond on release of attachment."

The evidence shows that the usual brokerage for insurance taken to such companies by a broker was 15 per cent. of the premiums collected, and that to the last letter above quoted the companies in question replied to Levy that, if the courts should finally decide that they were not released from their obligation under the contract for the reason above indicated, they would pay him \$1,000 a month as pro-

vided for in the contract; otherwise, they would pay him the usual brokerage of 15 per cent. for the premiums collected. The evidence further shows, without conflict, that from the beginning to the end of the second year provided for by the contract, to wit, from April 1, 1907, to April 1, 1908, Levy continued to take to the companies' office all of the insurance controlled by him, and for such as they accepted he regularly and duly took to them the premiums thereon, less 15 per cent. thereof, which he deducted and retained. The testimony of the witness Wren, who had been in his employ for about 25 years, is in part as follows:

"He (Levy) was sick in April, 1907. During the month of April, 1907, I took complete charge of the bookkeeping of plaintiff's business, and have been familiar with Mr. Levy's business from that time until the end of the contract with defendants. \* \* \* Q. Will you state whether or not, after that time (April 1, 1907), there was any difference in the performance of the contract of furnishing business to the insurance companies? A. Except in the collection of the commissions, the business went on the same, and he furnished the business to them as before. Mr. Levy turned over to these insurance companies, or through them, all of the insurance business which he controlled. After the month of March, 1907, Mr. Levy placed all the insurance he could in Mr. Conroy's office; but, if Mr. Conroy could not take any business we offered, we placed it on the outside, but to his credit as the broker. Mr. Levy, after the month of March, 1907, collected 15 per cent. commission and retained it for that year, after notifying Mr. Conroy's office that he was going to do that, and held it for office expenses. The first payment we made Mr. Conroy's office was in June on business that was placed during the year from April, 1907, to April, 1908. When we made that payment, instead of making Mr. Conroy a payment of the gross amount of premium, we paid him net, and we told him the reason we were doing so was we withheld those commissions to pay office expenses. \* \* \*

Pursuant to the letter of April 27, 1907, already set out, and shortly thereafter, Levy commenced suit in one of the superior courts of the state against the companies to recover the entire compensation, to wit, \$12,000, which would accrue to him under the terms of the contract during the second year therein provided for, and, having been nonsuited in the state court, commenced the present action in the court below.

As has been said, the facts of the case are undisputed. It is so conceded by counsel, and was so stated by the trial court, which denied a request of the defendants for a directed verdict, and then charged the jury as follows:

"This is an action upon a contract, in which the plaintiff seeks to recover from defendants on account of the breach of the contract by defendants. In such an action plaintiff must prove either performance on his part of the agreement or that he was prevented from performing by the acts of the defendants. In this action plaintiff has elected to rely upon his performance. Therefore, I instruct you that if, from the evidence, you find that the plaintiff has failed to perform any of the conditions contained in the contract dated March 31, 1906, on his part to be performed, your verdict must be for the defendants in this action.

"I further instruct you that the mere fact that the defendants may have failed to pay plaintiff the sum of \$1,000 in monthly installments—that is, his salary as stipulated in the contract—would not of itself constitute such a breach of the contract on the part of the defendants as would warrant the plaintiff in failing to keep the contract on his part. In other words, he

would be called upon to perform his contract and to sue for the payment of the salary which should be in default.

"The evidence in this case leaves the case really to depend upon whether the plaintiff did during this second year, which is the only portion of the term of this contract which is involved before you, perform that contract. In that regard, as to what was done there is really no dispute at all in the evidence. It is a question merely of the intent with which the acts were done, which the evidence shows were done by the plaintiff. And I instruct you in that regard that if you believe from the evidence that during the second year of the contract referred to in the pleadings, namely, from and including April, 1907, until and including March, 1908, which was the termination of the contract, the business between the plaintiff and the defendants was conducted in a manner similar to the previous year, and that the plaintiff did fulfill and perform on his part all of the terms and conditions of the contract, except that he deducted and retained, as stated by him, 15 per cent. of the premiums, in the amounts and at the times stated in his complaint, and for the reasons stated by him; that is, if you believe his evidence in that regard to be true, then I instruct you that the mere retention of such 15 per cent. of the premiums for that year for such reasons would not amount to a failure on his part to perform the contract.

"Now, if you find that he has performed the contract, in view of what I have said to you, and you further find that he paid out moneys by way of returned premiums in the manner and under the conditions set forth in the complaint, and that a balance of account therefor in the sum of \$237.45 remains unpaid to him for moneys that he had paid out by way of returned premiums, then there will be but one verdict for you to find under the evidence, because there is no dispute otherwise as to amounts, and your verdict in that event will be in favor of the plaintiff for the sum of \$11,710.57, which would be the amount of such unpaid return premiums and the principal amount involved in the controversy, made up of the unpaid salary for which the plaintiff sues.

"Now, the evidence is all before you, and it is largely uncontradicted, and it seems to me that there should be no difficulty in your reaching a conclusion."

There was a verdict for the plaintiff.

In our opinion there was nothing for the jury to pass upon; the real question in the case being one of law. We assume that the destruction of a large portion of the business district of San Francisco afforded no ground for the rescission of the contract by the companies. It was so held by the Supreme Court of California, upon the facts there disclosed, in the case hereinbefore referred to, pursuant to which decision the companies paid Levy the full amount due him for the first year covered by the contract. The present case was tried upon the theory that Levy performed his part of the contract covering the second year as well as the first, and in their brief here his counsel say:

"As the case was presented to the jury by both plaintiff and defendant, it is free from all doubt and difficulty, and presents a simple case of a contract having been performed by the plaintiff, and the plaintiff having received only a part of his compensation, and suing for the remainder with interest."

The court below, too, instructed the jury, as has been seen, that in the action—

"plaintiff must prove either performance on his part of the agreement or that he was prevented from performing by the acts of the defendants. In this action plaintiff has elected to rely upon his performance. Therefore I instruct you that if, from the evidence, you find that the plaintiff has failed

to perform any of the conditions contained in the contract dated March 31, 1906, on his part to be performed, your verdict must be for the defendants in this action."

The trouble is that while, during the second year, Levy continued to take to the companies all of the insurance he could control and to collect the premiums therefor, he did not do so in accordance with the provisions of the contract in question. By that contract he was required to turn over to the companies the whole of such premiums, and entitled to receive as full compensation for his services in the matter \$1,000 each month. Confessedly he did not do that during the second year, but, on the contrary, from April 1, 1907, to April 1, 1908, deducted and retained from all of such premiums a commission of 15 per cent. thereof. It is wholly unimportant that he claimed to withhold the 15 per cent. of the premiums for his office expenses, and that he so informed the companies. According to the contract the companies had nothing whatever to do with his office expenses, but were entitled to the full amount of the premiums. Yet the court instructed the jury, as has been seen, that if they believed from the evidence—

"that during the second year of the contract referred to in the pleadings, namely, from and including April, 1907, until and including March, 1908, which was the termination of the contract, the business between the plaintiff and the defendants was conducted in a manner similar to the previous year, and that the plaintiff did fulfill and perform on his part all of the terms and conditions of the contract, except that he deducted and retained, as stated by him, 15 per cent. of the premiums, in the amounts and at the times stated in his complaint, and for the reasons stated by him; that is, if you believe his evidence in that regard to be true, then I instruct you that the mere retention of such 15 per cent. of the premiums for that year for such reasons would not amount to a failure on his part to perform the contract."

It results, from what has been said, that the judgment must be and is reversed, and the cause remanded for a new trial.

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#### BRISTOL CO. v. GRAHAM.

(Circuit Court of Appeals, Eighth Circuit. August 22, 1912.)

No. 3,752.

1. TRADE-MARKS AND TRADE-NAMES (§ 43\*)—MARKS SUBJECTS OF APPROPRIATION—DRAWINGS OF EXPIRED PATENT.

On the expiration of a patent, any one has the right to make the patented article, and to describe it in advertisements not only in the language of the patent, but also by the use of a drawing therein, and the patentee cannot, by registering such drawing as a trade-mark, secure the right to its continued exclusive use, since it becomes free to the public, along with the article which it describes.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 48, 49; Dec. Dig. § 43.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



**2. TRADE-MARKS AND TRADE-NAMES (§ 93\*)—UNFAIR COMPETITION.**

Evidence considered, and *held* insufficient to sustain a claim of unfair competition by imitation of complainant's labels and boxes containing belt lacings.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 104-106; Dec. Dig. § 93.\*]

Unfair competition in use of trade-mark or trade-name, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

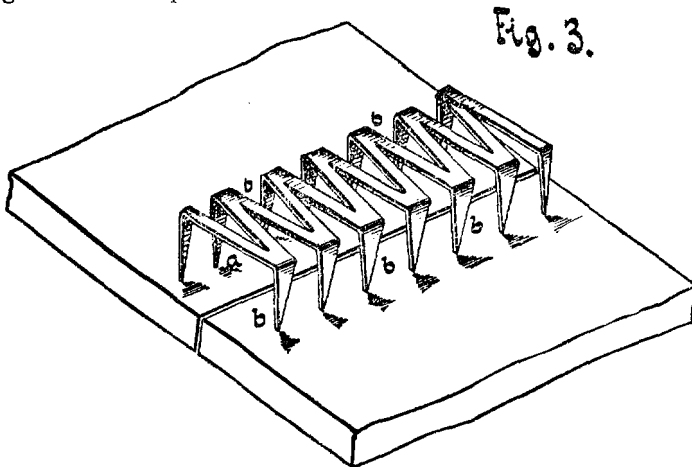
Suit in equity by the Bristol Company against David F. Graham. Decree for defendant, and complainant appeals. Affirmed.

Roy M. Eilers, of St. Louis, Mo. (Terrence F. Carmody, of Waterbury, Conn., of counsel), for appellant.

W. F. Small, of St. Louis, Mo. (W. Keane Small, of St. Louis, Mo., of counsel), for appellee.

Before SANBORN and HOOK, Circuit Judges, and WILLARD, District Judge.

WILLARD, District Judge. The Bristol Company, plaintiff below, charged in the bill infringement of its trade-mark and unfair competition. On July 30, 1889, William H. Bristol, the assignor of the plaintiff, obtained a patent for a steel belt lacing. The drawings accompanying that patent do not appear in the record, but it is said that the drawing below, marked Figure 3, is a correct representation of Figure 3 of the patent:



The lacing standing on the belt is identical with the model of the plaintiff's lacing, Exhibit 4. The patent expired in 1906. About three months before its expiration, and on March 9, 1906, the plaintiff applied for the registration of a trade-mark in connection with its

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

steel belt lacing, and on March 5, 1907, registration was granted of a trade-mark, of which the following is a copy:



This is the trade-mark claimed to be infringed.

[1] The patent having expired, the defendant had the right to manufacture Bristol steel belt lacings. This is conceded by the appellant. It says in its brief, on page 9:

"Complainant concedes that the article made under a patent is free to be used by the public after the patent expires, and that the marking, colors, etc., of the article may be imitated, and that the generic and identifying name may likewise be used."

The defendant or any one else having a right to make the lacing, he had a right to describe it as it was described in the specification in the patent. In describing it he was not limited to the words used by the patentee in telling what the patent was. He was entitled to describe it by the drawings. The registered trade-mark is nothing more than a pictorial description of the article made. It is a symbol showing how the lacing is applied. It is a part of the directions which the Bristol Company has always given as to the use of the article. This appears from the plaintiff's label, which, under the head of "Directions," contains the following:

"Place the lacing upon the joint as shown in the above cut, and drive the spurs through."

The plaintiff introduced in evidence a circular issued in connection with the Buffalo belt fasteners. That circular contains several cuts, and says under one of them:

"This cut represents the manner in which the fasteners should be used."

Under another cut it says:

"This cut represents a very excellent feature of the fasteners."

This is precisely what the plaintiff's cut represents, the manner in which the lacing should be used. Its trade-mark does not indicate origin or ownership. Any one making Bristol steel belt lacing could employ this design with equal truth and with equal right. In the case of *Standard Paint Co. v. Trinidad Asphalt Co.*, 220 U. S. 446, on page 453, 31 Sup. Ct. 456, on page 457 (55 L. Ed. 536), the court said:

"The definition of a trade-mark has been given by this court and the extent of its use described. It was said by the Chief Justice, speaking for the court, that 'the term has been in use from a very early date, and, generally speaking, means a distinctive mark of authenticity, through which the products of particular manufacturers or the vendable commodities of particular

merchants may be distinguished from those of others. It may consist in any symbol or in any form of words; but, as its office is to point out distinctively the origin or ownership of the articles to which it is affixed, it follows that no sign or form of words can be appropriated as a valid trade-mark, which, from the nature of the fact conveyed by its primary meaning, others may employ with equal truth, and with equal right, for the same purpose.' *Elgin National Watch Company v. Illinois Watch Co.*, 179 U. S. 665, 673, 21 Sup. Ct. 270, 45 L. Ed. 365. There is no doubt, therefore, of the rule. There is something more of precision given to it in *Canal Company v. Clark*, 13 Wall. 311, 323, 20 L. Ed. 581, where it is said that the essence of the wrong for the violation of a trade-mark 'consists in the sale of the goods of one manufacturer or vendor as those of another, and that it is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief.' A trade-mark, it was hence concluded, 'must therefore be distinctive in its original signification pointing to the origin of the article, or it must have become such by association.' But two qualifying rules were expressed, as follows: 'No one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured, rather than protected, for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients or characteristics, be employed as a trade-mark and the exclusive use of it be entitled to legal protection.' And, citing *Amoskeag Manufacturing Company v. Spear*, 2 Sandf. (N. Y.) 599, it was further said there can be 'no right to the exclusive use of any words, letters, figures, or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their names or qualities.'

When that case was before this court (*Trinidad Asphalt Mfg. Co. v. Standard Paint Co.*, 163 Fed. 977, on page 979, 90 C. C. A. 195, on page 197), it was said:

"It is the settled rule that no one can appropriate as a trade-mark a generic name, or one descriptive of an article of trade, its qualities, ingredients, or characteristics, or any sign, word, or symbol which, from the nature of the fact it is used to signify, others may employ with equal truth."

In *Merriam v. Famous Shoe & Clothing Co.* (C. C.) 47 Fed. 411, Judge Thayer said, on page 413:

"The next matter to be considered is the charge that the defendant uses the device of a book, with the words 'Webster's Dictionary' printed thereon, on its circulars, bill heads, etc. in imitation of a like practice pursued by the complainants. In my judgment, no person engaged in publishing and selling a book or books can acquire an exclusive right to use the device of a book on letter heads and bill heads, or on wrappers or boxes containing books. The device in question, when used in that connection or relation, is not sufficiently arbitrary to constitute a valid trade-mark. When so used by a publisher or bookseller, such a device serves to indicate the kind of business in which a party is engaged, or it is descriptive of the contents of particular packages. Other persons engaged in the same business have the right to advertise their calling, or to describe the contents of packages, by the use of the same device. If a publisher or bookseller can acquire an exclusive right to use the device of a book on letter heads, bill heads, wrappers, etc., then a watchmaker might acquire the exclusive right to use the picture of a watch, a shoemaker to use the picture of a shoe, and so on throughout the entire list of occupations in which men are engaged."

In *Rice-Stix Dry Goods Co. v. J. A. Scriven Company*, 165 Fed. 639, on page 642, 91 C. C. A. 475, on page 478, this court said:

"The buff-colored strip, in combination with the light-colored body, became clearly descriptive of the article, and because complainant alone, during the

life of the patent, manufactured the same, the color alone did not indicate to the public that such drawers were of complainant's make."

In *Greene, Tweed & Co. v. Manufacturers' Belt Hook Co.* (C. C.) 158 Fed. 640, it was said, on page 641:

"From the affidavit of complainant's witness E. W. Blake, it appears the studs made under Blake patents generally had the stars stamped upon them. Whatever of significance there may have been in this device is now, and was at the time this suit was begun, public property as an appurtenance to the Blake and Weston patents. If the stud was always so marked by the manufacturers while they had a monopoly thereof, it may well be claimed now that the distinctive earmarks which entered into its trade success also became public."

See, also, *Yale & Towne Mfg. Co. v. Worcester Mfg. Co.* (C. C. A.) 195 Fed. 528 (1st Circuit).

This is not the first time that an attempt has been made to extend the monopoly of a patent by registering a trade-mark connected therewith after the patent had expired. *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118; *J. A. Scriven Co. v. W. H. Towles Mfg. Co.*, 32 App. D. C. 321. In *Sternberg Mfg. Co. v. Miller, Du Brul & Peters Mfg. Co.*, 161 Fed. 318, at page 320, 88 C. C. A. 398, at page 400, this court said:

"When this patent expired in 1903, the complainant clearly enough, as we think, sought to perpetuate its monopoly by registering the name 'Vertical Top' as a trade-mark."

In *Cheavin v. Walker*, Law Rep. 5 Chanc. Div. 850, the court said, at page 862:

"Protection extends only to the time allowed by the statute for the patent, and if the court were afterwards to protect the use of the word as a trade-mark, it would be in fact extending the time for protection given by the statute. It is, therefore, impossible to allow a man who has once had the protection of a patent to obtain a further protection by using the name of his patent as a trade-mark."

And again at page 863:

"It is impossible to allow a man to prolong his monopoly by trying to turn a description of the article into a trade-mark. Whatever is mere description is open to all the world. In the present case the plaintiff's label was nothing more than a description, and he cannot therefore have protection for it as a trade-mark."

Our conclusion is that the trade-mark is not a valid one.

[2] The plaintiff says, however, that although defendant may have the right to manufacture Bristol steel lacing, to sell it under that name, and to use the design in question, he has no right to sell other lacings under the name of the Bristol lacing. This claim removes the discussion into the second part of the case, namely, that relating to unfair competition.

A sample of the paper box in which the defendant packs his hooks appears in the record, but it seems very strange that the plaintiff did not introduce a sample of its box. There is no way, therefore, of comparing the two boxes for the purpose of seeing whether the defendant has so dressed his goods as to attempt to palm them off as the goods of the plaintiff. The plaintiff's label, however, appears in

the record, and the testimony of Bristol is that the label was placed on the top of each box. That label, printed with black ink upon red paper, is as follows:



The defendant has no label, strictly speaking, but prints his design and reading matter upon the box itself. This box seems to be made of light manila cardboard. The design upon the top is as follows:



An examination of the tops of the respective boxes shows that there is no similarity whatever between them. There is hardly anything on one that appears on the other. It is true, however, that upon two sides of the box the defendant prints the words "Steel belt lacing," and upon another side he prints a cut very like that shown in the plaintiff's trade-mark. It differs from it, though in two respects: (1) It does not have the words, "Ready to Apply, Finished Joint," thereon; and (2) it represents, not the Bristol lacing, but the defendant's hooks, which are different from the lacing.

It is also true that on some of the stationery of the defendant his

cut appears as it does upon the box, but with the words "Ready to Apply, Finished Joint," thereon. There is no evidence in the case, however, that any one ever bought the defendant's hooks, thinking that he was buying Bristol steel belt lacing. One of the plaintiff's witnesses, a traveling salesman, testified that the representations made by the defendant were that the Star was just as good as the Bristol. He also said that he was unable to sell any of the Bristol product to one firm in Denver, because they had the Star, and said they were just as good for less money. The evidence is entirely insufficient to justify a holding that the defendant has been guilty of unfair competition.

The decree of the court below is affirmed, with costs.

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SOUTH SIDE TRUST CO. v. WILMARTH.

(Circuit Court of Appeals, Third Circuit. October 21, 1912.)

No. 29 (1,591).

BANKRUPTCY (§ 143\*)—CHANGE OF BENEFICIARIES—"DEPENDENT"—SISTER OF INSURED.

Act Pa. April 15, 1868 (P. L. 103), provided that all life policies which might thereafter mature, and which had been or should be taken out for the benefit of, or bona fide assigned to, the wife or children, or other relative "dependent" on the insured, should be vested in such wife, children, or other relative, free from the claim of insured's creditors. Shortly before the bankruptcy of a firm of which insured was a member, he directed a policy on his life, payable to his executors, administrators, or assigns, to be so changed as to be made payable to his sister as beneficiary. The sister at one time had lived with her father and brothers, including the insured, and had been their housekeeper; but there was no evidence that she was "dependent" on insured at any time. *Held*, that the attempted change of beneficiary to such sister was ineffectual to entitle her to the proceeds of the policy as against insured's trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213-217, 223, 224; Dec. Dig. § 143.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1901-1993.

Change of beneficiary of insurance, see note to *Hopkins v. Northwestern Life Assur. Co.*, 40 C. C. A. 4.]

Appeal from the District Court of the United States for the Western District of Pennsylvania.

Action by the South Side Trust Company against Mary F. Wilmarth. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

Lowrie C. Barton, of Pittsburgh, Pa., for appellant.

William M. McElroy, of Pittsburgh, Pa., for appellee.

Before GRAY and BUFFINGTON, Circuit Judges, and McPHERSON, District Judge.

J. B. McPHERSON, District Judge. This is a dispute between a trustee in bankruptcy and the substituted beneficiary in a policy of insurance upon the life of a bankrupt.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On September 1, 1910, Dana R. Wilmarth was a partner in the firm of Fred. Wilmarth & Sons; the other partners being his father and his brother. On that date the firm and the individual partners were adjudged bankrupt upon their voluntary petition, and all their property passed to the trustee—the South Side Trust Company of Pittsburgh. The subject now in controversy is a 20-year policy of life insurance taken out by Dana in 1897 in favor of himself, his executors, administrators, or assigns. On September 1st the policy had a surrender value of \$685, and it has since matured by his death. Whatever interest Dana had in the policy when he was adjudged bankrupt vested in the trustee, by whom the present bill is filed in order to test the right of Mary F. Wilmarth, the adverse claimant.

The policy contained the following clause:

“Privilege of Changing Beneficiary.

“The insured may, subject to the rights of any assignee, change the beneficiary at any time during the continuance of this policy by filing with the company a written request accompanied by this policy; such change to take effect upon the indorsement of the same by the company.”

This clause recognizes the right of the insured to deal with the policy in two ways, namely, by assignment, or by changing the beneficiary. It was never formally assigned, but what happened was this: On August 5th Dana wrote to the company:

“Referring to my policy 385,989, I desire to have the beneficiary changed from my estate to Mary F. Wilmarth, my sister.”

And on August 8th the company indorsed on the policy:

“At the request of the insured, dated August 5, 1910, Mary F. Wilmarth, sister of the insured, is hereby made beneficiary in this policy, subject to the right of the insured to change beneficiary as provided on the second page of this policy. If no beneficiary survive the insured, payment shall be made to the executors, administrators, or assigns of said insured.”

This transaction was voluntary, and without consideration. Within a month the adjudication was entered, and Dana's continuing interest in the policy passed at that time to the trustee, and was sufficient to support a recovery, unless the operation of some superior provision of law exempts the interest of the appellee. The only provision now relied upon is the Pennsylvania act of 1868 (P. L. 103), which is said to be a complete answer to the trustee's claim. The statute reads:

“All policies of life insurance or annuities upon the life of any person which may hereafter mature, and which have been, or shall be, taken out for the benefit of, or bona fide assigned to, the wife or children or any relative dependent upon such person, shall be vested in such wife or children or any other relative, full and clear from all claims of the creditors of such person.”

We do not decide the question whether the meaning of the word “assigned” in this statute is broad enough to include the mere designation of a beneficiary, when the power to change the beneficiary is reserved. Courts may differ in opinion on this subject, but for present purposes we assume that such a transaction would

be included. The serious obstacle in the path of the appellee is that (even if the transaction of August 5th should be regarded as an "assignment") it was not shown that she was a "relative dependent" on the insured, and therefore she has not been brought within the exemption of the statute. On the date just referred to, she was not, and for two or three years previous she had not been, dependent upon the insured for support. She was a sister, and therefore was not "dependent" by reason of any presumption, so that she was obliged to sustain the burden of proving dependence in fact. As we read the testimony, it is not sufficient upon this point. At one time she had lived with her father and her two brothers, and had been their housekeeper; but even during that period the expenses of the household were paid out of the firm business, and she was no more dependent on Dana than on the others. But this arrangement came to an end in 1907, and after that time the evidence does not establish that she was dependent on him in fact. As she certainly was not dependent on him by virtue of any statute or rule of law that made him legally liable for her support, it follows that the exemption of the Pennsylvania act does not now apply. We do not feel called upon to determine precisely the scope of the phrase "relative dependent." In the present controversy it is enough to say that—whether these words should be confined to a relative legally dependent by statute or by established decision upon the insured for support, or should be so construed as to include other relatives who are in fact dependent—the evidence before us does not show that the appellee was thus dependent in either sense.

It is proper to add that we are determining only the legal title to this policy and to the money now due thereon. If the appellee has a claim upon that fund, either as a general or a preferred creditor, she will be at liberty to present it when the fund is distributed, and the validity of her claim can then be considered.

The decree is reversed, with instruction to the district court to enter a decree in accordance with the prayer of the bill; the costs of this appeal and of the proceeding in the court below to be paid out of the fund.

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VANDERBILT et ux. v. BISHOP et al.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1912.)

No. 2,087.

APPEAL AND ERROR (§ 1009\*)—EQUITY SUIT—FINDINGS—REVIEW.

Findings of the trial judge in an equity suit, based on the evidence of witnesses before him and resulting in a substantial conflict with respect to the material issues, will not be set aside on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970–3978; Dec. Dig. § 1009.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



Appeal from the Circuit Court of the United States for the District of Oregon.

Suit by Oscar Vanderbilt and wife against Minette Thullen Bishop and another, in which defendants filed a cross-bill seeking equitable relief. From a decree granting the prayer of the cross-bill (188 Fed. 971), complainants appeal. Affirmed.

Jesse Stearns, of Portland, Or., and A. J. Derby, of Hood River, Or., for appellants.

Frederick V. Holman and Alfred A. Hampson, both of Portland, Or., for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This suit grew out of a contract for the sale by the appellants and the purchase by the appellees of a certain apple orchard, containing 30 acres, situated in the Hood river section of the state of Oregon, for the sum of \$43,000, the terms of which sale were to be \$1,000 in cash, \$9,000 on or before 30 days from the date of the contract, \$5,000 on or before 90 days from that date, the further sum of \$5,000 on the 1st day of December, 1910, and the remaining \$23,000 on or before five years from the date of the contract, all deferred payments to bear interest at the rate of 7 per cent. per annum from the termination of the period of 90 days after the execution of the contract. By the contract it was further agreed, among other things, that upon the making of the payment of \$5,000 on December 1, 1910, the vendors should execute to the vendees a deed to the premises, and that the vendees should thereupon give a mortgage thereon to the sellers as security for the payment of the balance of the purchase money. The vendees made the cash payment of \$1,000 and the payment of \$9,000, and refused to make any other, whereupon Vanderbilt and wife commenced the present suit of foreclosure.

The defendants to the suit, who are the appellees here, denied the plaintiffs' alleged right of foreclosure, and filed a cross-complaint, in which they set up fraud and misrepresentation in respect to the property by the plaintiff Oscar Vanderbilt and one John Leland Henderson, his agent, whereby they were induced to make the agreement, and therefore prayed a rescission of the contract. The specific acts of fraud alleged in the cross-bill were that Vanderbilt and his agent, Henderson, as an inducement to the purchase, represented to the agent of the purchasers, who was Mrs. Carrie R. Schmick, that the orchard contracted for was a first-class commercial orchard, planted with 14 varieties of apple trees and no more; that the trees were 14 years old, except 50 or 60 of them, which had been reset; that the land was first-class soil, entirely suitable for the successful growing of apple trees and their fruit, and that there was no hardpan in the orchard; that the orchard was of the value of \$45,000, and had been greatly benefited by deep plowing; and that the net returns each year from the orchard during the years that Vanderbilt had owned it were equal to a net in-

come of from 20 to 30 per cent. on \$43,000, and that the net returns for the year 1908 were \$11,333. The cross-bill further alleged that those representations were false, and so known to be at the time by Vanderbilt and his agent, Henderson, and that they were made to induce, and did induce, the appellees to enter into the contract of purchase, which they otherwise would not have done. It further alleged that the representations so made were false, in that the soil of the orchard is not first-class, nor suitable for growing apple trees, but, on the contrary, is hard and impervious to moisture and to the roots of the trees, and that it does to a large extent consist of hardpan; that the trees were, with the exceptions noted, at the time from 16 to 17 years old, and contained more than 21 varieties, instead of only 14; that the orchard was not benefited by the deep plowing, but, on the contrary, was irreparably injured thereby; and that the orchard was not a first-class orchard bearing merchantable varieties of apples, and was not of the value of \$45,000, nor of any greater value than \$20,000.

The answer of the appellants, complainants below, to the cross-bill, while denying the alleged fraud on their part, and other of the allegations of the cross-bill, admitted that they had represented to the agent of the appellees that the soil of the orchard was first-class, and was suitable for the growing of apple trees and the maintenance of such an orchard, and admitted that they had represented to the appellees that it contained no hardpan.

The cause came on for trial before the judge of the court below, who heard the evidence and saw the witnesses. The trial resulted in a very substantial conflict in respect to the material issues presented by the pleadings. From the evidence the trial judge found the making of the written contract as alleged, and that it was made upon representations of material facts in regard to the character of the soil of the orchard, the number of varieties of trees therein planted, and the age of the trees, which representations the findings declare were false and fraudulent, and were so known to be by Vanderbilt when made, and that they were made by him and his agent for the purpose of deceiving the appellees, and to induce them to enter into the contract in question.

In the circumstances appearing, the general rule applicable to such cases precludes us from interfering with the findings of the trial court, having the advantages alluded to; in addition to which it may be observed that the reading of the evidence disclosed to our minds certain suspicious circumstances strongly confirming the correctness of the conclusion reached by the court below, some of which we discovered, upon the subsequent reading of the opinion of the trial judge, impressed his mind as it does ours. It would, however, serve no useful purpose to go into those matters, so we forbear.

The judgment is affirmed.

## PAULSEN et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1912.)

No. 2,114.

## 1. COMMERCE (§ 47\*)—WHITE SLAVE TRAFFIC ACT—CONSTITUTIONALITY.

The act of Congress known as the "White Slave Traffic Act" (Act June 25, 1910, c. 395, 36 Stat. 825 [U. S. Comp. St. Supp. 1911, p. 1343]), is constitutional.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 26; Dec. Dig. § 47.\*]

## 2. COMMERCE (§ 82\*)—OFFENSES—TRANSPORTATION FOR PROSTITUTION—EVIDENCE—SUFFICIENCY.

Evidence in prosecution under the "White Slave Traffic Act" (Act June 25, 1910, c. 395, 36 Stat. 825 [U. S. Comp. St. Supp. 1911, p. 1343]), held to sustain a finding that accused transported women for the purpose of prostitution.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 47; Dec. Dig. § 82.\*]

In Error to the District Court of the United States for the Northern Division of the Western District of Washington.

Nels Paulsen and another were convicted of violating the "White Slave Traffic Act," and they bring error. Affirmed.

Revelle, Revelle & Revelle, of Seattle, Wash., for plaintiffs in error.

W. G. McLaren, U. S. Atty., and Louis E. Shela, Asst. U. S. Atty., both of Seattle, Wash., for the United States.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The plaintiffs in error were convicted of a violation of the act of Congress known as the "White Slave Traffic Act" (Act June 25, 1910, c. 395, 36 Stat. 825 [U. S. Comp. St. Supp. 1911, p. 1343]), and sued out this writ of error to review the judgment of the District Court entered upon the verdict.

[1] Only two points are made in support of the writ, the first being that the act of Congress is unconstitutional, and the second that the evidence was insufficient to support the verdict; and in respect to the second the counsel for the plaintiffs in error expressly concede that the sole question of fact is whether the evidence sufficiently shows the intent with which the women were procured and transported. The first point is answered by a recent ruling of this court against the position of the plaintiffs in error, and the second may be almost as briefly disposed of.

[2] The indictment charged the defendants to it with procuring the transportation as passengers in interstate commerce of four certain named women from the city of Seattle, in the state of Washington, to the city of Burke, in the state of Idaho, for the purpose of prostitution. The evidence shows that Burke is a small mining town in the mining regions of Idaho, situated in a gulch between the mountains, and is chiefly inhabited by miners; that the plaintiffs in error

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

were the proprietors of a dance hall which they conducted in the town; that in and on one side of the hall was a bar, and on the other side was partitioned off a small restaurant containing three tables, and in the rear end of the hall and opening directly into it were small rooms, each fitted up with a bed, stove, and bureau, for the use of the women, and into which they solicited the men who went to the hall. Among other things the government introduced a telegram, sent by the plaintiff in error Laura Paulsen, who had gone from Burke to Seattle, to the other plaintiff in error at Burke, which telegram reads as follows:

"Seattle, Washington, December 7, 1910.

"Nels Paulsen, Burke, Idaho. Wire \$50 at once for violin player. Can you use cornet player? If so, can get two more A No. 1. I would take him for a while I think. You can get him for three and the violin for three fifty. That will make four. Besides I am going to Everett in the morning for the others. R. is here. Will see her to-morrow morning. Answer in regard to cornet.

"Mrs. Nels Paulsen."

One of the government inspectors testified that the defendants to the indictment admitted to him the sending by Nels and the receipt by Laura Paulsen of the money mentioned in the telegram, and that the initial "R.," mentioned therein, referred to the girl Ruth, and that the reference therein to Laura Paulsen's going to Everett for two more had reference to the women Mabel Bell and Jennie Smith, all three of whom, the evidence shows, were among the four procured and transported to Burke by the plaintiffs in error. The evidence showed that the women wore low-necked dresses, short skirts, and kimonos, received no wages, but a commission of 40 per cent. on each bottle of beer they sold to the men whom they solicited to their rooms, and \$2 extra "if they had anything out of the way to do with the men."

In the face of such surroundings and uncontroverted facts, it is idle to contend that the evidence was insufficient to sustain the verdict, finding that the purpose for which the women in question were transported was that of prostitution.

The judgment is affirmed.

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#### AMERICAN RADIATOR CO. v. SHIRLEY RADIATOR & FOUNDRY CO.

(Circuit Court of Appeals, Seventh Circuit. May 3, 1912.)

No. 1,664.

#### PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—DESIGN FOR RADIATOR.

The Woolley design patent, No. 36,607, for a design for a steam radiator, *held* valid, but not infringed.

Appeal from the Circuit Court of the United States for the District of Indiana.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Suit in equity by the American Radiator Company against the Shirley Radiator & Foundry Company. Decree for defendant, and complainant appeals. Affirmed.

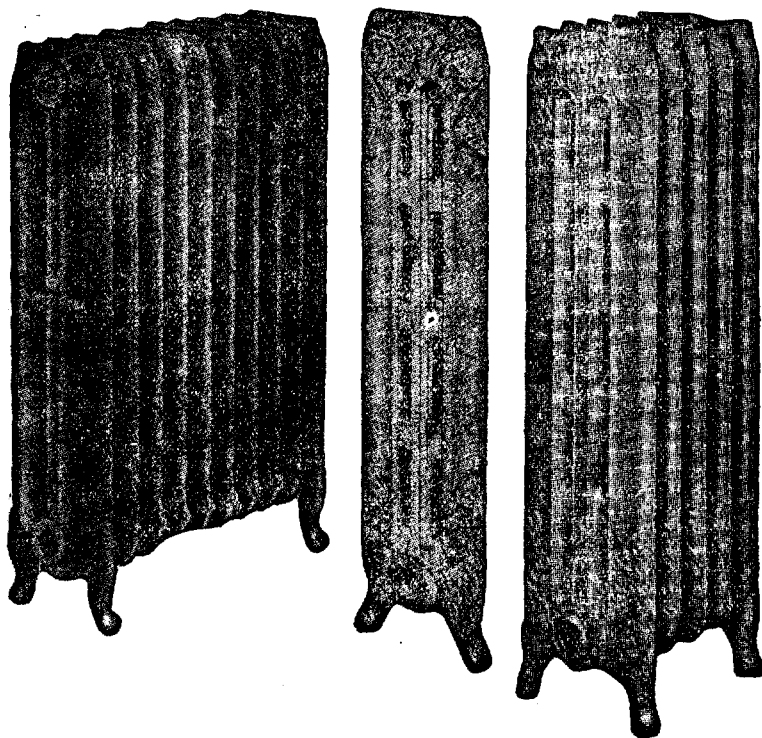
Bill for infringement of design patent No. 36,607, issued to Clarence M. Woolley, October 27, 1893, for an ornamental design for a steam radiator for use in dwelling houses. Defendant's design is known as the "Shirley," and complainant's as the "Premier." The two are quite similar in appearance to the casual observer, but differences in detail are quite apparent on closer inspection. The decoration on each is from the pattern of the Acanthus leaf in the form of a foliated scroll, but in the defendant's design the leaf is turned upside down as compared with the patented one. The form of the top and the legs are also distinct. In one there are three, and in the other four, cross-connections. Both designs are attractive in appearance, are simply but effectively adorned. They have three columns, the two outer ones convex, and the middle one concave, a series of short intermediate bridges between the columns having curved edges, graceful downward diverging legs, and shoulders at the top, also employing the curve or wavy line. The side columns in each are conically curved in cross section, being thicker near the inner edge, and diminishing outward by a compound curve. The accompanying cuts show these features clearly.

#### COMPLAINANT'S FORMS.

Prior Art Form.

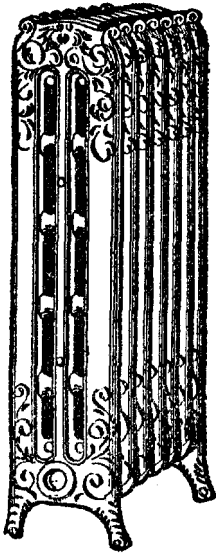
Premier, Patent  
Design.

Premier, Commercial  
Form.

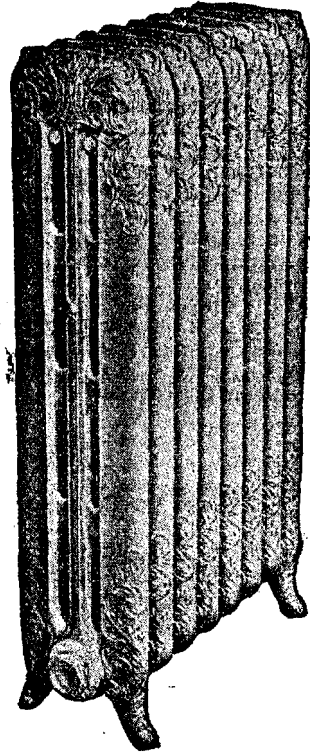


## DEFENDANT'S FORMS.

Shirley, Patented Design.



Shirley, Commercial Form.



Charles K. Offield (Offield, Towle, Graves & Offield and Roland J. Hamilton, of counsel), for appellant.

Charles Martindale, for appellee.

Before KOHLSAAT and MACK, Circuit Judges, and SANBORN, District Judge.

SANBORN, District Judge (after stating the facts as above). It is not claimed that the Acanthus leaf (found in all of the ancient art), or any of the single elements used by the patentee in his design, are at all new. What he asserts is that he has gathered together into a unitary and harmonious structure the various features of the old art, including the foliated scroll, in simple, chaste, and modest form, and has thus made use of the inventive faculty.

The St. Louis, Premier, and Shirley were exhibited side by side in the courtroom at the time of the argument. We thought then, and further examination convinces us, that defendant's radiator does not infringe. There is nearly as much difference between the Shirley and Premier as the Premier and St. Louis. Both patents may be treated as valid, within narrow limits.

Affirmed.

## CONROY et al. v. PENN ELECTRICAL &amp; MFG. CO.

## PENN ELECTRICAL &amp; MFG. CO. v. CONROY et al.

(Circuit Court of Appeals, Third Circuit. October 11, 1912.)

Nos. 43, 44, March Term, 1912.

## 1. PATENTS (§ 318\*)—INFRINGEMENT—DAMAGES—PROFITS.

In general, a patentee, on a decree for an accounting against an infringer, can only recover profits shown to be due to the inventor's patented contribution to the art, and not to the whole profits made on the manufacture and sale of the article to which he has only contributed an improvement; but this rule does not apply to a case where the invention does not consist of a mere improvement on, attachment to, or modification of a prior device of some particular character, but constitutes a new and complete type of article, constituting a single unitary and complete structure, no one of the parts or elements of which could be omitted and a useful and operative device remain, in which case the infringer is liable to account for the whole profits made from the manufacture and sale of the infringing article.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566-576; Dec. Dig. § 318.\*]

## 2. PATENTS (§ 318\*)—INFRINGEMENT—ACCOUNTING.

On an accounting of profits for the infringement of a patent on a particular style of toilet mirror, defendant was not entitled to credit for an alleged saving in manufacture by the use of certain patented machines in chipping the edges of the glass plates, where it appeared that, prior to the patenting of such machines, chipping machines for the same purpose were in use by claimant; there being no showing that any saving was effected by defendant over the cost to complainant by defendant's use of such patented machines.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566-576; Dec. Dig. § 318.\*]

Accounting by infringer for profits, see note to *Buckhill v. Mayor, etc., of City of New York*, 50 C. C. A. 8.]

## 3. PATENTS (§ 318\*)—INFRINGEMENT—PROFITS—ACCOUNTING.

On an accounting of profits for the infringement of a patent, the infringer is not entitled to credit for profits due to an alleged saving, because of superior skill and intelligence, over the cost to complainant of producing the patented article.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566-576; Dec. Dig. § 318.\*]

## 4. PATENTS (§ 318\*)—INFRINGEMENT—PROFITS—ACCOUNTING—EVIDENCE.

On an accounting of profits for the infringement of complainant's patent on toilet mirrors, evidence of the cost to others of silvering mirrors was inadmissible, except for comparison in testing defendant's claims for credit of the cost of manufacture; the question being the actual cost to defendant.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566-576; Dec. Dig. § 318.\*]

Bradford, District Judge, dissenting.

Cross-Appeals from the District Court of the United States for the Western District of Pennsylvania.

Suit by the Penn Electrical & Manufacturing Company against John M. Conroy and others. From a decree assessing damages in a suit for patent infringement, both parties appeal. Affirmed.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Edward Rector, of Chicago, Ill., and Joseph M. Nesbit, of Pittsburgh, Pa., for plaintiff.

Paul Synnestvedt, of Pittsburgh, Pa. (J. C. Bradley, of Pittsburgh, Pa., and Raymond Pitcairn, of Philadelphia, Pa., of counsel), for defendants.

Before GRAY, Circuit Judge, and BRADFORD and WITMER, District Judges.

WITMER, District Judge. This case brings before the court appeals by both parties from a final decree of the Circuit Court awarding the complainant, the Penn Electrical & Manufacturing Company, the sum of \$4,970.50, with interest and costs, in an accounting against the defendants, John M. Conroy, Edwin N. Prugh, and Mildred W. Prugh, copartners trading and doing business as Conroy, Prugh & Co., for infringement of letters patent No. 631,033, granted to complainant August 15, 1899, for new style of toilet mirrors. The accounting was had under a decree finding the patent valid and infringed, which was afterwards affirmed by this court. 146 Fed. 749, 77 C. C. A. 239.

[1] The first five of defendants' assignments of error, which aim at the fundamental right of the complainant to any recovery whatsoever on account of profits received by them from the manufacture and sale of the infringing mirrors, raise the question of primary importance. It is urged by the Conroy Company that the patent consisted solely and only in producing a new mirror mounting or easel; that it was construed by the court, and was so intended, as an improvement; and that therefore, for the purpose of an accounting, the court will look only at the actual contribution of the inventor to the art. Undoubtedly, the cases in the Supreme and federal courts, on the circumstances before them, in some measure, support the general proposition that a patentee, upon the decree for an account against an infringer, can only recover the profits shown to be due to the inventor's patented contribution to the art, and that he is not entitled to the whole profits made upon the manufacture and sale of the article to which he has only contributed an improvement.

The leading case of *Seymour v. McCormick*, 16 How. 480, 490, 14 L. Ed. 1024, to which reference is made, however, we think illustrates the position that each case must be decided upon the showing made by its special circumstances. In the case mentioned McCormick obtained a patent for a reaping machine. This patent expired in 1848. In 1845 he obtained a patent for an improvement upon his patented machine, and in 1847 another patent for new and useful improvements in the reaping machine. The principal one of these last was in giving to the raker of the grain a convenient seat upon the machine. The court decided, in a suit for violation of this patent of 1847, that it was erroneous in the Circuit Court to say that the defendant was responsible in damages to the same extent as if he had pirated the whole machine. Clearly it would have been unfair, and even absurd, to give the profits of the whole



machine to the patentee of a convenient seat on the machine, allowing the raker of the grain to ride, instead of walking as before. Judge Grier, in delivering the opinion of the Supreme Court in this case, said:

"It must be apparent to the most superficial observer of the immense variety of patents issued every day that there cannot, in the nature of things, be any one rule of damages which would equally apply to all cases. The mode of ascertaining actual damages must necessarily depend on the peculiar nature of the monopoly granted."

It is idle, therefore, to say that any hard and fast rule can be made applicable to all cases where profits are to be accounted for. The court and the accounting officer will consider each case in the light of its own peculiar characteristics, and deal with it practically and in a common-sense manner. Upon examination, it appears self-evident, from the very nature of the patented invention, that it does not consist of any mere improvement upon, attachment to, or modification of a prior device of some special character, but that, on the contrary, it constitutes a new and complete type of article of manufacture, comprising and composed of a combination of certain described elements, constituting a single unitary and complete structure, no one of whose parts or elements could possibly be omitted or withdrawn and a useful and operative device remain.

The patent, drawings, and exhibits disclose a hand mirror of peculiar structure. Different forms and mountings of such mirrors existed prior to the patent in suit, it is true. Hand mirrors have antedated even the invention of glass, and are as old as human vanity; but this particular structural design, form, and arrangement of parts, constituting the subject of the patent in suit, is a unitary novelty. It differs from every other hand mirror. It has an adjustable easel, and can be converted into a hand mirror, from which no part of the device patented could be removed and leave a salable structure. In this respect the case at bar is clearly distinguished from *Seymour v. McCormick*, *Garretson v. Clark*, 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371, and kindred cases presented by plaintiffs in error.

The patent is very analogous in its essential nature to a design patent; not a design superimposed upon some other creation of art, but a design of form and shape, such as the design of a particular form of vase, as distinguished from a design painted upon a vase. The infringer made his whole profits from adopting this particular form of hand mirror, and for these he is bound to account to the complainant. As was said by Justice Shiras, delivering the opinion of the court in *Warren v. Keep*, 155 U. S. 268, 15 Sup. Ct. 84, 39 L. Ed. 144:

"Where the patented invention is for a new article of manufacture, which is sold separately, the patentee is entitled to damages arising from the manufacture and sale of the entire article." *Manufacturing Co. v. Cowing*, 105 U. S. 253, 26 L. Ed. 987; *Hurlbut v. Schillinger*, 130 U. S. 456, 9 Sup. Ct. 584, 32 L. Ed. 1011; *Crosby Valve Co. v. Safety Valve Co.*, 141 U. S. 441, 12 Sup. Ct. 40, 35 L. Ed. 809.

To the same effect is the dictum of Judge Grosscup in *Orr & Lockett Hardware Co. v. Murray*, 163 Fed. 54, 89 C. C. A. 492, following the rule stated by Justice Bradley in *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000, wherein he said:

"Where profits are made by an infringer, by the use of an article patented as an entirety, the infringer is responsible to its patentee for the whole of such profits, unless he can show, and the burden is on him, that a portion of such profits is the result of some other thing used by him."

Cases might be multiplied holding to this effect, among them being *National Metal Strip v. Bredin et al.*, 186 Fed. 490, 108 C. C. A. 468; *Maimin v. Union Special Machine Co.*, 187 Fed. 123, 109 C. C. A. 41; *Regina Music Box Co. v. Otto & Sons (C. C.)*, 114 Fed. 507, decided by this court. There is no doubt as to such being the rule, nor is there any controversy as to its propriety. The test lies in its application to the facts warranting the same, as heretofore noted.

[2] Another of the assignments of the plaintiff in error questions the rejection of \$1,517.86 claimed for an alleged saving, on their part, in the manufacture of the infringing mirrors by reason of their use of certain patented machines in chipping the edges of the glass plates of the mirrors. A further credit for use of these machines formerly claimed for royalties due Mr. Conroy, owner of the patent and member of the firm, has been abandoned. The claim is based upon the assumption that if defendants, plaintiffs in error, had not chipped their mirror plates upon the Conroy machines, they would have been obliged to chip them by hand. It appears that the defendants had used chipping machines prior to the Conroy patent, which were also in use by the complainant. *Conroy v. Penn Electrical Mfg. Co.*, 159 Fed. 943, 87 C. C. A. 149; *Id.*, 185 Fed. 511. And there is no showing that any saving was effected over these by use of the Conroy patented machines. The machine used by the complainant might have accomplished the purpose as economically, had they not been deprived of the opportunity; hence there could have been no saving. Again, there is no better reason why anything should be allowed for savings due to the use of the machines in question than there would be for allowing credit for savings effected by the use of any other superior facilities for carrying on their business. As argued by counsel, defendants might as well claim that they had more skilled workmen than other manufacturers, or more experienced and efficient managers, or more reputation and prestige in the trade, which enabled them to secure higher prices for their goods. Many such dangerous, vague, and speculative reasons might be advanced in these accountings, were the opportunity afforded.

[3] It is well settled that, if a defendant has made no profits from his use of the patented invention, none can be recovered. The rule is that the complainants shall recover the actual profits derived by the infringer from the use of the patented invention; no more; no less.

"An infringer cannot be heard to say that his superior skill and intelligence enabled him to realize profits by his infringement which a person of less skill might not have realized. He is liable for all profits he has made by the illegal appropriation of another's invention. The patentee cannot recover more than actual profits because the exercise of skill would have enabled the infringer to realize better results, nor can the latter avoid paying actual profits on the ground that they would have been less, had he not been skillful." *Lawther v. Hamilton* (C. C.) 64 Fed. 221.

[4] The complainant in its cross-appeal assigns for error the allowance to defendant of 10 cents per square foot to silver the plates of the infringed mirrors. Evidence was introduced showing the cost of silvering mirrors in the experience of others, by which we are to infer the credit to be allowed defendants for the work. It is immaterial, as was heretofore shown, what it may have cost others for silvering glass, excepting possibly for comparison in testing the claims of defendant; the sole question being what it actually cost the defendants.

The master's careful consideration of the testimony, his findings and conclusions, having heard the witnesses and observed their manner, comes here affirmed by the court below, and on review we are not convinced that error has been committed.

Having considered the remaining assignments, we have concluded to pass them without special reference.

The decree of the court below is affirmed.

BRADFORD, District Judge, dissents.

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PRATT et al. v. AUTO SPRING REPAIRER CO.

(District Court, D. Massachusetts. December 20, 1911.)

1. PATENTS (§ 216\*)—NOTICE—CONSTRUCTION.

On the back of an order for certain patented auto spring repairers, the seller printed a "Warning to Trade," advising that its counsel claimed that the seller's patent covered broadly the seller's type of spring repairer, that all spring repairers of this type made by others were infringements, and that the seller had recently brought suit against a certain alleged spring repairer for infringement, and intended to proceed vigorously against all others who made and sold such articles. *Held*, that such notice did not constitute an undertaking to protect the seller's customers against infringement and as a guaranty against infringing competition.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 329; Dec. Dig. § 216.\*]

2. BANKRUPTCY (§ 322\*)—PROVABLE CLAIMS—DAMAGES—LOSS OF PROFITS.

A bankrupt on January 4, 1910, gave to claimant two orders, one for 30 gross of "Only Cotter setters," to be taken 5 gross or more at a time, during 1910, and the other for 2,000 auto spring repairers, to be taken in lots of 50 or more at a time, during the same year. Fifty gross of the setters were shipped, and 100 auto spring repairers, when the bankrupt canceled both contracts, without valid ground for so doing, and refused to receive any more. The materials were manufactured and sold under patents, and it did not appear that, when the orders were repudiated,

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

claimant had any goods with which to fill the subsequent orders, or had prepared to ship the same. *Held*, that claimant was entitled to prove for the difference between what the articles would have cost to manufacture and deliver and the contract price.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 508-510; Dec. Dig. § 322.\*]

In Bankruptcy. In the matter of bankruptcy proceedings against the Percy Ford Company. Proceedings to review a referee's order disallowing a claim of the Auto Spring Repairer Company. Overruled. Claims allowed.

For opinion of the Circuit Court of Appeals, affirming decree, see 196 Fed. 495.

Harvey H. Pratt, for plaintiffs.

Albert P. Carter, for defendant.

DODGE, District Judge. This creditor carried on business in New York City. The bankrupt, doing business in Boston, gave the creditor two orders in writing on January 4, 1910. One was for 30 gross of "Only Cotter setters," to be taken 5 gross or more at a time, during 1910. The other was for 2,000 auto spring repairers, to be taken in lots of 50 or more at a time, during 1910.

The order for "Only Cotter setters" called for 5 gross (720) to be shipped as soon as possible. They were shipped in February, and the bill for them, amounting to \$180, was paid in April. Five gross more were shipped in April, and the \$180 due for them was paid in installments in July. Five gross more were shipped in July. On account of the \$180 due for them, \$150 was paid in November and December; and \$30 remained due at the time of the bankruptcy, being the amount for which the referee has allowed the creditor's claim.

Fifteen gross more remained to be shipped under the order. They were never shipped, because the bankrupt, in a letter dated October 5, 1910, asked the cancellation of both orders, and gave notice that no more goods consigned by the creditor would be received. It is not claimed that the evidence affords justification for the cancellation of this order. The only questions to be considered are whether the creditor has proved the claim for damages by reason of the repudiation of the order, and, if so, to what amount? At the contract price, \$540 would have become due for the remaining 50 gross, if shipped, and they would have cost the creditor \$259.22. It contends that the difference of \$280.78 should have been allowed it, in addition to the unpaid \$30. The questions here raised are further considered below.

The order for the auto spring repairers directed 50 to be shipped immediately. They were shipped in January, and \$110 due for them was paid in March. Fifty more were shipped in July, and the same amount paid for them in October. On October 5th, 1900 remained to be shipped, when the bankrupt sent its notice refusing to receive any more goods. The bankrupt contends that the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

creditor so far failed to comply with certain agreements in connection with the order as to justify its repudiation of the contract and refusal to take the remaining 1,900.

[1] The auto spring repairers were manufactured by the creditor under a patent owned by it. On the back of the bankrupt's order for them was printed the following, under the heading "Warning to the Trade":

"Auto Spring Repairers.

"We are advised by our patent counsel that this patent covers broadly our type of spring repairer, now well known to the trade and to the public, and that all spring repairers of this type made by others are infringements upon our patent.

"We have recently brought suit in the United States Circuit Court for the Southern District of New York against the Manhattan Storage Co. and 35% Automobile Supply Co., maker and seller of one infringing spring repairer, and intend to proceed vigorously against all others who make or sell infringing articles.  
Auto Spring Repairer Company."

The referee has construed this notice as an undertaking by the creditor to protect its customers against infringers and as a guaranty against infringing competition. I am unable so to regard it. It seems to me to do no more than announce to the public the creditor's claim that other spring repairers infringed its patent and its intention to proceed with vigor against all who should make or sell them. I am unable to see in the notice any guaranty against such infringement as might continue notwithstanding the litigation threatened, nor does the evidence seem to me to warrant a finding either that the creditor had no intention of prosecuting infringers with vigor or failed to do so. Nor do I find sufficient reason in the evidence for the conclusion that any such failure on the creditor's part was the real cause of its attempted cancellation of the order. After endeavoring in vain in several letters to persuade the creditor to cancel, because it had found itself unable to pay for or sell more of the goods ordered, it seems to me to have repudiated the order on October 5th as a last resort, without any very distinct statement of the reasons whereon it relied.

Four thousand one hundred and eighty dollars would have been due at the contract price for the 1,900 spring repairers not shipped, and to have shipped them would have cost the creditor \$872.30. The difference of \$3,307.70 is claimed as damages.

The creditor did not itself manufacture the spring repairers. It bought from others the various parts constituting them, and assembled them in its own place of business for shipment. It never did actually make up ready for shipment the whole quantity of 1,900. A very much smaller quantity was all it had on hand when the bankrupt refused to take any more. All these it sold to other parties, and at no reduction, so far as appears, from the price agreed on with the bankrupt. The same facts are true as to the 15 gross of "Only Cotter setters" which it expected the bankrupt to take. Its claim for damages, therefore, is a mere claim for the profit it would have made, if permitted to fill both orders in full.

The referee has held that the claim for these anticipated profits is too remote and speculative, and for that reason has declined to allow them as damages.

In *Hinckley v. Pittsburg Steel Co.*, 121 U. S. 264, 275, 7 Sup. Ct. 875, 879 (30 L. Ed. 967), the facts were very similar to those here involved. The plaintiff was allowed to recover the difference between the contract price and the cost of making and delivering the goods contracted for. It is said:

"Wherever profits are spoken of as not a subject of damages, it will be found that something contingent upon future bargains, or speculations, or states of the market, are referred to, and not the difference between the agreed price of something contracted for and its ascertainable value or cost."

[2] It cannot be said in this case that the seller's profits under the contract were not within the intent of the parties when they agreed. The bankrupt cannot have supposed its orders were to be filled without profit to the creditor. On the contrary, it knew that the creditor claimed the exclusive right to sell them, and was presumably expecting to derive the benefit of its monopoly from filling orders like these. The general rule as to the seller's damages under circumstances like these, when the buyer has broken a contract for goods to be furnished at an agreed price, is thus stated by the Court of Appeals for the Eighth Circuit, in *Kingman v. Western Mfg. Co.*, 92 Fed. 486, 490, 34 C. C. A. 489, 493:

"The measure of damages upon articles covered by such a contract for which no materials had been bought and upon which no work had been expended at the time of the breach, is the difference between the amount it would cost the manufacturer to make and deliver them and the contract price, if that price is greater than the cost."

I am unable to see anything in the facts of this case sufficient to remove it from the operation of this rule. It does not appear that, when the bankrupt repudiated the orders it had given, there were any goods in the creditor's hands which had been specifically devoted to filling these orders and prepared for shipment under them. Had it so appeared, the market value of such articles might have to be taken into account. The definite refusal of the bankrupt to receive any more of the goods made it unnecessary for the creditor to ship, or offer to ship, before the end of 1910, all the goods not previously shipped under the orders before it could claim damages.

I am obliged to hold, on the facts presented, that the creditor has established its right to the allowance of the profits referred to as part of its claim. See the cases above cited; also *River Spinning Co. v. Atlantic Mills (C. C.)* 155 Fed. 466, decided in this circuit in 1907; *Jackson v. Washington, etc., Co.*, 35 App. D. C. 41 (1910). The referee's order disallowing this part of the claim is, therefore, overruled. The total amount for which the claim is to be allowed will include the \$30 unpaid for goods delivered, and also the profit upon the goods remaining to be shipped under both orders, in all \$3,618.48.

W. H. COE MFG. CO. et al. v. AMERICAN ROLL GOLD LEAF CO. et al.  
(District Court, D. Rhode Island. September 28, 1912.)

No. 2,746.

1. PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—MACHINE FOR PACKAGING DECORATIVE FILMS.

The Coe patent, No. 580,817, for a machine for packaging decorative films, designed for winding up on a supporting strip of paper and into a package roll a continuous strip of gold leaf or similar metallic film entirely by mechanical action, was not anticipated, discloses patentable invention, and is entitled to a fairly broad range of equivalents; also *held* infringed.

2. PATENTS (§ 235\*)—INFRINGEMENT—SIMILARITY OF OPERATION—"AUTOMATICALLY."

The word "automatically" may properly be applied to a mechanism which is hand-actuated, as well as to mechanism which is actuated by other mechanism, where, when so actuated, the parts co-operate and perform their functions automatically.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 371; Dec. Dig. § 235.\*

For other definitions, see Words and Phrases, vol. 1; pp. 649, 650.]

3. PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—PACKAGE ROLL OF METALLIC LEAF.

The Coe patent, No. 848,883, for a package roll of metallic leaf, *held* valid and infringed.

In Equity. Suit by the W. H. Coe Manufacturing Company and others against the American Roll Gold Leaf Company and others. On final hearing. Decree for complainants.

Tillinghast & Collins and Wm. R. Tillinghast, all of Providence, R. I., for complainants.

Horatio E. Bellows, of Providence, R. I., for defendants.

BROWN, District Judge. The bill charges infringement of two patents to Walter H. Coe—No. 580,817, April 13, 1897, for a "machine for packaging decorative films"; and No. 848,883, April 2, 1907, for a "package roll of metallic leaf."

[1] The machine of patent 580,817 is designed for winding up, upon a supporting strip and into a package roll, a continuous strip of gold leaf or similar metallic film. The continuous strip of gold leaf is formed from a succession of overlapping gold leaves.

In the prior art is the Wright patent, 289,486, December 4, 1883, which shows a continuous strip of gold leaf rolled up upon a supporting strip. Sheets of gold leaf were placed by a hand tool upon a supporting strip of paper, the edges were slightly overlapped, then pressed together, and the strips of paper and gold were then rolled up together into a package roll.

The Wright apparatus was simple, consisting of two rolls with a pad between them. From a supply roll the paper was carried along the pad to a second roll. The gold leaf was applied by the operator to the paper while on the pad, and then rolled up together with the paper upon the second roll; the operation being repeated until the package roll was of the desired size. The Wright patent

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

suggests that the paper be dusted with powder before the gold leaf is laid upon it.

Mr. Livermore, complainants' expert, states that the machine of the Coe patent was devised—

"to perform the operation of transferring sheets of gold from the book to the paper-supporting strip, and to apply them in proper lapped position on said strip, without requiring any hand manipulation whatever of the gold leaf other than what may be involved from time to time in smoothing out some portion of the sheet which may have failed to adhere properly to the paper when applied thereto by the machine."

In the Coe machine there is a supply roll for a strip of mounting paper, to which the metal film is to be applied, and in which it is to be rolled up, and from which it subsequently may be applied to a surface prepared for gilding. As the strip is led off from the supply roll, there is provision for giving one surface a slight covering of powder to render it nonadhesive relative to the gold leaf; the other surface being dragged over a bar of wax to render it slightly adhesive, so that the gold leaf will adhere thereto. After one surface has thus been rendered adhesive and the other non-adhesive, the strip is carried around a cylinder or pressing roller with its nonadhesive surface against the cylinder and its adhesive surface exposed. The book of films or gold foil sheets is placed upon a supporting table. The uppermost paper leaf of the book is turned back, exposing the gold film. At each cycle of operation of the machine the pressing roller and other rollers will draw off from the supply roll a part of the mounting strip, and wind another equal portion into the package roll. At the same time the table will be yieldingly pressed upward toward the pressing roller, whereby the exposed sheet of gold will be pressed against the mounting strip on the pressing roller and pressed into contact with said strip as it advances in feeding action. The table is then returned to its original position, the operator turns another paper leaf and exposes the next gold film sheet, and the operation is repeated.

To form a continuous strip the sheets of gold must be properly lapped. At the end of the feed movement the sheet already applied is left in just the proper position to engage with the forward edge of the next sheet. The sheets of foil are each properly lapped upon the one previously applied without hand manipulation of the leaf. The movements of the table and pressing roller are positively fixed by the mechanism, and these movements determine the relative positions of the rear edge of the leaf already applied to the forward edge of the sheet to be applied.

The complainants' expert, Mr. Livermore, says upon a review of the evidence as to the prior art:

"The machine of the Coe patent was the first example of a machine of any kind for performing the work of transferring metallic film sheets from a book to a supporting strip of indefinite length and forming a rolled-up package strip of such paper with foil mounted upon one side thereof; said work being performed entirely by the machine elements, without any hand manipulation of the foil whatever in the normal regular operation of producing material. \* \* \*"

In my opinion this statement is accurate and fully justified by the evidence in the record. The inventor, therefore, was entitled



to generic claims and to cover a fairly broad range of equivalents.

As each brief discusses claims 1 and 4 as similar claims involving the same questions, we may follow that course.

"1. In a machine for winding decorative films into a package roll, the combination, with means for drawing the strip forward, of the pressing roller, the table for holding the book of decorative films, and means for automatically causing the lapping contact of the decorative films upon the strip, substantially as described."

"4. In a machine for winding decorative films into a package roll, the combination with the pressing roller, the table for supporting the book of films, and means for automatically lapping the films upon the strip, of the stationary roller, and the movable roller, adapted to hold the winding package in contact with the pressing roller and the stationary roller, substantially as described."

Claim 1 has as an element "means for automatically causing the lapping contact of the decorative films upon the strip, substantially as described." Claim 4, "means for automatically lapping the films upon the strip," etc.

The relative positioning of the two films is produced positively by the relative travel of the table and roll. There is a concurrent travel of table and pressing roll for a distance equal to the length of the leaf less the length of the lap of the two films. The lapping operation includes the bringing of the edge of one film over the edge of the other and the bringing of the two edges into contact, so that they will adhere and form a continuous strip.

The principal question of infringement relates to the lapping operation, and to a comparison of the means employed by complainants and defendants for that purpose.

In the complainants' machine the table that supports the book of films has both a lateral movement, whereby the edge of the new sheet is brought under the edge of the preceding sheet, and an upward movement, which brings the edges in contact. These movements are machine controlled.

The defendants employ a table which is pivoted and is tilted by the hand of the operator, carrying the new film to the preceding film on the pressure roll by an angular movement that is both forward and upward. This is the exact mechanical equivalent of complainants' lateral and upward movement.

As in complainants' machine the relative positioning of the films is produced positively by the mechanism of the machine. The defendants' table is positively controlled in its angular movement forward and upward by the pivots upon which it moves. The operator has only to press downward the rear end of the table, and can trust entirely to the machine itself to guide and carry the advancing leaf of gold into proper contact with the preceding film.

[2] The defendants lay great stress upon the manual operation of pressing down the rear end of the table. This, it is said, is not an "automatic" operation. The defendants' combination, nevertheless, includes means for causing the lapping contact of the films upon the paper strip. These means are mechanical means, which are not mere hand tools, though the hand may be employed to furnish power to operate them. The hand power is applied at a time when the strip upon the pressure roll is in a suitable position for

lapping engagement with the succeeding strip. The roll, it is said, merely serves as a dead abutment. But it not only co-operates with the table when the table brings the new film in contact with the preceding film to press the two films together, but it automatically presents a film in proper position for engagement with a new film. It is apparent that what the operator does in the lapping operation is very different from the manipulation of a hand tool.

The word "automatically" may properly be applied to mechanism which is hand-actuated, as well as to mechanism which is actuated by other mechanism. It may mean "self-regulating," as well as self-moving. The operator may do something, and the machine may do the rest. So far as the mechanism does what the operator himself was obliged to do in the prior art, so far as machine parts act in accordance with the law of their organization, and do what otherwise the operator must do himself, so far the word "automatically" may be properly applied.

"It may as well be applied to any part of the patented machine as to the whole of it, when necessary to give full effect to the invention." *Bresnahan v. Tripp Giant Leveller Co.*, 102 Fed. 899, 43 C. C. A. 48.

The defendants' machine has means for automatically controlling the position of the film that is on the roll, and also means for carrying the succeeding film into lapping contact with the preceding. The latter means, while hand-actuated, do not correspond to and are not controlled in direction by the movements of the hand. The hand moves down, and this movement is "automatically," by the law of the machine, converted into a forward upward movement, which produces the lapping contact in co-operation with the roll, which has been machine-controlled in its movements. The questions which the defendants raise upon the word "automatically" are rather verbal than substantial. I agree with the opinion of complainants' expert, Mr. Livermore, that the machines differ only in minor mechanical details of subsidiary features not referred to in the claims in suit.

#### Claims 2 and 3.

"2. In a machine for winding decorative films into a package roll, the combination, with means for winding up the strip and film in a package roll, of a bar of wax or other suitable material, in contact with which the strip is drawn, to receive a coating adapted to secure the proper adhesion of the film to the strip, and means for applying the film to the strip, substantially as described.

"3. In a machine for winding decorative films into a package roll, the combination, with means for drawing the strip forward, of a pad for spreading the powder upon one side of the strip, and a bar of wax or other suitable material, in contact with which the strip is drawn to receive a coating upon the opposite side of the strip, which is adapted to secure the proper adhesion of the decorative film thereto, substantially as described."

These claims include elements which operate upon the paper to make it adhesive or nonadhesive. The bar of wax is employed to make one side of the paper adhesive in order to secure the adhesion of the gold.

In defendants' machine there is employed, in a position corresponding to that of complainants' bar of wax, a brush of stiff wire. Ac-

cording to the preponderance of evidence, this serves to give a slight roughness to the surface of the paper, thus aiding the adhesion of the gold film to one side of the paper. The presence of this wire brush for the performance of any other function is not satisfactorily shown by the defendants.

Claim 2 is for a combination which includes means for applying the film to the strip, as well as means for preparing the strip to make it adhesive. In a patent to Coe, No. 848,883, is a disclosure that a strip roughened on one side may be employed, instead of a strip waxed on one side. The substitution of means for roughening, instead of means for waxing, seems merely the substitution of equivalent means of rendering the surface adhesive. The bar of wax and the wire brush are similar in location. They are alike, in that they both serve to make one side of the paper adhesive. The cylindrical bar of wax is not merely material used in making the product, but serves as a mechanical support to a removable surface, just as a metal inking roll serves to support and to present ink in a printing press. It has a mechanical function of presenting the adhesive to the paper at the proper time. Whether this roll is all of wax, or of metal covered with wax, would be immaterial.

Under the principles stated by Judge Colt in *Edison Electric Light Co. v. Boston Incandescent Lamp Co.* (C. C.) 62 Fed. 397, and by Judge Taft in *McCormick Harvester Mach. Co. v. C. Aultman & Co.*, 69 Fed. 371, 386, 16 C. C. A. 259, I am of the opinion that the defendants do not escape infringement of claim 2 by the substitution of the wire brush for the bar of wax.

Claim 3 includes a pad for spreading powder upon one side of the strip, as well as the bar of wax, but omits the means for applying the film to the strip. It thus seems to relate merely to the function of preparing the paper, so that one side may be adhesive and the other nonadhesive. The defendants cite nothing that anticipates this claim. What has been said concerning the bar of wax in relation to claim 2 is also applicable to claim 3.

Patent 848,883, for Package Roll of Metallic Leaf.

[3] The single claim is:

"A package roll of metallic leaf, having its supporting strip provided with a smooth surface at one side, and a comparatively rough surface at the other, whereby the metallic leaf may be suitably held for delivery upon unwinding the roll."

The patentee thus describes the invention:

"It is the object of my invention to dispense with the use of both adhesive and nonadhesive materials in connection with the supporting strip of a package roll; and my invention consists in a package roll of metallic leaf in which the supporting strip is provided with a smooth surface upon one side and comparatively rough surface upon the other side, whereby the metallic leaf will be unequally acted upon by the surface of the said strip, and the package roll may be unwound without liability of displacing the fillet of metallic leaf from its proper connection with the unwound strip, and the troublesome employment of wax or powder will be avoided."

The first question is whether the specific character of the comparatively adhesive and nonadhesive surfaces of the supporting strip in-

volves a patentable difference from the package rolls of the prior art. The specification states:

"The metallic leaf, when unwound from the package roll A, will be properly held on the said supporting strip by the natural tendency of the metallic leaf to cling to the rough side and leave the smooth side thereof."

The citations from the prior art do not describe this specific construction, which is in the line of simplification in structure as well as of manufacture.

The prior use of adhesives and nonadhesives shown in the machine patent in suit and in other patents to Coe, No. 508,869, November 14, 1893; No. 548,113, October 15, 1895; No. 668,575, February 19, 1901—and his means for dispensing with adhesives in his patents No. 678,162, July 9, 1901, and No. 819,001, April 24, 1906, tend to show that, after the generic invention of a roll with a supporting strip with adhesive and nonadhesive sides, there was still a practical difficulty in finding the best means for that purpose.

Under such conditions, and in the absence of evidence to anticipate, the court is unable to say that the change from the prior art was obvious and did not involve patentable invention. The patentee is entitled to the presumption of validity which attaches upon the issue of a patent.

Upon a hearing which included the operation of the machines before the court, and upon a consideration of the briefs and record, I am of the opinion that both patents are valid, and that the defendants infringe claims 1, 2, 3, and 4 of patent No. 580,817, and the single claim of patent No. 848,883.

A draft decree may be presented accordingly.

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#### PERFECTION COOLER CO. v. CORDLEY et al.

(District Court, D. Massachusetts. August 19, 1912.)

No. 83.

#### PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—WATER-COOLER.

The Newell patents, No. 895,781, for a water-cooler, and No. 895,782, for an improvement thereon, are meritorious, and represent an advance in the art, in that they cover a new type of water-cooler, disclosing patentable novelty and invention; also held infringed.

In Equity. Suit by the Perfection Cooler Company against Henry G. Cordley and others. On final hearing. Decree for complainant.

A. S. Pattison, of Washington, D. C., James A. Tirrell, of Boston, Mass., and Livingston Gifford, of New York City, for complainant.

Ellis Spear, Jr., of Boston, Mass., and A. P. Greeley, of Washington, D. C., for defendants.

COLT, Circuit Judge. This is a suit for infringement of two patents granted to Isaiah Newell for improvements in water-coolers. The first patent, No. 895,781, was applied for July 22, 1902,

and issued August 11, 1908. The second patent, No. 895,782, was applied for September 26, 1903, and issued August 11, 1908.

The first patent is for a new type of water-cooler, and the second patent is for an improved form of this type.

The delay in the issuance of these patents was caused by interference proceedings, in which priority of invention was awarded to Newell. *Rose v. Clifford*, 31 App. D. C. 195, 197 (1903).

In the opinion in these interference proceedings, the Court of Appeals thus defines the invention:

"The invention here in issue relates to an improvement on water-coolers, having a receptacle for water within a chamber for ice, so arranged that the receptacle containing the water is surrounded with ice. The water is drawn from the receptacle by means of a pipe, to which a faucet is attached. The receptacle is supplied with water from a bottle filled with water, and inverted so that the mouth of the bottle extends through a funnel, in which the inverted bottle rests, into the receptacle. The water passes from the bottle into the receptacle until it rises to a level with the mouth of the bottle, when the liquid seals the mouth of the bottle. When water is drawn from the faucet, the water is lowered in the receptacle until the air is permitted to enter the mouth of the bottle, when the water again flows into the receptacle and so continues until it rises to the mouth of the bottle and seals it."

In *Cole v. Cordley*, 167 Fed. 542, 93 C. C. A. 220, the Circuit Court of Appeals for the Second Circuit, in referring to the water-cooler described in the first Newell patent, speaks of it as "Newell's fundamental invention," and it describes the Newell type of cooler as one in which a large glass bottle containing pure, potable water is inverted upon a receptacle containing ice, which surrounds a conduit for the water located in the receptacle. In this way the water is kept cool, and may be drawn off by a faucet, in which the conduit terminates, at the bottom of the receptacle. In short, the water, after being cooled, is delivered to the drinker direct from the bottle.

There is no doubt upon this record that Newell invented a new type of water-cooler, which has met a public want, and which has gone into extensive use.

While the problem which Newell undertook to solve was a comparatively simple one, the evidence shows that he only attained success after repeated efforts: and it further appears that, although the Newell structure described in his first patent is a simple one, a number of patents have been issued for improvements or modifications of that structure; the first of these improvements being embodied in the second Newell patent in suit.

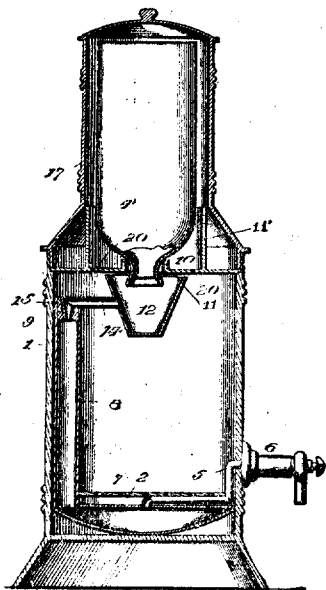
In his first patent, No. 895,781, Newell describes his invention as follows:

"My invention relates to improvements in water-coolers, and pertains to a construction which is adapted for users of mineral and distilled waters, whereby the same can be used directly in the cooler from the original package, bottle, or demijohn; the construction being simple for enabling the bottle to be placed in position or removed, and for the purpose of inserting ice within the cooler.

"By the use of my invention, the users of mineral and distilled waters are enabled to use the water directly from the original package, and thus absolutely prevent any contamination of the water by coming in contact

with the ice, or becoming contaminated by disease germs in any manner whatsoever, which insures the user that he is receiving the mineral or distilled water in its original pure condition, and at a proper cool temperature for pleasant drinking."

The following drawing from the patent illustrates the Newell structure:



have an inner rubber lining.

"Removably placed in the upper end of the body portion, is a cover or bottle supporting member 10, and this member has a centrally upwardly projecting flange 11, forming a flange opening for the neck of the original package, bottle, or demijohn receptacle 4 and an outer upwardly-extending flange 11', which surrounds a portion of the bottle as shown. Placed immediately below the flange opening 11 is a receptacle 12, and this receptacle 12 carries a pipe 14 having a tapered end 15, fitting snugly and water-tight the tapered opening 9 at the upper end of the pipe 8, but which is removable therefrom. The location of the receptacle 12 is such that the mouth of the bottle is inserted within the receptacle, as clearly shown in Figs. 1 and 2, and serves as an automatic feed for the water from the bottle or demijohn 4 as it is being drawn through the faucet 6.

"A bottle protecting case 17 is removably placed over the upper end of the main or body portion 1 of the cooler, and forms a protection for the bottle, and as a finish to the cooler.

"By means of a cooler of this form, less ice is required, and, as before stated, contamination of the pure water absolutely prevented. There are no valves or siphon action in this device, and it is so simple that any one can use or operate it, and it enables the user to obtain water from the original package, which is an absolute assurance of obtaining the water in its original condition.

"The action of automatically cutting off the flow of water from the bottle 4 is well understood, and operates by the water in the funnel closing the mouth of the bottle, thus preventing the flow of air into the bottle, which

In describing this structure the specification says:

"Referring to the drawings, 1 is the main or body portion of the cooler, and in which the ice is placed. Located within the body portion is a water receiver, which extends upward to near the top thereof, and, as here shown, consists of either a diaphragm 2 as illustrated in Fig. 1, or a coil of pipe 3. As here shown, the pipe 8 extends upward to near the top of the body portion 1, and communicates with a receptacle 12. The water from the original package, bottle, demijohn, or other vessel 4, passes therefrom to the receptacle 12, thence through the pipe 8 and to the coil or diaphragm, at the bottom of the body portion 1.

"In the two forms of construction here shown for carrying out the invention, the cooled water is dispensed from either the coil pipe form 3, or the diaphragm form 2, through a pipe 5 which extends through the body portion 1 of the cooler, and carries a suitable faucet 6 at its outer end. The upper end of the pipe 8 is suitably supported at the inner side of the body portion, and is provided with a conically shaped opening 9, constituted of block tin, which may or may not

prevents the flow of water therefrom, and it may aptly be termed a pneumatic automatic cut-off."

It is apparent from this citation from the specification that, while the main features of the Newell structure are comparatively simple, the structure as a whole involved the combination of quite a large number of separate parts or elements.

Of the claims in issue, Nos. 12, 13, 14, and 15, it is sufficient to cite claim 12:

"A device for delivering and cooling bottled water, the same consisting in the combination of a cooling-chamber adapted to contain a cooling agent and provided with an opening in its upper part through which the neck of the inverted bottle passes, a water receptacle upon which said cooling agent acts to cool the contents thereof and provided with an opening into which the head or neck of the inverted bottle projects, a bottle placed with its open mouth extending through said openings in the cooling-chamber and said receptacle and projecting downwardly into said water-receptacle in position to be sealed by the water in said receptacle when said water rises therein to substantially the level of the mouth of the bottle to stop the flow therefrom and to be unsealed by said water when its level is lowered in said receptacle and thereby replenish the latter, and means for drawing water for use from said water-receptacle, whereby successive portions of the water in the bottle are automatically delivered to said water-receptacle and cooled therein, such delivery taking place at times determined by the drawing of water from said water-receptacle for use, substantially as and for the purpose set forth."

The second Newell patent, No. 895,782, is for an improved and more simple form of the same type of water-cooler as is described in his first patent. This water-cooler is illustrated in the following drawing from the patent:

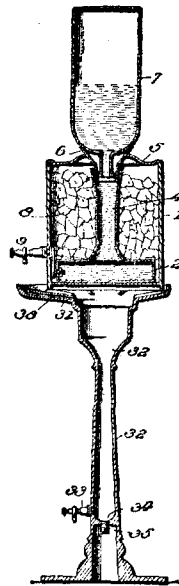
In describing the important features of this structure the specification says:

"In carrying out my invention, I provide a suitable receptacle or body portion 1, which may be made of any suitable material. Located within this receptacle is a water-containing vessel 2. This vessel 2 is principally composed of glass, as being the best suited for the purpose, and the particular formation of this vessel is one of the essential features of my present invention. It will be observed that this vessel 2 is constructed with a lower and large portion 3, which preferably almost fills the bottom portion of the main vessel 1. Projecting from the enlarged portion 3 is an elongated neck 4, forming a passageway, and the upper end thereof is preferably about in the same horizontal plane as the top of the main vessel 1.

\* \* \* \* \*

"The main vessel is provided with a cover 5, and this cover has a central opening provided with an upwardly-flaring flange or member 6, which projects above the top and preferably below the top, and into the mouth or upper end of the neck 4 of the auxiliary vessel, as clearly illustrated in Fig. 2. The flange 6 forms a support for the bottle 7 containing the pure water, and which is the original package. Placed within the main vessel 1, around the neck and upon the lower enlarged portion of the auxiliary vessel, is a suitable quantity of ice 8.

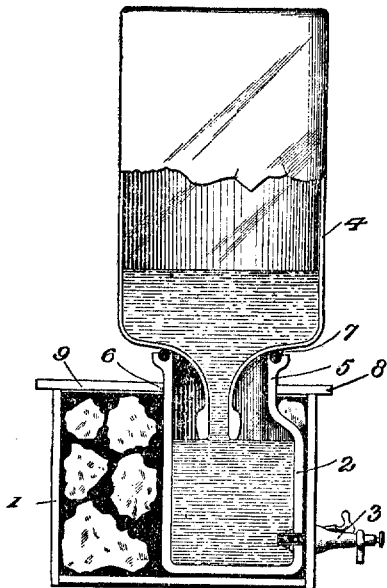
"A suitable faucet 9 passes through the main vessel 1 and is in communication with the enlarged portion 3 of the auxiliary vessel."



With respect to this patent, claims 1, 3, and 7 are in issue. Of these claims it is only necessary to cite the first:

"A cooler comprising a main vessel, an auxiliary vessel placed therein and of a smaller area than the main vessel to permit ice to be placed there-around, the auxiliary vessel extending to the upper portion of the main vessel and adapted to receive the mouth of the bottle, a support for the bottle arranged exterior in respect to the main vessel, and an outlet connection connected with the lower portion of the auxiliary vessel and passing through the main vessel."

The defendants' cooler is illustrated in the following drawing:



It is apparent, upon an examination of the defendants' cooler, that it is like the Newell cooler, with some immaterial changes in form. The main difference in form between the defendants' structure and the structure of the second Newell patent is that in the former the water receptacle projects above the top of the main vessel and forms the support upon which the bottle rests, whereas the Newell structure is provided with a cover having an upwardly extended flange, which forms the support for the bottle. This extension, however, of the defendants' receptacle, performs the same function as the Newell cover, and is therefore clearly an equivalent.

If we take the defendants' structure, and compare it with claim 12 of the first Newell patent and claim 1 of the second Newell patent, we find that it contains the combination of elements which form the subject-matter of these claims, or what is manifestly the equivalent of those elements; and the same may be said of claims 12, 13, and 15 of the first Newell patent and claims 3 and 7 of the second Newell patent.

Upon the question of infringement, therefore, we entertain no doubt.

The main defense to this suit which was argued before the court, and which is discussed in the briefs, is that the Newell patents are void for want of invention in view of the prior art. In support of this defense there are introduced in evidence numerous prior patents in the water-cooler art and in analogous arts.

While it is true that there is found in the prior art every element of the Newell cooler, yet it is equally true that the prior art fails to disclose any structure which contains the combination of elements which constitute the Newell cooler. The Newell patents describe a type of cooler which is not found in any prior patent or prior publication.



Under the circumstances, it would serve no useful purpose to review the prior art, and compare these old devices with the Newell cooler.

Upon the general question of the prior art as bearing on the question of invention, it is sufficient to say that Newell invented a new type of water-cooler, that prior efforts in this direction had proved unsatisfactory, that this new type of cooler met a public demand, and that it has gone into extensive public use.

In view of the evidence in the present record and the decision of the Court of Appeals in *Rose v. Clifford*, *supra*, it seems to me that the complainant has fixed the date of the Newell inventions at a time prior to the Rose invention, which was in interference in that case, and which is covered by his patent, No. 715,609, dated December 9, 1902.

With respect to the so-called Estes cooler, it is clear that the evidence is not sufficiently definite and certain to take this alleged anticipation out of the list of abandoned experiments.

Our conclusion is that the inventions covered by the Newell patents in suit are meritorious, that they represent an advance in the water-cooler art, in that they cover a new type of water-cooler, that they are not void for want of patentable novelty, in view of the prior art, and that the defendants' cooler infringes the claims in issue.

A decree may be entered for the complainant.

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BOSTON TOWBOAT CO. v. JOHN H. SESNON CO.

(District Court, W. D. Washington, N. D. August 24, 1912.)

No. 2,055.

CORPORATIONS (§ 499\*)—CAPACITY TO SUE—WASHINGTON STATUTE—EFFECT OF FAILURE TO PAY LICENSE FEE—COUNTERCLAIM.

Rem. & Bal. Code Wash. § 3715, which provides that a corporation which has not paid its annual license fee last due, imposed by the preceding section, shall not be permitted to commence or maintain any action or suit in the courts of the state, as construed by the Supreme Court of the state, does not deprive a corporation which is in default for non-payment of such fee of the capacity to defend an action, and where, in an action commenced by it, the defendant pleads its incapacity to sue and also a counterclaim, the court has jurisdiction to adjudicate upon the counterclaim, and, if established, to allow it as a set-off against plaintiff's demand, where defendant prays for such relief, although not to render an affirmative judgment in favor of the plaintiff for any excess.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1910, 1911, 1913-1919; Dec. Dig. § 499.\*]

At Law. Action by the Boston Towboat Company against the John H. Sesnon Company. On demurrer by plaintiff to defendant's second affirmative defense. Overruled.

Piles & Howe and E. C. Hanford, for plaintiff.

William Gorham, for defendant.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

CUSHMAN, District Judge. This cause is now before the court on plaintiff's demurrer to the defendant's second affirmative defense. The complaint was filed in this court in November, 1911, and is one to recover \$3,446.80, which it is alleged the defendant collected at Nome in charges for freight earned in 1907 by the steamship Hyades, which ship and freight charges belong to plaintiff.

The second affirmative defense of the answer sets up: That, before the bringing of suit in this court, this controversy had been terminated in the courts of the state of Washington. That, in 1908, plaintiff brought suit against the defendant for \$4,269.69, in the superior court of King county, Wash., a court of general jurisdiction. That this defendant appeared and answered, setting up a number of counterclaims and offsets, aggregating \$3,446.86. That plaintiff, by reply, put in issue the allegations of the various counterclaims. That the answer was amended to allege that the plaintiff was a foreign corporation. "That, at the time of the commencement of the action, plaintiff had not, and has not since said time, paid its annual license fees to the state of Washington, due at the time of the commencement of the action."

These allegations were put in issue by a further reply: That the cause was tried in the superior court, without a jury; the court finding the defendant indebted to the plaintiff in the amount prayed for in the complaint, \$4,269.69, of which amount, during the progress of the trial, \$822.89 was paid the plaintiff, leaving a balance due the plaintiff of \$3,446.80. That the court further found in favor of the defendant upon its counterclaims and set them off against plaintiff's recovery to the amount of \$3,446.86. That the court further found and concluded that the plaintiff was a foreign corporation; that it had not paid its license fee, as alleged in the answer; that therefore the plaintiff was without legal capacity to sue; that, but for the latter finding and conclusion, the plaintiff would be entitled to judgment for costs. The action was dismissed with costs to the defendant. That the plaintiff appealed to the Supreme Court of the state of Washington from the judgment of dismissal, upon which appeal the Supreme Court, finding no error, rendered an opinion affirming the judgment of the lower court. That plaintiff filed in the Supreme Court a petition for a rehearing, upon the ground that the court was without jurisdiction to decide the case upon the merits, after deciding that the action could not be commenced or maintained, in the courts of this state, and that so to do, and to enter judgment thereupon, was to take appellant's property without due process of law and against the provisions of the fourteenth amendment to the Constitution of the United States. That the petition for rehearing was thereafter denied and judgment rendered affirming the decision of the lower court.

The argument upon the demurrer has covered a wide range; the plaintiff's main contention being: That the Supreme Court, necessarily, first determined that the plaintiff was without capacity to sue. *Port Blakeley v. Springfield Ins. Co.*, 59 Wash. 501, 110 Pac. 36, 140 Am. St. Rep. 863. That, having so decided, it thereby ousted itself

of jurisdiction to consider the cause upon the merits. That the only judgment that it had power to make was one of dismissal without prejudice. That any attempted ruling upon the merits was without jurisdiction, and its decision upon the same a mere nullity for all purposes. *Black on Judgments*, vol. 2, par. 713; *Bunker Hill & Sullivan Min. & Concentrating Co. v. Shoshone Min. Co.*, 109 Fed. 504, 47 C. C. A. 200; *Robertson v. State*, 109 Ind. 79, 10 N. E. 582, 643; *Parker v. State*, 133 Ind. 178, 32 N. E. at page 845, 18 L. R. A. 567; *Elliott v. Peirsol*, 1 Pet. 328, 7 L. Ed. 164; 11 Cyc. 702 K (3); *Parker v. State*, 133 Ind. 178, 32 N. E. p. 845, par. 5, 18 L. R. A. 567; *Black, Judgments*, vol. 1, par. 278; *Armour v. Howe*, 62 Kan. 587, 64 Pac. 43; *Risley v. Phenix Bank*, 83 N. Y. 337, 38 Am. Rep. 421; *Thompson v. Whitman*, 18 Wall. 457, 21 L. Ed. 897; *State of Rhode Island v. Com. of Mass.*, 12 Pet. 657, 9 L. Ed. 1233; *Wilcox v. Jackson*, 13 Pet. 511, 10 L. Ed. 264. In view of the conclusion reached, it will not be necessary to decide many of the matters for which contention has been made.

The affirmative defense shows, if true, that, upon the trial in the superior court, the plaintiff was by the court allowed all that it asked in its complaint; but that there was set off against it the amount of the counterclaims sued for by the defendant. After all, the only injury which has been suffered by the plaintiff is the judgment upholding the counterclaims. The question involves the construction of a state statute. The interpretation given it by the Supreme Court of the state is binding upon this court.

The act (section 3714, Rem. & Bal. Code) requires the payment of an annual license fee by corporations. Section 3715 of the same Code provides that:

"No corporation shall be permitted to commence or maintain any suit, action or proceeding in any of the courts of this state, without alleging and proving that it has paid its annual license last due."

Under this act it has been held that, though a corporation may have no capacity to sue, still it has a capacity to defend, whether it has paid its license fee or not, and that, for the purpose of defending, it may "maintain" a suit. *Rothchild Bros. v. M. H. Mahoney*, 51 Wash. 633, 99 Pac. 1031.

In the later case of *North Star Trad. Co. v. Alaska Y. P. E.*, 123 Pac. 605, 606, it is said:

"As to the plaintiff, it will be observed that the question of its capacity to sue was raised by the denial of the answer; that no proof of payment of its license fee was made; and that for the purpose of obtaining an affirmative judgment it was not entitled to commence or maintain this action. The record, however, shows that, while the defendant by answer questions plaintiff's capacity to commence and maintain this action, it also by cross-complaint seeks an affirmative judgment for percentages due. To this cross-complaint, the plaintiff stands in the attitude of a defendant, and we cannot hold that it must be turned out of court for want of capacity to sue, thus depriving it of the right to interpose any valid defense it may have to the cross-complaint. Although the statute prohibits a defaulting corporation from commencing or maintaining an action, it does not prohibit it from defending an action against it to the extent at least of any affirmative claim prosecuted by its adversary. If a corporation could not be sued because of nonpayment of its license, it might avoid payment of its just

obligations and defraud its creditors by refusing to pay the license. On the other hand, if it could not defend an action, it might be subjected to unauthorized and unjust judgments. A corporation, even though in default for its license fee, should be permitted to defend an action against it to the extent of the demand made by its adversary, although it should not be permitted to obtain an affirmative judgment, other than an order of dismissal. In this action, plaintiff comes into court without previous payment of its license fee, while the defendant, although attacking plaintiff's capacity to sue, asks an affirmative judgment against it by cross-complaint. This being true, plaintiff may by denial, set-off, counterclaim, or otherwise, oppose defendant's action, but only to the extent of resisting the cross-complaint. To permit the plaintiff to obtain an affirmative judgment for any excess in its favor would authorize it to commence and maintain an action in violation of the statute."

If the plaintiff had capacity to defend upon the counterclaim, the court's finding and judgment were authorized. If there was any irregularity, it was in giving the plaintiff credit for its claim against the counterclaim. There was no prejudice to the plaintiff in this. The defendant, having prayed in its answer that the amount of its counterclaims be offset against plaintiff's claim, it was the only judgment that could be entered.

Demurrer overruled.

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#### In re HOFFMAN

(District Court, D. New Jersey. October 7, 1912.)

#### 1. WITNESSES (§ 53\*)—HUSBAND AND WIFE—COMMUNICATIONS—STATUTES.

2 Comp. St. N. J. 1910, p. 2222, § 5, provides that, in any trial or inquiry in any suit, action, or proceeding in any court or before any person or committee having authority to examine witnesses, the husband or wife of any person interested therein as a party or otherwise shall be competent and compellable to give evidence, the same as other witnesses, on behalf of any party to such suit, action, or proceeding. *Held*, that where a husband, after wrongfully pledging his wife's bonds for his debt, in order to satisfy her offered to give to her other bonds belonging to him of the same value, she was competent, in bankruptcy proceedings against her husband, to testify as to the conversation had between them at the time of the delivery of such bonds, though at the time of the conversation they were subject to a lien for a loan to the husband, which was not discharged until within four months prior to the institution of bankruptcy proceedings.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 137-141; Dec. Dig. § 53.\*]

#### 2. COURTS (§ 349\*)—FEDERAL COURTS—COMPETENCY OF WITNESSES.

The competency of witnesses in civil proceedings in the federal courts is determined by the laws of the state in which the court is held, under the Conformity Act (Rev. St. § 858, as amended by Act June 29, 1906, c. 3608, 34 Stat. 618 [U. S. Comp. St. Supp. 1909, p. 242]).

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 925; Dec. Dig. § 349.\*]

Competency of witnesses in federal courts following state practice, see notes to *O'Connell v. Reed*, 5 C. C. A. 602; *Hinchman v. Parlin & Orendorf Co.*, 21 C. C. A. 278.]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**3. HUSBAND AND WIFE (§ 45\*)—CONTRACTS—MARRIED WOMAN—PROPERTY RIGHTS.**

3 Comp. St. N. J. 1910, p. 3222, gives to a wife the ownership and control of her personal property as if she were sole, and section 14 declares that nothing therein contained shall enable a husband or wife to contract with or to sue each other, except as previously prescribed. *Held*, that section 14 did not prohibit an exchange of bonds between husband and wife to make good the husband's wrongful pledge of bonds belonging to his wife, nor did it limit the jurisdiction of a court of equity to take cognizance thereof and enforce the wife's right to the bonds acquired by her by virtue of the exchange.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 229-231; Dec. Dig. § 45.\*]

**4. HUSBAND AND WIFE (§ 205\*)—CONTRACTS INTER SE—ENFORCEMENT.**

Though courts of law, in the absence of statutory authority, will not enforce contracts between husband and wife, equity will aid the wife to recover her separate property, which has come into the hands of her husband, and has been retained by him against her consent.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 744, 749-755; Dec. Dig. § 205.\*]

**5. BANKRUPTCY (§ 210\*)—WIFE OF BANKRUPT—RIGHT TO PROPERTY—ENFORCEMENT.**

Courts of bankruptcy are courts of equity, and will aid the bankrupt's wife to recover her separate property, which had come into the hands of her husband, and had been retained by him against her consent, as against the husband's trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 321-323; Dec. Dig. § 210.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of Nicholas W. Hoffman. On review of referee's order adjudging that the title of certain bonds in the possession of the bankrupt's wife was in the trustee, and directing her to turn them over to him. Reversed and remanded.

James L. Griggs, of Somerville, N. J., for Anna C. Hoffman.  
George H. Large, of Flemington, N. J., for trustee.

RELLSTAB, District Judge. Nicholas W. Hoffman was adjudicated a bankrupt on July 14, 1911. On the petition of the trustee, Anna C. Hoffman, the wife of the bankrupt, was ordered to turn over to the trustee two certain bonds, issued by the Dover Gas Company, aggregating in value \$2,000, which the bankrupt had delivered to his wife within four months of the filing of the petition in bankruptcy. The primary question raised on the record is of the admissibility of evidence; and if the rejection of the testimony sought to be introduced, presently referred to, was erroneous, no other question can be considered, as the testimony rejected vitally affects the title to the bonds in question.

[1] The testimony discloses that in the year 1910 the bankrupt was the owner of such Dover Gas Company bonds, and that his wife was the owner of two certain bonds, designated "Middlesex bonds," aggregating the like sum of \$2,000; that both these classes of bonds

were coupon bonds, transferable by delivery; that until the pledging of said bonds, presently to be mentioned, both of said sets of bonds were kept in a box under the control of the bankrupt, which he had deposited with the First National Bank of Clinton, N. J., for safe-keeping; that some time previous to December, 1910, the bankrupt delivered his Dover bonds to such bank as collateral security for the payment of a loan made to him of \$800; that subsequent to the making of such pledge he borrowed from such bank \$2,000, and delivered to it his wife's Middlesex bonds as collateral security; that such latter pledge was made without his wife's knowledge or authority, and she derived no benefit from the loans made thereon; that the first the wife knew of the pledge of her bonds was in December, 1910; that on May 29, 1911, the bankrupt paid off such loan of \$800, and had his bonds (Dover Gas) returned to him, and that he immediately turned them over to his wife in lieu of her bonds (Middlesex); that at the time in December, 1910, when the wife learned that her bonds were held by such bank as collateral security for her husband's debt, she insisted that they be returned to her; and that her husband then offered to give her the Dover bonds for her Middlesex bonds. There was other conversation at that time and subsequent thereto regarding such bonds; but the referee, on objection of the trustee, refused to allow either the bankrupt or his wife to testify to such further conversation, holding that at that time the bank had the title, as well as the possession, of the bonds, and that they were not subject to the control of the husband, and that, as he did not regain either title or possession until within four months of the institution of bankruptcy proceedings against him, such evidence was incompetent.

In this the referee erred. The title to the Dover bonds was still in the husband, and transferable by him, subject only to the bank's lien. *Mitchell v. Roberts* (C. C.) 17 Fed. 776; *Clark v. Equitable L. Ins. Co.* (C. C.) 133 Fed. 816; 31 Cyc. p. 808, c. 3. Having the right to transfer, and being under a legal obligation to return his wife's bonds wrongfully pledged by him, or to render an equivalent thereof, both he and his wife should have been permitted to testify to what took place between them at the time of such offer, that the court might know whether the title to such bonds passed on such occasion. The idea that, because these persons bore the relation of husband and wife, they were incompetent to testify to such transaction is not tenable. Section 5 of the New Jersey act concerning evidence (Rev. 1900, 2 Comp. Stat. N. J. p. 2222) removes the common-law disability of husband and wife to testify in such matters. This section in terms provides that:

"In any trial or inquiry in any suit, action or proceeding in any court, or before any person or committee having by law or consent of parties authority to examine witnesses or hear evidence, the husband or wife of any person interested therein as a party or otherwise shall be competent and compellable to give evidence the same as other witnesses, on behalf of any party to such suit, action or proceeding."

[2] The competency of witnesses in civil proceedings in the United States courts is determined by the laws of the state in which the court

is held. R. S. § 858, as amended by Act June 29, 1906, 34 Stat. 618, Fed. Stat. Ann. Supp. 1909, p. 708, Comp. St. Supp. 1909, p. 242

[3] The New Jersey act in relation to the property of married women (3 Comp. Stat. N. J. p. 3222) gives the wife the ownership and control over her personal property as absolute as if she were a feme sole, and the concluding clause of section 14 of the act, viz., "Nor shall anything herein enable husband or wife to contract with or to sue each other except as heretofore," does not prohibit transactions like the one under consideration, nor limit the jurisdiction of a court of equity to take cognizance thereof.

[4] Although courts of law, in the absence of statutory authority, will not enforce contracts between husband and wife, the instances are many where courts of equity, following the doctrine of the civil rather than the common law, will do so. See 21 Cyc. p. 1272. That courts of equity will aid the wife to recover her separate estate, which has come into the hands of her husband and has been retained by him against her consent, is entirely settled. Story, Eq. Juris. §§ 1368-1372; Garwood v. Garwood, 56 N. J. Eq. 265, 38 Atl. 954.

[5] Courts of bankruptcy are courts of equity, and such recovery will be enforced against the trustee administering the husband's estate in bankruptcy. Clark v. Hezekiah (D. C.) 24 Fed. 663.

The rejected testimony being competent, the order under review is reversed, and the proceedings are remanded, with instructions to receive the testimony of the bankrupt and wife in relation to the transfer of title to such bonds.

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STEPHANO et al. v. SATMATOPOULOS et al.

(District Court, S. D. New York. September 30, 1912.)

1. TRADE-MARKS AND TRADE-NAMES (§ 55\*)—INFRINGEMENT—INTENT.

In a suit for infringement of a trade-mark, not involving unfair competition, complainant is not bound to establish fraudulent intent; the only question being whether confusion is likely to result from the defendant's mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 63; Dec. Dig. § 55.\*]

Restraining infringement of trade-mark or trade-name as dependent on knowledge or intent of infringer, see note to Hutchinson, Pierce & Co. v. Loewy, 90 C. C. A. 4.]

2. TRADE-MARKS AND TRADE-NAMES (§ 59\*)—INFRINGEMENT.

Complainants having adopted the word "Rameses" as a trade-mark for cigarettes, and having manufactured and sold cigarettes under that name since 1895, defendants' use of the word "Radames," as applied to similar cigarettes made by them, was likely to cause confusion, and was therefore subject to injunction for infringement.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 68-72; Dec. Dig. § 59.\*]

In Equity. Suit by Constantine Stephano and another against Stamatis D. Satmatopoulos and others. On motion for preliminary injunction to restrain infringement of a trade-mark. Granted.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Wise & Lichtenstein, for complainants.  
Hatch & Clute, for defendants.

LACOMBE, Circuit Judge. Diversity of citizenship gives this court jurisdiction of the controversy as to the common-law trade-mark upon which complainants mainly rely. There seems to be practically no dispute as to their ownership of the trade-mark "Rameses" as applied to cigarettes. There is no suggestion of any use of that word in that connection prior to the time when complainants in 1895 began to manufacture cigarettes which it designated by that name. And they have ever since used the name as distinguishing a brand of their cigarettes. The evidence as to the use by Baron Bothers in 1898 of the name "Radames" applied to cigarettes is unpersuasive; but even that use seems to have been discontinued prior to 1902, and for nearly 10 years no one manufactured and sold cigarettes under that name.

There is nothing in the case to sustain the plea of laches on the part of complainant. The sole question in the case is whether or not the use of the word "Radames" as a name for cigarettes is an infringement of complainant's trade-mark "Rameses," similarly applied. There is no claim of any simulation of style of package, labels, etc. The only question is as to similarity of appearance and sound of the two names. That both names are historical is not material. There were plenty of names in Egyptian history which could be chosen as an arbitrary title for cigarettes of so-called Turkish tobacco, without selecting one sufficiently similar to "Rameses" to produce confusion.

[1] Since the question is one of trade-mark only, and not of unfair competition, it is not necessary for complainants to establish fraudulent intent. The only question is: Will confusion be likely to result from the use of the name defendants have chosen?

[2] It is stated, and apparently not disputed, that in popular speech both names are pronounced (or mispronounced) with the accent on the first syllable, and with both the other syllables short. Assuming that a person, even of average intelligence, who has smoked a cigarette given him by a friend and found it pleasing, is informed that it is the "Ram'-es-es" brand, it seems a not unreasonable supposition that he might accept from a dealer a box which he is assured is of the "Rad'-am-es" brand, believing it to be the same. To me, at least, this seems so likely to occur that infringement of complainants' trade-mark seems obvious.

Complainant may take an injunction against the use of the name "Radames" as the designation of a brand of cigarettes, but the operation of the injunction will be suspended for 60 days after the entry of the order.



## In re BOUCK.

(District Court, S. D. New York. June, 1912.)

**1. BANKRUPTCY (§ 414\*)—DISCHARGE—OBJECTIONS—SPECIFICATIONS.**

Where objections to a bankrupt's discharge were based entirely on the ground that the bankrupt had been guilty of a conveyance with intent to defraud creditors, the fact that he was guilty of concealment of property was immaterial.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 720-722; Dec. Dig. § 414.\*]

**2. BANKRUPTCY (§ 407\*)—DISCHARGE—PREFERENTIAL PAYMENT.**

The fact that a bankrupt made a preferential payment is not ground for denial of a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 729-731, 737, 738, 740-751, 758, 760, 761; Dec. Dig. § 407.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of one Bouck. On motion to confirm the report of a referee recommending the bankrupt's discharge. Granted.

Orin Q. Flint, for bankrupt.

Samuel B. Coffin (Guernsey Price, of counsel), for objecting creditor.

HOUGH, District Judge. [1] The objections to discharge are entirely upon the ground that the bankrupt has been guilty of conveyance with intent to hinder, delay, and defraud creditors. The master's memorandum seems to me to be based rather on the thought that the bankrupt was accused of concealing property. Even if he did conceal property, that idea is not material here, because it is not set forth in the specifications. The meager testimony is uncontradicted and extremely simple. The bankrupt had a blacksmith shop, and sold it out, and with the proceeds employed an attorney, in order that he might go into bankruptcy, paid a small debt or two, and gave his wife \$20 to buy groceries.

[2] I think in the evidence there was a preferential payment, but that is not ground for denying discharge. The sole inquiry in this case is whether in the evidence there was a conveyance with intent to hinder, delay, and defraud. The rules on this point have recently been stated authoritatively by our Circuit Court of Appeals in *Van Iderstine v. National Discount Co.* (C. C. A., 2d Cir.) 23 Am. Bankr. Rep. 345, 347, 174 Fed. 518, 521, 98 C. C. A. 300. Applying these rules to the facts here, I am unable to perceive that there was any intent on Bouck's part to do the forbidden act.

The report is confirmed, and the discharge granted.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

## LOUISVILLE &amp; N. R. CO. et al. v. WRIGHT, Comptroller General.

(District Court, N. D. Georgia. July 18, 1912.)

## 1. TAXATION (§ 124½\*)—RAILROADS—CONSTRUCTION OF LEASE—INTEREST TAKEN BY LESSEE.

The charter of the Georgia Railroad & Banking Company (Act Ga. 1833, p. 262, § 12) authorized such company to "rent or farm out all or any part of their exclusive right of transportation—on the railroad or railroads, with the privilege to any individual or individuals, or other company, and for such term as may be agreed on." In 1881 the company, acting under such authority, "rented and farmed out" to complainants for a term of 99 years all its privileges of transportation, and also rented and farmed out "as the means of full enjoyment of the privileges hereinbefore rented and farmed out" its railroad and all its branches and extensions, together with its right of way, roadbeds, stations, etc. Civ. Code Ga. 1910, § 3691, provides that "when the owner of real estate grants to another simply the right to possess and enjoy the use of such real estate either for a fixed time or at the will of the grantor, and the tenant accepts the grant, the relation of landlord and tenant exists between them. In such case no estate passes out of the landlord, and the tenant has only a usufruct which he cannot convey without the landlord's consent and which is not subject to levy or sale." *Held*, that complainants did not take an estate for years, but came within the provisions of such statute, and became tenants having the mere right of possession and use with no interest in the property which was taxable, all estate therein subject to taxation remaining in the lessor, and especially in view of the fact that for 29 years the state acquiesced in such construction and collected taxes only from the lessor.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 124½.\*]

## 2. TAXATION (§ 124½\*)—RAILROADS—CHARTER EXEMPTION—INTERESTS OF LESSEE.

The charter of the Georgia Railroad & Banking Company (Acts Ga. 1833, p. 263, § 15) provides that the company shall be subject to a tax not exceeding one-half of 1 per cent. per annum on the net proceeds of its investment. As construed by the courts, such provision constitutes a contract which exempts from ad valorem taxation all property of the company used in producing its income, including renewals, alterations, and betterments of the original property made from time to time. *Held* that, while lessees of the property for a long term under their contract took no interest in the property which was taxable to them, the exemption did not extend to certain new terminal property in which they acquired an interest, and which was not merely a betterment of the lessor's property, and only indirectly, if at all, contributed to its income.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 124½.\*]

In Equity. Suit by the Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company against William A. Wright, Comptroller General of the state of Georgia. On final hearing. Decree for complainants in part.

For former opinion, see 190 Fed. 252.

Jos. R. & Bryan Cumming, of Augusta, Ga., and McDaniel & Black, R. C. & P. H. Alston, Tye, Peeples & Jordan, and King, Spalding & Underwood, all of Atlanta, Ga., for complainants.

T. S. Felder, Atty. Gen., and John C. Hart and Samuel H. Sibley, both of Union Point, Ga., for defendant.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

NEWMAN, District Judge. This case is now before the court for final decree on a bill filed by the Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company, lessees of the Georgia Railroad & Banking Company, against William A. Wright, Comptroller General of the state of Georgia, to enjoin the collection of certain taxes assessed against them by the Comptroller General. The case is here on bill, answer, and agreed statement of facts; this agreed statement of facts being in writing and signed by counsel for the parties, respectively. The facts necessary to an understanding of the case are as follows:

The Georgia Railroad Company was chartered by an act of the General Assembly of the state of Georgia December 21, 1833 (Acts 1833, p. 256). On December 18, 1835 (Acts 1835, p. 180), the name was changed to the Georgia Railroad & Banking Company, by which name it is still known. In the original charter of the company, granted in 1833, is this provision (section 15):

"The stock of the said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads, or any one of them; and after that, shall be subject to a tax not exceeding one-half per cent. per annum on the net proceeds of their investments."

The question as to whether or not this scheme of taxation is binding upon the state, and still exists, has been before the courts several times. It was before the Supreme Court of Georgia in *City of Augusta v. Georgia R. & Banking Co.*, 26 Ga. 651, and in the case of *State of Georgia v. Georgia R. & Banking Co.*, 54 Ga. 423, and *Goldsmith, Comptroller, etc., v. Georgia R. & Banking Co.*, 62 Ga. 485, and before this court in *Georgia R. & Banking Co. v. Wright, Comptroller General (C. C.)* 132 Fed. 912, and, finally, on appeal from this last-named decision, before the Supreme Court of the United States, settling the matter definitely and finally as between the state and the Georgia Railroad & Banking Company, in favor of the Georgia Railroad & Banking Company's right to be taxed one-half of 1 per cent. on the net proceeds of its investment. *Wright, Comptroller General, v. Georgia R. & Banking Co.*, 216 U. S. 420, 30 Sup. Ct. 242, 54 L. Ed. 544. So clearly is this settled that the learned counsel for the Comptroller General in the present case state in their brief:

"It is conceded by the Comptroller General that at the time the state incorporated the Georgia Railroad & Banking Company the Legislature had the power to make, and did make, a contract with the Georgia Railroad & Banking Company never to tax that company in excess of the rate fixed in the charter, to wit, one-half of 1 per cent. on its net income, and that as far as that company is concerned that it has an irrevocable contract with the state"—citing the case in 216 U. S., 30 Sup. Ct., 54 L. Ed., just mentioned.

The original charter of the Georgia Railroad & Banking Company of 1833 (section 12) contains this provision:

"That the said company may, when they see fit, rent or farm out all or any part of their exclusive right of transportation or conveyance of persons, on the railroad or railroads, with the privilege to any individual or individuals, or other company, and for such term as may be agreed upon. \* \* \*"

On May 7, 1881, the Georgia Railroad & Banking Company entered into a contract with William M. Wadley, under the provision of this charter authorizing it to "rent or farm out," etc., in which it was provided that the Georgia Railroad & Banking Company—

"hath rented and farmed out to said party of the second part and his assigns, and does by these presents rent and farm out to said party of the second part and his assigns for the full term of ninety-nine years from the first day of April, one thousand eight hundred and eighty-one, all its privileges, general and exclusive, of transporting persons, merchandise, produce and every kind of property whatsoever, which is or may become the subject of railroad transportation, over the lines of railroad owned or controlled by the party of the first part, to the full extent that the party of the first part has and enjoys, or is now entitled to have and enjoy, or may hereafter acquire the right to have and enjoy such privileges, and subject to all the obligations and duties, imposed by its charter in this behalf upon the party of the first part.

"And the party of the first part has also rented and farmed out, and does by these presents rent and farm out to the party of the second part for the aforesaid term of ninety-nine years, as the means of full enjoyment of the privileges hereinbefore rented and farmed out, the following property, to wit:

"The Georgia Railroad from Augusta to Atlanta, and its branches, viz.: The Branch from Barnett to Washington; the branch from Camak to Warrenton, and the branch from Union Point to Athens, with all the extensions thereof which may be made hereafter to other points; also, the Macon and Augusta Railroad, from Warrenton to Macon; together with the rights of way, roadbeds, depots, stations, warehouses, elevators, workshops, wells, cisterns, water tanks, and other appurtenances of said railroad and branches."

The Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company have, by successive conveyances, become the successors of William M. Wadley, and have been operating said railroads thereunder for a number of years.

The main question for determination here is, Did the Georgia Railroad & Banking Company, by this contract and agreement, give to Wadley and his assigns a mere usufruct of this property, or did it convey an estate for years? The contention for the Comptroller General is that this instrument, properly construed, vested an estate in complainants, making them liable, under the laws of Georgia, for the taxes thereon. The contrary contention is that this contract conveyed a mere usufruct, and that, even if it be an estate for years as opposed to an usufruct, it would still leave the landlord liable for the entire taxes due on the property.

[1] The first question, therefore, is, Do the complainants occupy the position of tenants having the mere right of possession and use, or have they an estate for years in the property? Section 3691 of the Code of Georgia of 1910 is as follows:

"When the owner of real estate grants to another simply the right to possess and enjoy the use of such real estate, either for a fixed time or at the will of the grantor, and the tenant accepts the grant, the relation of landlord and tenant exists between them. In such case no estate passes out of the landlord, and the tenant has only a usufruct, which he cannot convey except by the landlord's consent, and which is not subject to levy and sale; and all renting or leasing of such real estate for a period of time less than five years shall be held to convey only the right to possess and enjoy such real estate, and to pass no estate out of the landlord, and to give only the

usufruct, unless the contrary be agreed upon by parties to the contract, and so stated therein."

Section 3685, under the chapter heading of "Estates for Years," defines an estate for years as follows:

"An estate for years is one which is limited in its duration to a period fixed, or which may be made fixed and certain. If it be in lands, it passes as realty in this state. It may be for any number of years, so that the limitation be within the rule against perpetuities."

The language used in the contract between the Georgia Railroad & Banking Company and Wadley is, "hath rented and farmed out," following the exact language of section 12 of the charter, "all its privileges, general and exclusive, of transporting persons, merchandise, produce and every kind of property whatsoever," etc., and "has also rented and farmed out, and does by these presents rent and farm out, to the party of the second part for the aforesaid term of ninety-nine years, as the means of full enjoyment of the privileges hereinbefore rented and farmed out," etc. So that the language of the instrument clearly is such as to bring it within the section of the Code of Georgia defining the relation of landlord and tenant. I do not see anything whatever in the definition of landlord and tenant to prevent the creation of such a relation in Georgia for any number of years. The length of the tenancy would be immaterial so far as anything is said in this provision of the statute.

If I understand the argument here, it is not denied that, if the relation of landlord and tenant exists in this case, the Georgia Railroad & Banking Company, as owner, is liable for the taxes, but the contention is, as stated above, that the effect of the transaction is to create such an estate in the complainants as to render them liable for the taxes. If the Georgia Railroad & Banking Company is still the owner of this property, and is consequently liable for the taxes on the same, it seems clear that it is liable only under the scheme of taxation provided for it by the Legislature in its original charter. If an estate has been created in the property, a difficult question would arise as to whether or not it was such an estate as would make complainants liable for the entire taxes on the property, or for the lesser liability, that of taxes on the value of its lease-hold estate.

In my opinion the relation of landlord and tenant exists; that is, the right in complainants here, the Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company, to possess and enjoy the property, and that they have no estate therein. This view of the case, to my mind, is supported by a good many things. In the first place, by section 12 of the original charter of the Georgia Railroad & Banking Company that company is given the power to rent or farm out the right of transportation. After giving this right in the twelfth section, in the fifteenth section comes the provision with reference to taxation at one-half of 1 per cent. on the net income. The very way in which these two things are placed in the charter seems to indicate that, even though

operated by others, the taxes imposed should be upon the income, whether the income came from the operation of the road by the chartered company or by others to whom it might rent or farm out the privilege of transportation.

In the next place, the character of the contract itself is significant. It rents and farms out, in accordance with the charter, "all its privileges, general and exclusive, of transporting," etc., and "as the means of full enjoyment of" such privileges, rents, and farms out the railroad and all its branches and any extensions of the same, together with the rights of way, roadbeds, depots, stations, warehouses, elevators, workshops, wells, cisterns, water tanks, and other appurtenances of said railroad and branches. It rents and farms out the right of transportation, and, as a means of rendering that right effective, the railroad property. It conveys the right to possess and use the property as a means of carrying out the right of transportation, and nowhere, so far as I can see, conveys any estate in the property; nothing but its use and occupation for the purpose stated.

I think in addition to this that the trend of the decisions of the Supreme Court of the state indicates that this is the view of that court as to the proper relationship between the Georgia Railroad & Banking Company and the companies engaged in operating the railroad. The company is held liable to the public just as if it were engaged in operating the railroad itself. The only instance of nonliability, so far as I have observed, is in relation to the employes of the lessees. They being employes of the lessees, their rights for injuries received while in such employment were, of course, against their employers. But otherwise, as to passengers and those for whom it was engaged in carrying freight, and in other instances, the original company itself has been held liable, and in many cases. The latest case, or certainly one of the latest, on the subject, is that of *Georgia Ry. & Banking Co. v. Haas*, 127 Ga. 187, 199, 56 S. E. 313, 318 (119 Am. St. Rep. 327, 9 Ann. Cas. 677), and in the opinion of Judge Lumpkin it is said:

"Counsel for plaintiff in error contend with ability and ingenuity that under the peculiar terms of the charter of the Georgia Railroad & Banking Company (Acts 1833, p. 262; Acts 1835, p. 180) it is not subject to the general rule of liability for the acts of its lessees above referred to. But the agreed statement of facts shows that it has leased the right to operate the entire railroad. If the original company leased its road and turned over the operation of its franchises to others, it is subject to the rule. When the original charter was granted, railroad building was in its infancy, and turnpikes were great public highways. Certain expressions were used which seem perhaps rather inapt to modern railroad conditions. But, in view both of the charter and the general law, the Legislature never intended that lessees could take the place of the original company in the operation of its cars and franchises as a railroad company, and the original company be entirely freed from liability in connection therewith."

None of the cases before the Supreme Court of Georgia have discussed the question involved here, because that question had never been made or suggested, so far as I know, until the action of the Comptroller General in trying to tax the property *ad valorem* and the bringing of this proceeding as a result of that action.

Another reason why I think the view expressed is the correct view

of the relation between the Georgia Railroad & Banking Company and these operating companies is that the state had acquiesced for 29 years—that is, from 1881 until 1910—in this view of the matter. The Georgia Railroad & Banking Company had returned and paid taxes in accordance with the provisions of the charter on the net income derived from the operation of the railroad during that period without any question being made about the correctness of the same. In *Wright v. Georgia R. & Banking Co.*, 216 U. S. 420, 30 Sup. Ct. 242, 54 L. Ed. 544, in the opinion of Mr. Justice Lurton, in discussing the question of the meaning of the word “stock” in section 15 of the company’s charter (216 U. S. 426, 30 Sup. Ct. 244 [54 L. Ed. 544]), after stating that it means “capital,” he says this:

“That this is the way in which it has been read and interpreted by everybody who has had to do with the matter of taxation in an official way since 1845, when the railroad seems to have been finished, affords strong evidence that this construction accords with the intent of the charter.”

In *Temple Baptist Church v. Georgia Terminal Co.*, 128 Ga. 669, 680, 58 S. E. 157, 161, Judge Cobb, speaking for the Supreme Court of Georgia, says:

“The long continued practice of the executive or the legislative department will be treated as persuasive authority by the courts,” etc.

Of course, it is not contended that the action of the proper officials of the state in this matter would estop the state, but the fact of the long continued acquiescence of the state is stated, in the language of Judge Cobb, as “persuasive authority.”

Entertaining the opinion that I do therefore, gathered from the charter, the contract between the parties, the trend of the Georgia decisions, and the long acquiescence by the state in the action of the Georgia Railroad & Banking Company in continuing to return its property for taxation in accordance with the charter, on the net income derived from its operation, notwithstanding the fact that it was operated by other parties, that the relation of landlord and tenant, under the statutes of Georgia, exists, and that complainants have a mere usufruct to the property and not an estate of any kind therein, it is almost useless to enter upon a discussion of the numerous authorities cited by counsel pro and con in their very able and thorough arguments and in their briefs submitted to the court. It is claimed, however, that there are decisions by the Supreme Court of the state which give force to the contrary view of this matter.

One of the cases so relied upon is *Wells v. Savannah*, 87 Ga. 397, 13 S. E. 442. In that case the land was sold subject to a perpetual ground rent. Chief Justice Bleckley, delivering the opinion in that case, says:

“Possession of real estate attended with an indefeasible right to occupy in perpetuity, and also with an indefeasible right to be clothed with the fee upon the voluntary payment of a fixed sum as purchase money, will constitute the purchaser the substantial owner of the property. So long as his possession, supplemented by these rights, continues, he is not a mere lessee but a purchaser admitted into possession on the faith of his contract of purchase.”

I do not think that case is at all like this case.

Another case relied upon is that of *Central R. & Banking Co. v. Macon*, 43 Ga. 605. As I understand the question involved in that case, it is not an authority either way upon the question now before this court, but it was decided by the majority of the court, Judge McCay dissenting, that the Macon & Western Railroad Company had the right to lease the road from the Central Railroad & Banking Company notwithstanding there was a provision in the agreement for a sale of the road after legislative authority was obtained. The only thing I understand counsel to emphasize in the case is the use of the word "lease" in connection with that agreement. It may be remarked here that this use of the word lease is not deemed very material if it appears that what was done was to create the relation simply of landlord and tenant and to contract merely for the right to use and not to convey an estate in the property.

Section 3690 of the Code of Georgia, which must be read in connection with the section heretofore cited, is as follows:

"When one grants to another an estate for years out of his own estate, reversion to himself, it is usually termed a lease. It may be confined to a particular interest in lands, such as mining or agricultural, in which event no other interest passes. If no object of the lease is stated, the mining interest will not pass unless the circumstances justify an implication of such an intention in the parties."

The case of *South Carolina & G. R. Co. v. Augusta Southern R. Co.*, 107 Ga. 164, 33 S. E. 36, is also cited as an authority here. In that case the plaintiff company had "granted, demised, leased and farm let" to the latter company its railroad right of way, depots, yards, rolling stock, and all its other property during the corporate existence of the lessee with warranty for its enjoyment. The questions made in the case were whether the contract between the parties created a partnership, and, if not, whether there was a trust relation between the parties. In discussing the case Chief Justice Simmons in the opinion used the expression that the lessee during the term of the lease was the absolute owner of the property, with the right to use it and operate it as it deemed best. 107 Ga. 182, 33 S. E. 38. In another place (107 Ga. 183, 33 S. E. 38) he used the language:

"This was purely a contractual relation between landlord and tenant, which was enforceable at law."

The Chief Justice was discussing entirely the question made in that case, which related to whether it was a case for equitable relief, as stated, whether a partnership was created and whether a trust relation existed, and was not discussing at all the question that is involved here, certainly not in any manner attempting to decide whether the lessee there had acquired an estate in the property, or whether it was a mere ordinary relation of landlord and tenant under the Georgia law. It cannot in any sense be considered a decision affecting the special matter at issue here.

There is another decision of the Supreme Court of Georgia, and a recent decision, that contains language which seems to me peculiarly applicable here. That is the case of *the State of Georgia v. Western*



& A. R. Co., 136 Ga. 619, 71 S. E. 1055. The right of the state to put certain taxes on the Western & Atlantic Railroad Company, a lessee of the road from the state, was the question involved, and referring to the lease contract there, which was for 29 years from December 29, 1890, Judge Evans, in the opinion, says:

"The case presented is not that of a perpetual leaseholder, where the tenant is the virtual owner of the property, entitled to its use forever and subject to pay taxes thereon as owner, as was the case in *Wells v. Savannah*, 87 Ga. 397, 13 S. E. 442. In making the lease the state reserved the right of forfeiture on broken conditions subsequent, and imposed terms and conditions indicating that no estate was intended to be conveyed to the lessee, but that the lessee was to have only a usufructuary interest during the lease period."

In the lease between the state and the Nashville, Chattanooga & St. Louis Railway Company the act authorizing the lease (Acts 1889, p. 368) provided that:

"If the lessee fails to comply with the lease contract, the Governor, at his option, may declare the lease forfeited and take immediate possession."

Here the lease contract provides that:

"The party of the first part reserves the right, in addition to all other remedies now usual or hereafter to become usual in the law, to enter upon and resume possession and enjoyment of all its property for the breach of any of the covenants or agreements of this indenture."

While there may be some difference between the "terms and conditions" in the lease of the State to the Western & Atlantic Railroad Company and that of the Georgia Railroad & Banking Company, it is well understood and well known that in practical effect both roads have been operated since the contracts in very much the same way, the lessee companies, in both instances, keeping up and improving the track, buying new rolling stock, and keeping the railroads up with what modern railroading requires.

Counsel for the Comptroller General here rely upon the case of *Jetton v. University of the South*, 208 U. S. 489, 28 Sup. Ct. 375, 52 L. Ed. 584. In that case the University of the South, known familiarly as Sewanee, had been granted an exemption from taxation as to 1,000 acres of land to be used for the purposes of the University. The language of the exempting section of the act is as follows (208 U. S. 491, 28 Sup. Ct. 376 [52 L. Ed. 584]):

"Be it further enacted, that said university may hold and possess as much land as may be necessary for the buildings and to such extent as may be sufficient to protect said institution and the students thereof from the intrusion of evil-minded persons who may settle near said institution, said land, however, not to exceed ten thousand acres, one thousand of which, including buildings and other effects and property of said corporation, shall be exempt from taxation as long as said lands belong to said university."

In 1903 it appears that an act was passed by the Legislature of Tennessee taxing leasehold interests in land. It also appears that the 1,000 acres of land were duly surveyed and marked out and many buildings erected for the university, and "leases were also granted by it of lots within the thousand-acre limit to persons who, under such leases, built upon the lots severally leased to them. By this method

a population of about 1,000 or 1,200 people had been gathered within the village called Sewanee, situated within the limit stated, and which was a barren wilderness when the charter was granted. In fact, the very existence of the village is the result of the efforts of the university." Under the act of the Legislature of 1903, proceedings were taken to subject the leasehold interests to taxation. Out of this grew the decision of the Supreme Court of the United States referred to above. The Supreme Court held that there was a leasehold interest in that case subject to taxation. It was stated in the opinion, however, that it was not necessary to determine what the exact interest of the lessees was. If it was believed that the complainants here had such a leasehold interest in this property, it would be an interesting question as to how and in what way it could be reached in Georgia for taxation. The Comptroller General has assessed the whole property for taxation, both the fee and entire interest otherwise in the property, and there is no attempt to separate any leasehold interest from the fee.

In *Wright v. Georgia R. & Banking Co.*, *supra*, the opinion discusses the extent to which the Georgia Railroad & Banking Company could claim that the scheme of taxation provided for in the charter—that is, for taxes on the net income only—applied, and, after stating the fact that the road at present has a value of \$4,000,000 in excess of the cost and of the authorized capital, proceeds in this way:

"This plan of tax upon net earnings is quite inconsistent with any other form of taxation, and is absolutely independent of any question as to whether the property thus taxed only upon its profits should have a less or greater value than the capital invested. A tax upon earnings is a tax which at last covers and includes, unless double taxation is intended, all property necessarily held and used to make that income, including the enjoyment of its franchises. It is not to be presumed, in the light of the public policy of the time, that the state intended that this pioneer railroad should be subjected to any form of taxation of property which produced the taxable income. We are therefore of opinion that this property is not subject to any other method of taxation than that of the special system stipulated for by the contract, and that the act of the Georgia Legislature in so far as it provides for an *ad valorem* tax upon any part of this invested capital of the Georgia Railroad & Banking Company does impair the obligation of the contract."

So it will be perceived that the view of the Supreme Court was that this railroad and its accretions during all the years of its existence and during the lease, and all the property used by it to make this net income, was not taxable otherwise than provided in its charter, because to tax part of it in any other way would be double taxation. The discussion of this, however, may be a mere abstraction, because, as stated above, I have reached the conclusion that a mere usufruct exists as to this property.

[2] In the decision of the Supreme Court of the United States cited above, in *Wright v. Georgia R. & Banking Co.*, there are suggestions made which, it seems to me, are important in reaching a conclusion as to whether there is any of the property from which the Comptroller General is now seeking to collect an *ad valorem* tax subject to that tax. It is clear to my mind that the interest of the lessee companies in the Atlanta terminals is subject to taxation in that way. Mr. Justice Lurton in that opinion says that:

"An investment made nearly 75 years since of \$4,156,000 has now a value of \$4,000,000 in excess of that cost. The property is the same property. The conceded fact is that through renewals, alterations, and betterments made from time to time, and the natural increase in the value of the road, this appreciation has come about. There has been no suggestion that there has been any hiding away of capital added by either new stock, or by the use of bonds or other forms of credit, nor that the improvements made from time to time, called 'renewals, alterations and betterments,' have been other than the necessities of an enlarging business and the improved maintenance naturally demanded."

It is the road thus spoken of by Mr. Justice Lurton, with its "renewals, alterations, and betterments," that makes the net income which is subject to taxation. Anything beyond this or outside of this would appear to be subject to ad valorem taxation.

So far as I have been able to gather from the agreed statement of facts and from the agreement between the Louisville & Nashville Railroad Company, called the Louisville Company, the Atlanta & West Point Railroad Company, called the West Point Company, and the lessees of the Georgia Railroad & Banking Company, called the lessees, these terminals, brought into existence under this agreement, are a separate and distinct thing from that which produces the taxable income. There may be some part of this terminal property which amounts to a mere betterment of the old property, and not thus subject, but what that may be I am unable at present, from the facts before me, to determine. Counsel agree, as I understand it, that, should this property be found so subject, it would require either a reference or some further action to determine this. Probably in a way these terminals do help the income, but I do not believe that they come within the classification of "renewals, alterations and betterments" of the original property. They seem to me to be separate and apart from that. I think they are subject to ad valorem taxation by the state.

The claim by the Comptroller General of the right to collect certain ad valorem taxes of the complainants because of an issue of bonds by the Georgia Railroad & Banking Company I am unable to understand satisfactorily from the pleadings or from the agreed statement of facts. It makes clear, of course, the fact that bonds were issued and that the bonds, or the proceeds thereof, were used in connection with a certain railroad, but this claim of a right to tax by reason thereof is not clear to me. No opinion, therefore, is expressed upon this feature of the case, and counsel will be further heard before it is determined.

I do not believe that the claim for ad valorem taxes on the improved terminals in Augusta or on the slight extension of the terminus of the road into Athens can be sustained. It seems to me that both of these come within the classification of "renewals, alterations and betterments" to the road as it existed originally.

## UNITED STATES v. NELSON.

(District Court, D. Idaho, N. D. September 5, 1912.)

## 1. PERJURY (§ 2\*)—REPEAL—REVISION.

Act Cong. March 3, 1857, c. 116, § 5, 11 Stat. 250, provides that in all cases where an affidavit shall be made or taken before any register or receiver of any local land office in the United States, or any territory thereof, and shall be filed in the local or general land office, and in cases arising under any or either of the orders, regulations, or instructions of the Land Department in any wise affecting the right, claim, or title to any public lands of the United States, if any person shall knowingly testify falsely, he shall be deemed to have committed perjury. *Held* that, such section having been partially incorporated into the Revised Statutes of the United States in section 5392 (U. S. Comp. St. 1901, p. 3653), it was within the provisions for repeal embodied in section 5596 (U. S. Comp. St. 1901, p. 3750).

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 2; Dec. Dig. § 2.\*]

## 2. PERJURY (§ 25\*)—INDICTMENT—MATERIALITY OF FALSE STATEMENT.

Materiality of an alleged false statement on which an indictment for perjury is based may be charged in the indictment, either by setting out the facts from which the materiality appears as a matter of law, or by a direct averment that the matter so falsely stated was material, either of which will render the indictment good on demurrer, unless it affirmatively appears, as a matter of law, from the facts otherwise charged that the false statement was immaterial.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 82-89; Dec. Dig. § 25.\*]

## 3. PERJURY (§ 25\*)—INDICTMENT—PUBLIC LANDS.

Act Cong. June 11, 1906, c. 3074, 34 Stat. 233 (U. S. Comp. St. Supp. 1911, p. 640) authorizes the opening of agricultural lands in any forest reserve, and provides that any settler actually occupying and in good faith claiming such lands for agricultural purposes, prior to January 1, 1906, who shall not have abandoned the same, if qualified to make a homestead entry, on whose application the land proposed to be entered was examined and listed shall have a preference right of settlement and entry. *Held* that, where an indictment charged that defendant sought to enter such land, and for that purpose filed a false affidavit that he had established his residence upon and commenced cultivation and improvement of the land about October 6, 1902, with the intent to claim the same under the homestead laws, and had ever since continuously resided thereon in good faith, the indictment was not defective as snowing on its face that the statements falsely made were immaterial.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 82-89; Dec. Dig. § 25.\*]

## 4. PERJURY (§ 9\*)—FOREST RESERVE LANDS—AGRICULTURAL ENTRY—AFFIDAVIT.

Act Cong. June 11, 1906, c. 3074, 34 Stat. 233 (U. S. Comp. St. Supp. 1911, p. 640) provided for the entry of agricultural lands within forest reserves in accordance with the general homestead laws "and that act," conferring on the occupant a preference right to entry over other qualified applicants on certain conditions. Rev. St. § 2478 (U. S. Comp. St. 1901, p. 1586) provides that the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of the title relating to the surveying and sale of the public lands of the United States not otherwise es-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pecially provided for. General Land Office Circular No. 10, approved by the Secretary of the Interior April 20, 1911, par. 17, prescribes the sworn showing to be made by homestead applicants in all cases under the general homestead laws; and paragraph 19 provides that all applications by persons claiming as settlers must, in addition to the facts required in that paragraph, state the date and describe the acts of settlement under which they claim a preferred right of entry, etc. *Held*, that such regulation was within the authorization of section 2478; and hence an affidavit of settlement, made by an applicant to enter agricultural lands within a forest reserve, was one taken in a case in which a law of the United States authorizes an oath to be administered as provided by Rev. St. § 5392 (U. S. Comp. St. 1901, p. 3653), and was therefore a proper subject for prosecution for perjury.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 27–35; Dec. Dig. § 9.\*]

William D. Nelson was indicted for making a false affidavit of residence with reference to an application to enter certain forest reserve lands. On demurrer to the indictment. Overruled.

C. H. Lingenfelter, U. S. Atty.

McFarland & McFarland and Fred Miller, for defendant.

DIETRICH, District Judge. By an act entitled "An act to provide for the entry of agricultural lands within forest reserves," etc., approved June 11, 1906, c. 3074, 34 Stat. 233 (U. S. Comp. St. Supp. 1911, p. 640), it is provided that the Secretary of Agriculture may request the Secretary of the Interior to open for entry, under the act and the general homestead laws, specifically described lands in any forest reserve, found upon examination by the Secretary of Agriculture to be chiefly valuable for agricultural purposes, if such lands can be occupied for such purposes without injury to the forest reserve. It is made the duty of the Secretary of the Interior, upon receiving such a request, to declare the lands "open to homestead settlement and entry in tracts not exceeding one hundred and sixty acres." He is further directed to file a list of such lands in the local office, and to give public notice of the date when they will become subject to settlement and entry. It is further provided:

"That any settler actually occupying and in good faith claiming such lands for agricultural purposes prior to January first, nineteen hundred and six, and who shall not have abandoned the same, and the person, if qualified to make a homestead entry, upon whose application the land proposed to be entered was examined and listed, shall, each in the order named, have a preference right of settlement and entry."

From the indictment it appears that on the 24th day of July, 1911, the defendant made application at the proper local land office to enter 160 acres of land situate within the boundaries of the Cœur d'Alene national forest, in Idaho, as the same had theretofore, upon November 6, 1906, been established by proclamation of the President of the United States. It is averred that in connection with the defendant's application it became and was material for the officers of the local land office to be informed at what time, if at all, prior to such application the defendant established his residence upon the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

land applied for, and whether or not his residence thereon had been continuous and in good faith; and, apparently to meet the demand for such information, the defendant made and filed with his application an affidavit, sworn to before the receiver of the land office, in which he stated that he established his residence upon, and commenced the cultivation and improvement of, the land on or about August 6, 1902, with the intent to claim the same under the homestead laws, and that ever since said date his cultivation, improvement, and residence had been continuous, and that, in good faith, he had at all times complied with the homestead laws. It is further charged that the affidavit was in all substantial particulars false, and that in truth the defendant never had occupied the land as a home, or cultivated or improved the same.

The defendant demurs to the indictment, upon the ground that it does not state facts sufficient to constitute a public offense, the particular point being that the affidavit was not required or authorized by law, and that, assuming the statements contained therein to be willfully false, they relate to immaterial matters, and therefore cannot serve as the basis of a charge of perjury. There are two counts in the indictment, the first of which, according to the statement of the District Attorney, is intended to charge the offense under section 5392 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3653), and the second under section 5 of an act entitled "An act in addition to an act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes," approved March 3, 1857, c. 116, 11 Stat. 250, which, it is contended, is still in force.

[1] First. Is section 5 of the act of 1857 in force? The section is as follows:

"In all cases where any oath, affirmation, or affidavit shall be made or taken before any register or receiver or either or both of them of any local land office in the United States or any territory thereof, or where any oath, affirmation, or affidavit, shall be made or taken before any person authorized by the laws of any state or territory of the United States to administer oaths or affirmations, or take affidavits, and such oaths, affirmations, or affidavits are made, used, or filed in any of said local land offices, or in the General Land Office, as well in cases arising under any or either of the orders, regulations, or instructions, concerning any of the public lands of the United States, issued by the Commissioner of the General Land Office, or other proper officer of the government of the United States, as under the laws of the United States, in any wise relating to or affecting any right, claim, or title, or any contest therefor, to any of the public lands of the United States, and any person or persons shall, taking such oath, affirmation or affidavit, knowingly, willfully, or corruptly swear or affirm falsely, the same shall be deemed and taken to be perjury, and the person or persons guilty thereof shall, upon conviction, be liable to the punishment prescribed for that offense by the laws of the United States."

Except in so far, if at all, as it is covered by section 5392, the section was not carried forward into the Revised Statutes; and admittedly, if repealed, such repeal was wholly the result of the adoption of the Revised Statutes, and especially of the sections thereof numbered 5392, 5595, and 5596, which are as follows, respectively:

"Sec. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States

authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed." (U. S. Comp. St. 1901, p. 3653.)

"Sec. 5595. The foregoing seventy-three titles embrace the statutes of the United States general and permanent in their nature, in force on the 1st day of December one thousand eight hundred and seventy-three, as revised and consolidated by commissioners appointed under an act of Congress, and the same shall be designated and cited, as the Revised Statutes of the United States." (U. S. Comp. St. 1901, p. 3750.)

"Sec. 5596. All acts of Congress passed prior to said first day of December one thousand eight hundred and seventy-three, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof; all parts of such acts not contained in such revision, having been repealed or superseded by subsequent acts, or not being general and permanent in their nature: Provided, that the incorporation into said revision of any general and permanent provision, taken from an act making appropriations, or from an act containing other provisions of a private, local, or temporary character, shall not repeal, or in any way affect any appropriation, or any provision of a private, local or temporary character, contained in any of said acts, but the same shall remain in force; and all acts of Congress passed prior to said last-named day no part of which are embraced in said revision, shall not be affected or changed by its enactment." (U. S. Comp. St. 1901, p. 3750.)

Under a fair construction of these last two sections, it should, I think, be held that they did not repeal any act of a general and permanent nature, no part of which is embraced in the revision. Section 5595, standing alone, would operate to repeal all prior statutes, and would make the revision the sole and exclusive evidence of existing law. But section 5596 was doubtless added for the purpose, among others, of rescuing from repeal general provisions of law wholly overlooked or inadvertently omitted by the commissioners. But it must be borne in mind that the precaution manifested in the latter section is against oversight alone, and if, as is picturesquely stated in one of the briefs, "the compilers left their footprints upon an act, that portion not carried into the revision is repealed." Furthermore, as was said by the Supreme Court, in *Dwight v. Merritt*, 140 U. S. 213, 11 Sup. Ct. 768, 35 L. Ed. 450:

"The Revised Statutes are not a mere compilation and consolidation of the laws of Congress in force on the 1st of December, 1873. The object of that revision was to simplify and bring together all statutes and parts of statutes which, from similarity of subject, ought to be brought together, to expunge redundant and obsolete enactments, and to make such alterations as might be necessary to reconcile contradictions and amend imperfections in the original text of the pre-existing statutes. All those statutes were abrogated by section 5596, which provides that 'all acts of Congress passed prior to said first day of December, one thousand eight hundred and seventy-three, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof.'"

Undoubtedly the act of 1857 is a law of a permanent nature, and particularly section 5 thereof is to be so considered. If now we give to the term "acts," the second word in section 5596, its ordinary im-

port, and accordingly hold that the act of 1857 is a single "act," and not that it consists of five acts, because it is subdivided into five sections, then undoubtedly section 5 is a part of an act of a general and permanent nature, a "portion of which is embraced" in the revision; for admittedly sections 1, 2, and 3 thereof are incorporated into the Revised Statutes as sections 5341, 5342, and 5343, respectively, and therefore section 5 is brought within the scope of the repealing provision. It is, however, urged by a course of reasoning not entirely convincing that section 5 is of itself to be deemed to be a complete act, within the purview of section 5596. *Peters v. United States*, 2 Okl. 116, 33 Pac. 1031. Assuming, but not deciding, that the position is tenable, I am still inclined to think that the result is the same; for section 5 is, at least in part, embraced in section 5392, and is therefore superseded by it. The courts have divided upon the main question; but, in view of what I have deemed to be a controlling consideration, it is not thought necessary to enter into an elaborate analysis of the reasons advanced in support of the conflicting views. Favoring the contention that the section is still in force, there is little to be added to the forceful discussion found in *Peters v. United States*, *supra*, and the opposing view is persuasively presented by District Judge Toulmin, in *United States v. Bedgood* (D. C.) 49 Fed. 54. So far as I am aware, in no other case has the question been expressly decided. In *Caha v. United States*, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415, the Supreme Court declined to pass upon it. In *United States v. Wood*, 70 Fed. 485 (District of Oregon, 1895), no question seems to have been raised, and Judge Bellinger assumed that the section was still in force. In *United States v. Shinn*, 14 Fed. 447 (District of Oregon, 1882), Judge Deady apparently proceeded upon the same assumption. *Babcock v. United States*, 34 Fed. 873, decided by Brewer, Circuit Judge, in the Colorado district, in 1888, in a measure tends to support the Government's position. At least an indictment, some counts in which were based upon section 5, was sustained; but there the contention was, not that section 5 was repealed, but that its enactment operated to repeal section 5392 of the Revised Statutes. Apparently the court's attention was not called to sections 5595 and 5596, R. S., and their effect upon section 5 was not considered. In *Fisher v. United States*, 1 Okl. 252, 31 Pac. 195, the view is suggested which is later amplified and confirmed by the same court in the *Peters Case*, already referred to. No other decision even remotely involving the question has been brought to my attention, or has come under my observation.

The weakness of the argument in support of the proposition that the section is still in force lies in the assumption of premises which, it is thought, are unwarranted in fact. It is not controverted that Congress desired that there be incorporated into the revision all existing laws of a general and permanent nature, and adopted the Revised Statutes under the belief that all such laws were embraced therein. That is made entirely clear by section 5595. If, therefore, any such law was improperly omitted therefrom, such omission must be accounted for by the presumption of inadvertence or oversight on the part of the commissioners by whom the revision was prepared.



Appreciating the strain of the theory that the commissioners could have overlooked so important and conspicuous a section in a short act covering little more than a page of printed matter, all other sections of which they considered and carried forward, those who contend against the repeal assume that section 5392 of the Revised Statutes was in existence in 1857, and, upon such assumption, argue that, upon the other hand, it is incredible that the commissioners would have deliberately omitted from the revision, as being unimportant, a section which Congress had deemed to be necessary, and had seen fit to enact in addition to, and to supplement, section 5392. And if it were true that section 5392 in its present form was in existence in 1857, the argument would have great force; for it would seem to be presumptuous for the commissioners deliberately to set aside or ignore what would thus, by implication, clearly appear to be the intent of Congress. It is sometimes loosely stated that section 5392 dates from the Crimes Act of 1790; but in fact it did not become a law in 1790, and was not in existence in 1857, but is a new section formulated by the commissioners for the purpose of covering and superseding all existing statutes, both special and general, inclusive of section 5 of the act of 1857, and became a law for the first time upon the adoption of the Revised Statutes. Section 18 of the act of April 30, 1790, c. 9, 1 Stat. 116, to which, doubtless, reference is made, is as follows:

"That if any person shall willfully and corruptly commit perjury, or shall by any means procure any person to commit corrupt and willful perjury, on his or her oath or affirmation in any suit, controversy, matter or cause depending in any of the courts of the United States, or in any deposition taken pursuant to the laws of the United States, every person so offending," etc.

—shall be punished as therein provided. It will be noted that not only in form, but in substance, this provision is materially different from section 5392. It is true that by an act of March 3, 1825, c. 65, 4 Stat. 115, entitled "An act more effectually to provide for the punishment of certain crimes," etc., the act of 1790 is, in a measure, supplemented or amplified. Section 13 thereof, which relates to the crime of perjury, provides that:

"If any person, in any case, matter, hearing, or other proceeding, when an oath or affirmation shall be required to be taken or administered under or by any law or laws of the United States, shall, upon the taking of such oath or affirmation, knowingly and willingly swear or affirm falsely, every person, so offending, shall be deemed guilty of perjury," etc.

While it may be conceded that this section, which appears to have been the general law upon the subject of perjury at the time of the passage of the act of 1857, somewhat enlarges the scope of section 18 of the act of 1790, it is far from being identical with section 5392 of the Revised Statutes. Upon the face of the statutes themselves, therefore, it is reasonable to conclude that section 5392 in its present form was drafted and adopted with the understanding and intent that it did and should cover all cases embraced within section 18 of the act of 1790, and section 13 of the act of 1825, and section 5 of the act of 1857; and upon a reference to the commissioners' Draft of the revision, as presented to Congress for adoption, I find confirma-

tory evidence thought to be conclusive of the correctness of this view. Certain it is that section 5 was not omitted through any oversight or inadvertence. At pages 2582 and 2583 of volume 2 of the Draft is found, first, a section covering perjury, which is doubtless a modified form of section 13 of the act of 1825, with marginal references to the act of 1790 and the act of 1825. Following this is another section covering subornation of perjury. And then follows what is denominated a "List of Statutes on Perjury and False Swearing," under which head there are cited 20 different sections or acts passed at different dates, among them being the act of March 3, 1857. Following this list of statutes is what is called a "note," which I quote in full:

"The crime of perjury and false swearing occupies a conspicuous place in the laws of the United States, as the foregoing list of acts abundantly shows. The list might be doubled. The legislative practice is to affix the pains and penalties of perjury anew every time an oath is required in any statute, to be taken before either a judicial or administrative officer. It would be well if this growing mass of laws in regard to perjury were no further enlarged. To this end the cited sections of the acts of 1790 and 1825 are so revised and slightly altered as to embrace, it is believed, every case of false swearing, whether in a court of justice or before any administrative officer of the government. For fear, however, that sections 73 and 74 may not be broad enough to cover every perjury and subornation of perjury, it is recommended that the two following sections, in brackets and italicized, be adopted in lieu thereof. We feel much confidence that no case can occur which these provisions will not reach."

Following the note, in brackets, are two sections, one numbered 78, covering perjury, and one numbered 79, covering subornation of perjury. Bracketed section 78 is identical in language with section 5392, and section 79 is identical with section 5393, of the Revised Statutes. Obviously the only inference which can be drawn is that Congress adopted the recommendation of the commissioners and incorporated section 5392 in the Revised Statutes, with the understanding that it did and would supersede and take the place of the numerous existing statutes defining perjury and false swearing; and it is accordingly held that section 5 of the act of 1857 was repealed by sections 5595 and 5596 of the Revised Statutes.

Second. Are the facts charged in the indictment sufficient to constitute an offense under section 5392? It is not questioned that if the averments of the indictment are true the defendant, in making the affidavit, took the oath before a competent officer; and that he willfully, and contrary to such oath, stated or subscribed to matters which were false, and which he did not believe to be true. It is denied only (1) that the false statements were upon "material" matters, and (2) that the proceeding was a "case in which a law of the United States authorizes an oath to be administered."

[2] As to the first objection, it is to be said that there are in common use two methods of alleging the materiality of a false statement constituting the basis of a perjury charge, either one of which is deemed to be sufficient. The pleader may either set out the facts from which the materiality appears, as a matter of law, or he may directly aver the materiality without setting forth the probative or

circumstantial facts. The latter method is here adopted, and, upon demurrer, the indictment must be held sufficient, unless it conclusively appears, as a matter of law, from the facts therein set forth that the affidavit was immaterial. Bishop on Criminal Procedure (3d Ed.) vol. 2, § 921; 16 Enc. of Pl. & Pr. pp. 343, 344.

[3] I am unable to yield to the defendant's contention that the inquiry to which the affidavit relates was, as a matter of law, immaterial. It is entirely within the range of possibilities, for instance, that, simultaneously with the application of the defendant, there was tendered to the land office an application by John Doe, a qualified homesteader, for the same tract of land. In such a case it would seem to be material for the officers to know which of the two applicants was in the actual occupancy of the land, in order properly to decide which application they should accept, and to that end they might require a showing to be made by affidavit. It is wholly unimportant that at most such an affidavit is held to establish only a *prima facie* case in favor of the affiant, which the opposing applicant may later assail in an adversary proceeding; for it still remains true that the defendant's right to enter the land at all, as against such other claimant, may depend entirely upon the existence of the facts set forth in such affidavit, and the making of the affidavit, with the consequent acceptance of the application, takes from him and casts upon another the burden of instituting a formal proceeding for the final adjudication of the conflicting claims. Upon this branch of the case, it is concluded that, while the affidavit may have related to immaterial matters, such immateriality does not conclusively appear, either from the facts averred, or by reason of any presumption of law.

[4] Assuming now, as alleged, that the affidavit was material, we proceed to consider whether or not the defendant's oath taken thereto was "in a case in which a law of the United States authorizes an oath to be administered." Preliminarily it is to be noted that no statute expressly provides for such an affidavit, or directly, in terms, authorizes the oath; and if authority existed at all it must have been conferred indirectly and by implication only. Was it so conferred? The theory of the defendant, as I understand it, is that Congress, having, in section 2290 of the Revised Statutes (U. S. Comp. St. 1901, p. 1389), required the homestead applicant to make an affidavit, the contents of which are expressly prescribed, it is not competent for the administrative officers, by rule or otherwise, to exact additional requirements, at least any additional statements required by the land officers to be made under oath, even though false, cannot serve as the basis of a charge of perjury; reference being had to the general principle that a criminal offense cannot be created or defined by a mere administrative rule. *United States v. Eaton*, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591. But from this principle it does not necessarily follow that a departmental regulation may not, in any case, provide the opportunity for, or in some other way sustain, a vital relation to the commission of a crime. *United States v. Bailey*, 9 Pet. 238, 9 L. Ed. 113; *Caha v. United States*, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed.

415; *United States v. Grimaud*, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563. Nor is it essential to the offense of perjury that the oath falsely taken should be particularly pointed out or directly prescribed by express statute. It is sufficient if, indirectly or by necessary implication, the laws of the United States require or permit the oath to be taken. *Caha v. United States*, supra; *United States v. Curtis*, 107 U. S. 671, 2 Sup. Ct. 501, 27 L. Ed. 534; *United States v. Hearing* (C. C.) 26 Fed. 744; *United States v. Hardison* (D. C.) 135 Fed. 419. It may be conceded that there is some support, both in reason and the decided cases, for the view that, in the administration of the general homestead law, Congress having, by section 2290, specifically prescribed the contents of the required affidavit, it is incompetent for the Land Department to impose upon the applicant additional conditions. "Expressio unius est exclusio alterius." *United States v. Maid* (D. C.) 116 Fed. 650. That point, however, it is unnecessary presently to decide; for it must be borne in mind that the application under consideration was not made under the general homestead laws alone. The lands were within the boundaries of a national forest, and by express provision of the act of June 11, 1906, authorizing their entry, they could be entered only in accordance with the general homestead laws *and that act*. That act conferred upon the defendant, if otherwise qualified, a preference right to make entry over other qualified applicants, provided certain facts and conditions existed. To enable the officers properly to administer the law and accept the application of the person entitled to make the entry, it was requisite that they inform themselves concerning the existence of such facts. No method of inquiry or form of procedure is pointed out by the law. The method most familiar, most convenient, and most commonly adopted for making a prima facie showing of a fact in the administration of the public land laws is, as Congress must have well known, by affidavit or verified written statement. Such a method is entirely reasonable, and imposes upon the applicant no undue burden. Furthermore, in the Revised Statutes we find the following sections:

"Sec. 441. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects: \* \* \* Second. The public lands, including mines." (U. S. Comp. St. 1901, p. 253.)

"Sec. 453. The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all [agents] [grants] of land under the authority of the government." (U. S. Comp. St. 1901, p. 257.)

"Sec. 2478. The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specially provided for." (U. S. Comp. St. 1901, p. 1586.)

"Sec. 2246. The register or receiver is authorized, and it shall be their duty, to administer any oath required by law or the instructions of the General Land Office, in connection with the entry or purchase of any tract of the public lands." (U. S. Comp. St. 1901, p. 1371.)

In circular No. 10 of the General Land Office, issued by the Commissioner, and approved by the Secretary of the Interior. April 20, 1911, paragraph 17 prescribes the sworn showing to be made by homestead applicants in all cases under the general homestead laws; and paragraph 19 provides that:

"All applications by persons claiming as settlers must, in addition to the facts required in paragraph 17, state the date and describe the acts of settlement under which they claim a preferred right of entry," etc.

This appears to be an "appropriate regulation," and therefore fully within the authority conferred by section 2478, empowering the officers charged with the responsibility of disposing of the public lands "to enforce and carry into execution, by appropriate regulations," provisions of law "not otherwise specially provided for." No valid reason is apparent, therefore, why the oath to the affidavit made by the defendant pursuant to this regulation should not be held to be an oath which, by necessary implication, is permitted by the laws of the United States to be administered.

The case seems to fall within the principle of *Caha v. United States*, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415, and *United States v. Hearing* (C. C.) 26 Fed. 744. In the former case the defendant was charged with having given false testimony in a contest in the land office involving the validity of a homestead entry. While it was held that if Congress had not authorized, it had at least recognized, the validity of such a contest, it is not suggested that there was any express authorization of the administration of oaths in such proceedings. The whole matter of procedure, including the taking of evidence and the administration of oaths, rested solely upon the rules and regulations of the Department; and it seems to have been assumed that if the Land Department was authorized to make an investigation by entertaining a "contest" it was authorized to administer oaths to persons appearing to testify in such contest. Accordingly the judgment of conviction was affirmed.

In *United States v. Hearing* there was no express authority of law for requiring the affidavit which served as the basis of the perjury charge, and which had been taken in a land matter and filed in the land office. The comments of Judge Bellinger, in overruling a demurrer to the indictment, are very pertinent. He said:

"It is not directly contended that the existence of these facts was not material to the right of the defendant to make his proof of qualification and purpose, before the clerk, to make an entry under the homestead act, but only that, however material they may have been in that connection, the statute did not require or authorize the defendant to make an oath to them. The oath of the applicant to the affidavit or the excusatory facts is not compulsory. But whoever wishes to have the benefit of the homestead act must show in some way the existence of the facts which entitle him thereto; and these, when not of record, being within the applicant's knowledge, may be shown by his own oath. As to the facts showing the qualifications of the applicant and his purpose in making the entry, the statute expressly permits and requires them to be proven by his oath; and if there were no specific direction in the statute on the subject I think he would be allowed to do so as a matter of course. And this is the condition of the statute in regard to

these excusatory facts. The mode of their proof is not prescribed; and convenience, usage, and necessity all point to the oath of the party as the proper evidence of their existence. Certainly it would be within the power of the Department to make a regulation on the subject permitting or prescribing this mode of proof in such a case. \* \* \* The statute, not having prescribed the mode of proving the excusatory or preliminary facts, a regulation of the Department might direct or permit that it be done by some such recognized mode of procedure as the oath of the applicant, and thereupon such oath, when taken, is administered, in effect, under or in pursuance of a law of the United States; and therefore perjury may be assigned thereon."

The affidavit here is not like that involved in the case of *Williamson v. United States*, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278, or *Robnett v. United States*, 169 Fed. 778, 95 C. C. A. 244, where the sworn statements required by the regulations of the Department were in contravention of the legal rights of the entryman, or were at least immaterial to such rights. In the *Robnett Case* the *Williamson Case* is followed, and the precise point decided in the latter case appears from the statement of the proposition made by Mr. Justice White, who rendered the decision, as follows:

"It remains only to consider whether it was within the power of the Commissioner of the General Land Office to enact rules and regulations by which an entryman would be compelled to do that at the final hearing which the act of Congress must be considered as having expressly excluded, in order thereby to deprive the entryman of a right which the act, by necessary implication, conferred upon him. To state the question is to answer it."

Obviously such a principle is not applicable here, if our conclusion is correct that the inquiry to which the defendant's affidavit related was a material one.

Counsel for the government have not pointed out what they conceive to be the material distinction between the two counts, and I have failed to discover it. Both counts appear to be sufficient under section 5392, and the demurrer to each will therefore be overruled. There is some discussion found in one of the briefs upon the question whether or not the prosecution should be compelled to elect as between the two counts; but such question has not been submitted, and need not now be decided.

The demurrer will be overruled and the defendant required to plead further.

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In re MARENGO COUNTY MERCANTILE CO.

(District Court, S. D. Alabama, N. D. October 5, 1912.)

No. 929.

1. SALES (§ 46\*)—FRAUD—RECLAMATION OF GOODS.

Representations as to the financial status of a buyer, made as a basis for credit and known by the person making them to be false, and but for which the sale would not have been made, are fraud sufficient to entitle the seller to reclaim the goods.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 95; Dec. Dig. § 46.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

## 2. SALES (§ 46\*)—RESCISSION—FRAUD—FALSE REPRESENTATIONS AS TO CREDIT.

False representations as to a buyer's credit, made to induce a sale of goods, in order to authorize the seller to rescind and reclaim the goods, must be willfully false, or such that the buyer did not believe them to be true, or made without reasonable grounds to believe them to be true, whereby the seller was deceived and induced to consummate the sale; the buyer having either knowledge or reasonable grounds to believe his insolvency and intending not to pay for the goods at the time they were bought.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 95; Dec. Dig. § 46.\*]

## 3. SALES (§ 52\*)—GOODS SOLD TO BANKRUPT—RECLAMATION—FRAUD—EVIDENCE.

Evidence *held* insufficient to show that a sale of goods to a bankrupt was induced by fraudulent representations as to the bankrupt's solvency at the time of the sale, so as to entitle the seller to reclaim the goods from the bankrupt's trustee.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 118-144, 1045; Dec. Dig. § 52.\*]

Misrepresentation and concealment by vendee of goods as to financial condition as affecting validity of contract of sale, see note to *In re Pierce*, 87 C. C. A. 538.]

## 4. BANKRUPTCY (§ 178\*)—SALE OF GOODS—NATURE OF INSTRUMENT—POSSESSION OF BUYER—VALIDITY.

Petitioner sold merchandise to a bankrupt under contract providing that, in case the bankrupt should become insolvent or attempt to sell or dispose of the goods in any other way than in due course of trade, all the bankrupt's indebtedness to the petitioner should immediately become due, and that it might take immediate possession of all goods of every kind shipped by petitioner to the bankrupt and credit it at the invoice price on the indebtedness. Petitioner never took possession, but the bankrupt remained in possession and made sales in the usual course of trade until dispossessed by its receiver and trustee in bankruptcy. *Held*, that the contract was in substance a chattel mortgage and void as to creditors acquiring rights by bankruptcy proceedings before petitioner took actual possession.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 221, 264-274, 283, 284; Dec. Dig. § 178.\*]

Petition to Review Order of the District Court of the United States for the Northern Division of the Southern District of Alabama, in Bankruptcy.

In the matter of bankruptcy proceedings of the Marengo County Mercantile Company. Reclamation proceeding by the Page Woven Wire Fence Company. Petition to review a referee's order denying the relief prayed. Affirmed, and petition dismissed.

Mallory & Mallory, of Selma, Ala. (Charles L. Robertson, of Adrian, Mich., of counsel), for petitioner.

Pettus, Fuller & Lapsley, of Selma, Ala., for trustee.

TOULMIN, District Judge. This is a reclamation proceeding brought by the Page Woven Wire Fence Company, a corporation, against the trustee of said bankrupts on a petition praying that the petitioners may have a lien upon the funds of said bankrupt estate to the amount and value of certain goods, consisting of woven

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

wire fencing, purchased by the bankrupts from the petitioners, and that said trustee be directed to pay the same to the petitioners; they claiming said goods as belonging to them. The petitioners base their claim on the ground that the bankrupt was insolvent at the time of the purchase of such goods, wares, and merchandise, and that this insolvency was known to it at the time of the purchase. Petitioners allege that said Marengo County Mercantile Company, the bankrupt, upon false and fraudulent representations, induced petitioners to sell and deliver to it the said goods mentioned, and wrongfully, fraudulently, and with intent to deceive and defraud petitioners, and knowing that petitioners relied upon the truth of the representations so made, induced them to sell and deliver said goods and merchandise to the said bankrupt, with the intent and design not to pay for them. This petition is, in substance and effect, a proceeding brought to rescind and set aside the sale of the goods to said bankrupt, and to recover the proceeds of their sale made by the trustee in bankruptcy. The referee dismissed the petition, and the case is here on a petition to review such action of the referee.

[1] "It is well settled that representations as to the financial status of a buyer made as a basis of credit, and known by the party making them to be false, and but for which the sale would not have been made, are fraudulent, and entitle the seller to reclaim the goods so obtained by fraud." In re J. S. Patterson & Co. (D. C.) 125 Fed. 564.

[2] In *Donaldson v. Farwell*, 93 U. S. 631, 23 L. Ed. 993, it was held to be established that what entitles a vendor to disaffirm a contract of sale and recover his goods consists in the vendee's inducing the vendor "to sell him goods on credit" when he was (a) insolvent, (b) concealed his insolvency, and (c) did not intend to pay for what he bought. In re *Levi & Picard* (D. C.) 148 Fed. 655.

But "to entitle a seller of goods to rescind the sale for fraud, there must have been an undisclosed knowledge of insolvency and an intention not to pay for them on the part of the purchaser when the goods were bought." In re *Levi & Picard* (D. C.) 148 Fed. 654.

In the absence of fraud in making the statement reclamation should not be allowed. In re *Levi & Picard* (D. C.) 148 Fed. 654; *Ellet-Kendall Shoe Co. v. Ward*, 26 Am. Bankr. R. 114, 187 Fed. 982, 110 C. C. A. 320.

"The representations must be willfully false, or must have been such that the buyer did not believe to be true, or had no reasonable grounds to believe to be true, and by means whereby the seller was deceived, and thereby induced to consummate a sale he otherwise would not have made." In re *Roalswick* (D. C.) 110 Fed. 639.

And it has been held that:

"A known condition of insolvency at the time of the purchase, and the failure of the bankrupt to disclose such condition to the claimant, cannot



be regarded as fraudulent. The law, having in view the ordinary conduct of business affairs, draws a distinction in matters of this kind between withholding information and making false statements for the purpose of deceit." In re Davis (D. C.) 112 Fed. 296.

[3] The real question presented by the petition and in the brief of counsel for petitioners is:

"Does the evidence show that the Marengo County Mercantile Company, by false and fraudulent representations of material facts, obtained from the petitioners the goods, wares, and merchandise, the proceeds of the sale of which are claimed?"

Under the allegations of their petition, the petitioners must establish these several propositions to entitle them to rescind the sale in question, and to obtain an order for the payment of the sum of money claimed by them therein: (1) That the bankrupt was insolvent at the time of the purchase of the goods, wares, and merchandise; (2) that the bankrupt concealed its insolvency from the petitioners, which insolvency was known to the said bankrupt at the time of said purchase; (3) that false and fraudulent representations were made by it with the intent to deceive and defraud petitioners, and were so made to induce the petitioners to sell and deliver to said purchaser the goods in question, with the intent and design not to pay for them.

The referee has failed to certify to the judge the question presented for review, except as to whether or not the order made by him, disallowing the petition, was correct. And there is no *summary* of the evidence relating thereto. "Both of these provisions are important and required, and should be carefully observed. The summary of the evidence is required in order to save the judge the labor of examining what is often a mass of testimony on many different questions, and of extracting so much as may be relevant to the point immediately in hand. The summary may also be valuable as showing what evidence has been considered by the referee before coming to a conclusion." In re Kurtz (D. C.) 125 Fed. 992; *Crim v. Woodford*, 136 Fed. 38, 68 C. C. A. 584; General Order, or Rule 27 (18 Sup. Ct. viii), in Bankruptcy.

However, the case is before me, and I have carefully examined and considered it.

The referee expresses the opinion that the evidence is sufficient to find that at the time of the sale the bankrupt was insolvent. He has furnished no *summary* of the evidence relating thereto. Assuming that the petitioners have established that proposition, and that the referee's finding on it is correct, as I do, it does not follow that the bankrupt concealed its insolvency from the petitioners, or had knowledge of its insolvency at that time. George F. Conant, the president of the bankrupt company, and who purchased the goods from one Edwards, the agent and traveling salesman of the petitioner, was called as a witness by the petitioners. He testified that on September 22, 1910, the date of the purchase of the goods, his company was "in good shape"; that its assets were greater than its liabilities. He also testified that business was

good, prospects and collections also good, in September, 1910, and at the time these goods were bought. He also testified that he made no special representation of any kind in reference to the solvency or financial condition of the Marengo County Mercantile Company to Edwards, the salesman of petitioners, at the time he placed the order for the goods with him on September 22, 1910; that he was not asked for a statement on the subject, and he made none. Edwards, the salesman of petitioners, who procured the order for the goods from Conant, corroborates in substance the latter's evidence in regard to what occurred at the time the order was given. He, as a witness for petitioners, testified that Conant did not tell him that his company had any special amount of assets or was solvent, in terms, but gave him to understand that it was financially in good shape; that he told him he was an officer in a bank there, and in that way gave him to understand that the sale was a good one. He testified no statement was made by Conant in reference to the solvency of his company, and he requested none. But it was his understanding from what was said by Conant, which was that he was an officer of a bank. From this he was given to understand that the firm was in good shape, and he considered the sale a good one. The evidence shows that Edwards sought Conant and solicited the order for the goods. He stated that he wrote to petitioners "he thought the company was good for the bill as it was well rated, was doing a tremendous business, had an elegant stock of goods, and that Conant seemed to be a good business man."

The evidence fails to satisfy me that the bankrupt made any false statements or was guilty of any positive fraud at the time of the purchase of the goods. As said by the court in *Re Aarons & Co.*, 28 Am. Bankr. R. 400, 193 Fed. 646, 113 C. C. A. 514:

"Fraudulent concealment in this case must be established by silence, if at all. But we think it is not so established, because we are unable to see that the bankrupt was under any obligation to speak or to disclose its financial condition to the petitioners; no request for any statement having been made."

I agree with the referee in his opinion that the evidence is not sufficient to find that the bankrupt had the intent and design not to pay for the goods at the time of their purchase, or had then no reasonable expectation of being able to do so.

L. B. Robertson, the manager and treasurer of petitioners, testified that he had special charge of the acceptance and approval of all orders and the making and signing of all contracts with customers of his company. He said Edwards made the contract involved here subject to his (witness') approval. The contract was received by him at his office in Adrian, Mich., on September 24, 1910, for acceptance and approval. Before doing so, he stated it was necessary for him to be satisfied of the financial standing and credit of the Marengo County Mercantile Company. He immediately consulted the published book of commercial ratings of bankers, merchants, etc., issued by the Bradstreet Company, and found that

said bankrupt company was given a rating of "T-D," which is estimated worth \$10,000 to \$20,000, with a second or fair credit. Witness stated that he then requested from the Bradstreet Company, at its office at Montgomery, Ala., a special report in writing showing on what such credit rating was based, and received a special report from them, a true copy of which is annexed to and made a part of his deposition. He testified that relying wholly on such published rating, and signed report made by the Marengo County Mercantile Company to the Bradstreet Company, he approved the contract on September 26, 1910, and instructed shipment immediately under the contract, which was made on October 3, 1910. It does not appear from the testimony of this witness when he requested from the Bradstreet Company, at their office in Montgomery, Ala., the special report in writing referred to; but it does appear therefrom that the contract and order for the goods were signed at Linden, Ala., on September 22, 1910, that they were received by mail by the witness at Adrian, Mich., on September 24, 1910, and that he accepted and approved the contract on September 26, 1910, and ordered the goods shipped immediately. This witness testified that in granting credit and shipping these goods he relied on the contract as to their right to claim a return of the goods, and as to the financial responsibility of the parties, on information of the Bradstreet Company in their published book of September, 1910, and special information as shown in "Exhibit C." If the special information mentioned was the special report he requested from the Bradstreet Company, and on the strength of which he approved the contract on September 26, 1910, I am unable to see how he secured such special report in so short a time, in view of the evidence in the case. He received the contract from Alabama on September 24th, mailed on September 22d. He requested from Bradstreet Company the special report not earlier than the 24th, and yet he approved the contract on the 26th of September, relying wholly on Bradstreet Company's rating and on such special report as to the financial responsibility of the parties. The evidence is that it takes about two days for a letter to come by mail from Adrian, Mich., to Montgomery, Ala., and as many days for a reply to be received by mail at Adrian, Mich. The evidence of G. M. Williams, superintendent of the local office of Bradstreet Company at Montgomery, Ala., is that their office obtained from Marengo County Mercantile Company a report or statement of its financial condition, dated February 4, 1910. It was received by mail on February 10, 1910, and was the only report from that company during the year 1910. Witness said he could not swear that the Montgomery office of the Bradstreet Company furnished the petitioners or L. B. Robertson, their treasurer, a report covering the financial condition of said Mercantile Company directly. He said:

"If the Montgomery office got such a request from them for this report it came by mail, and if a reply was made it was sent by mail. If they have the information wanted, they answer the day the request is received. If

a special report is asked for, it is always a week or ten days before we can get up the information for such a report."

This witness also testified:

"That by the usual route of travel it would take a letter about two days to come from Adrian, Mich., to Montgomery, Ala., and in like manner it would take about two days returning."

If witness Robertson requested the special report from Bradstreet Company at Montgomery, Ala., on September 24th, the day he received the contract and order for the goods, and the contract was approved on September 26th and goods ordered shipped, then such action of Robertson could not have been at all predicated on such special report or information as stated. The contract was approved in two days after it was received for approval, and it would have taken at least four days to have received the special report after request. There is evidently some mistake or error in this statement of the witness. Moreover, Exhibit C, designated by witness Robertson as a true copy of the special report referred to, shows upon its face the date of September 9, 1910, as, presumably, the date of the "T-D" rating by Bradstreet Company; and, on the back thereof, at the beginning of a printed form of letter from Bradstreet Company addressed to Page Woven Wire Fence Company, is the date *March 7, 1911*, as presumably the date of transmittal of such special report to petitioners at Adrian, Mich., upon which report witness says he relied in granting credit to the bankrupt on *September 26, 1910*.

[4] The contract under which the petitioners contend that they have a right to reclaim the goods sold and delivered under the contract to the Marengo County Mercantile Company provides that said company shall sell said goods only in the usual course of trade, and that, in case said Mercantile Company shall become insolvent or attempt to sell or dispose of the goods in any other way except in due course of trade, all of the said buyer's indebtedness to petitioners shall immediately become due and payable, and that the said petitioners shall take immediate possession of all goods of every kind shipped by them to the said buyer and credit the buyer at the invoice price therefor on the said indebtedness.

The goods were purchased and received under these conditions. They were sold, and being sold by the buyer in accordance with said conditions, and those unsold remained and continued in the possession of the buyer until dispossessed by the receiver and trustee in bankruptcy.

This contract was, in substance and effect, a chattel mortgage on said goods.

A mortgage on a stock of merchandise, which expressly or impliedly provides that the mortgagor shall remain in possession of the property until condition broken, or the mortgagee in his own interest chooses to dispossess him, is, before such possession is taken, void, as a matter of law, as to purchasers and creditors of the mortgagor. The retention of possession by the mortgagor (the

bankrupt), with the power of disposition by sale, makes the mortgage ineffectual as against creditors who assert a claim before the mortgagee takes actual possession. The proceeding in bankruptcy amounted to an effectual sequestration of the property, and it was a seizure for the benefit of all of the creditors of the bankrupt. The instrument is fraudulent in law, and void as to creditors, who acquired rights before the mortgagee takes actual possession. Here the mortgagee never took possession; but the mortgagor (the buyer) was to remain in possession and to make sales of the property in the usual course of trade, and did so remain and make sales until dispossessed by the receiver and trustee in bankruptcy. In *re First Nat. Bank*, 135 Fed. 62, 67 C. C. A. 536; In *re Bazemore* (D. C.) 189 Fed. 236; *Johansen Bros. Shoe Co. v. Alles* (C. C. A.) 197 Fed. 274.

If the insolvency of the bankrupt, at the time the goods were purchased, has been shown, I do not find from the evidence that there was any fraudulent concealment of it. I am inclined to think that the bankrupt did not know it was bankrupt until its property was attached by creditors, and it was put into bankruptcy.

The order of the referee is affirmed, and the petition dismissed, with costs.

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SPOKANE VALLEY LAND & WATER CO. v. KOOTENAI COUNTY, IDAHO.

(District Court, D. Idaho, N. D. August 19, 1912.)

**1. TAXATION (§ 234\*)—EXEMPTION OF IRRIGATION WORKS—CONSTRUCTION OF IDAHO STATUTE.**

Rev. Codes Idaho, § 1644, subd. 12, which exempts from taxation irrigation canals and ditches and appurtenant water rights used by the owner exclusively for the irrigation of lands owned by him, must be limited in its application to cases where the land on which the water is used is situated within the state.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 381, 382; Dec. Dig. § 234.\*]

**2. TAXATION (§ 234\*)—EXEMPTION OF IRRIGATION WORKS—CONSTRUCTION OF IDAHO STATUTE.**

Such statute, however, fairly construed, applies to and exempts irrigation works owned by a corporation, the stockholders of which own the lands irrigated; but under a provision therein that, in case any water is sold or rented from any such canal or ditch, the same shall be taxed to the extent of such sale or rental, where the corporation which constructed the works sold all the land irrigated, with a perpetual right to a certain quantity of water thereon, retaining ownership of the works and water right with the right to sell or use any surplus and to collect a fixed sum from each user to cover maintenance and operating expenses, the works are taxable.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 381, 382; Dec. Dig. § 234.\*]

**3. TAXATION (§ 204\*)—EXEMPTION STATUTES—CONSTRUCTION.**

While statutes granting exemptions from taxation are not to be read so literally as to thwart their purpose or destroy their spirit, as a general

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
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rule they are to be construed strictly, and substantial doubts touching their meaning and scope are to be resolved in favor of the public.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 322, 325, 332–334, 346; Dec. Dig. § 204.\*]

4. COURTS (§ 328\*)—JURISDICTION OF FEDERAL COURTS—AMOUNT IN DISPUTE.

The value of the matter in dispute in an action, for the purpose of determining the jurisdiction of a federal court, is the aggregate amount prayed for, and not the separate amounts of each cause of action stated.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 890–896; Dec. Dig. § 328.\*]

Jurisdiction of federal courts as determined by the amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Tennent-Stribbling Shoe Co. v. Roper*, 36 C. C. A. 459; *O. J. Lewis Mercantile Co. v. Klepner*, 100 C. C. A. 288.]

At Law. Action by the Spokane Valley Land & Water Company against the County of Kootenai, Idaho. On demurrer to amended complaint. Sustained in part.

Allen & Allen, for plaintiff.

N. D. Wernette, Co. Atty., of Cœur d'Alene, Idaho, and C. H. Potts, for defendant.

DIETRICH, District Judge. The plaintiff, a corporation organized under the laws of the state of Washington, brings this action to recover from the defendant county \$5,056; the same being the aggregate of taxes paid by it under protest upon its irrigating canals in that county for the years 1909 and 1910. There are two causes of action. In the first, which relates exclusively to the taxes for 1909, it is shown that in that year plaintiff was the owner of 50 second feet of water in Fish Lake, together with a ditch by which the same is conveyed to East Greenacres, and there used for the irrigation of lands, all situate within the boundaries of Kootenai county, Idaho; also, of another water right to the amount of 250 second feet in the Spokane river, together with the dam and canal by which the water is diverted and conveyed from the river at Post Falls, Idaho, to the lands irrigated therefrom, such canal extending in a northwesterly direction about 18½ miles, the first 5½ miles thereof being in Idaho and the other 13 miles in the state of Washington. It is also averred that this Spokane river water is used partly for the irrigation of lands in Idaho and partly for the irrigation of Washington lands. It is further made to appear that, prior to 1909, plaintiff, being the owner of lands susceptible to irrigation from both of its canals, sold tracts thereof to divers persons, together with perpetual rights to receive water from these canals, and that all of its water rights in Fish Lake were thus sold; that the waters of Spokane river, not so disposed of, were used by the plaintiff in the irrigation of its own lands; and that none of the water distributed through either system is rented or held for rental, or used except upon lands owned by the plaintiff or owned by the several persons to whom such lands were sold with perpetual appurtenant water rights. At all times mentioned

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in the complaint the plaintiff was the owner of the primary water rights, together with the diverting and distributing works, subject only to the rights of the several purchasers of lands already referred to. By reference to the water deed or contract, a copy of which is attached to the complaint, it appears that the purchaser is granted title to a certain described tract of land, together with a perpetual right to use water flowing in plaintiff's canals sufficient for the irrigation thereof, upon certain conditions, one of which is the annual payment of a specified amount per acre as maintenance and operation charges. The plaintiff retains the control, and assumes the responsibility of maintaining the canal systems and of properly distributing the water therefrom. The taxes, inclusive of penalties, upon the Fish Lake system for the year 1909, amounted to \$198.24, and upon the Spokane river system to \$2,640.50, making a total for the year of \$2,838.74.

In its salient features the second cause of action, involving the taxes for 1910, is similar to the first, with the important exception that it relates only to the Spokane river system, the taxes upon which for that year, including penalties, amounted to \$2,217.26.

The contention of the plaintiff is that all the property so assessed was exempt from taxation under subdivision 12 of section 1644 of the Revised Codes of Idaho, which is as follows:

"All irrigation canals and ditches and water rights appurtenant thereto, when the owner or owners of said irrigating canals and ditches use the water thereof exclusively upon land or lands owned by him, her or them: Provided, in case any water be sold or rented from any such canal or ditch, then, in that event, such canal or ditch shall be taxed to the extent of such sale or rental."

The defendant demurs to the amended complaint, and the objections raised thereto will now be considered.

[1] 1. It is first contended that, while the application of the statute relied upon is not in terms confined to cases where water is used exclusively for the irrigation of Idaho lands, such a restricted meaning is strongly implied by the considerations which must have led to its enactment, and in this view I am inclined to concur. There may be room for a difference of opinion as to the wisdom or policy of exempting from taxation canal property of any sort; but there would not seem to be even a semblance of a reason for extending such immunity to works constructed and maintained for the purpose of taking water out of Idaho for use in another state. In cases where the water is used for the irrigation of Idaho lands, it may be persuasively argued that the value of the irrigating system is correctly represented in the enhancement of the value of the lands irrigated therefrom, and that therefore, if such lands are fully assessed, the public revenues are not affected by the exemption of the irrigating canal.

But what can be said in favor of such a policy where the water is used upon lands beyond the reach of the Idaho revenue laws? By permitting its public waters to be carried beyond its borders

the state loses one of its most valuable assets, and by clothing the appropriator with the power of eminent domain it enables him wholly to destroy the productive value of such lands as are taken for right of way. To accept the plaintiff's view of the statute is therefore to hold that the state not only intended to permit a non-resident to come within its boundaries, and, without price, appropriate water for use outside the state, and convert productive, revenue-bearing lands into nonproductive rights of way for canals and ditches, but also intended to encourage such an enterprise by exempting from taxation the entire property, including the right of way, which, but for the project, would bear its share of the burden of taxation; and all without any reciprocal advantage or possible benefit accruing to the state directly or indirectly. It is thought that, in the absence of language unequivocally expressing it, an intent so extremely altruistic ought not to be imputed to the Legislature of the state. The truth in all probability is that, in framing and enacting the statutory provision relied upon, the Legislature took no thought of a case where the irrigated lands were outside the state. It was concerned with the taxation and exemption of property subject to its jurisdiction only, and was not providing for a case where a part of the property involved lies beyond its reach. It is a familiar rule that in the construction of statutes such meaning will be given as will best harmonize with the considerations out of which they have sprung and is most likely to effect the object to accomplish which they were enacted. *Endlich on Interpretation of Statutes*, par. 73.

"The general language of statutes will be limited to such persons and subjects as it is reasonable to presume the Legislature intended it should apply. Throughout the entire history of English and American law the courts have been ruling that the general words of statutes were to be restrained in import and application whenever the taking of them in a literal sense would lead to absurd and hurtful consequences." *State v. Smiley*, 65 Kan. 240, 69 Pac. 199, 67 L. R. A. 903.

The case of *State v. Holcomb*, 85 Kan. 178, 116 Pac. 251, is very closely in point. By section 1 of article 2 of the Kansas Constitution, all property used exclusively for municipal purposes is exempt from taxation. The city of Kansas City, in Missouri, owned a water plant situate in the state of Kansas, which it claimed was exempt from taxation under this constitutional provision and the statutes enacted in pursuance thereof, for the reason that the plant was used exclusively for municipal purposes. The Supreme Court of Kansas, in rejecting the claim, said:

"It is true that the constitutional provision relating to taxation does provide that all property used exclusively for municipal purposes shall be exempt; but the fact that the provision does not expressly say that the Constitution is made for Kansas is not a good basis for an inference that the framers were attempting to regulate and protect the municipalities of other states. The provisions of both the Constitution and the statutes in relation to exemptions from taxation must be understood as referring to Kansas and to the counties, municipalities, and families of Kansas, over which it has power of visitation and control."



It is concluded that subdivision 12 of section 1644 provides no exemption in cases where the lands irrigated are not within the state of Idaho.

[2] 2. It is further urged that the statute does not avail the plaintiff where it has sold water rights for the irrigation of lands situate in the state of Idaho. The question is not free from great difficulty. It will be noted that the precise language of the law restricts the exemption to cases where "the owner or owners of said irrigating canals or ditches use the water thereof exclusively upon land or lands owned by him, her or them." Taken literally, the language does not effect an exemption in favor of the plaintiff covering water rights which it has sold to others. In such cases the ownership of the irrigated land and the ownership of the canal have been severed. If we take cognizance of the several classes of irrigating systems prevailing in Idaho, it must be admitted that the language of the statute was not aptly chosen to make the distinction which it is reasonable to suppose was intended by the Legislature. There are small ditches, and possibly a few large canals, where, strictly speaking, the ownership of the irrigating works and the ownership of the lands irrigated rest in the same person or persons; but generally in the maintenance and operation of systems of considerable magnitude associational or joint ownership is found to be unwieldy, if not wholly impracticable, and incorporation is resorted to as furnishing a more efficient and satisfactory method of administration and control. From an early day a common, if not the most common, type of ownership in Southern Idaho, where irrigation almost universally prevails, is a species of corporation, the stockholders in which are the farmers who actually use the water upon their farms, each share of stock entitling the holder to the use of a certain amount of water, or water sufficient for the irrigation of a certain amount of land, and the assessments or dues upon such stock are sufficient only and are levied for the sole purpose of defraying the expenses of maintaining and operating the system. *Hall v. Eagle Rock & Willow Creek Water Co.*, 5 Idaho, 551, 51 Pac. 110.

In the case of such corporations, strictly speaking, the legal title to the canal and appurtenant water right is in the corporation, whereas the water is used upon land belonging severally to the individual stockholders, and therefore there is not absolute identity of ownership of the irrigating system and the irrigated lands. No reason, however, is apparent why such a canal should, for the purposes of taxation, be differentiated from a canal directly held by the water users as joint owners thereof. The corporation but holds the naked legal title in trust for its stockholders, and the owners of the land as stockholders are therefore the beneficial owners of the canal, possessing all the powers of control and disposition incident to full ownership. It is therefore thought that, under a fair construction of the statute, such canals must be held to be exempt from taxation. But obviously there are material distinctions between such a system of ownership and one like that described in the amended complaint. The plaintiff here not only retains the legal title to the canals, but it reserves to

itself the entire management and control thereof. None of the powers ordinarily incident to ownership are exercised by the water users, nor are they the holders of the entire beneficial interest. It may be conjectured that, if water rights are sold under contracts or deeds similar to those attached to the complaint up to the full capacity of the canal, the residual interest remaining in the plaintiff company will be a worthless shell; but such is not the necessary result. The purchaser is, under the contract, entitled only to the use of the stipulated amount of water during the specified season of four months, from May 15th to September 15th, of each year. It is entirely possible that during the other seasons of the year, if not during this season, the water may, to the advantage of the plaintiff, be applied to some other beneficial purpose, possibly for generating power.

But if it be assumed that no other use can be made of the water, it does affirmatively appear that under the terms of its contracts or deeds (Exhibit A) the plaintiff is entitled to receive a fee from each water user annually at the rate of \$1.50 per acre, or \$300 per second foot. To be sure, it is recited in the instrument that this fee is to cover cost of maintenance and operation; but, whatever may be the actual cost of maintaining and operating the system, this charge is absolute, and may become a source of substantial profit. The plaintiff alleges its ownership of a water right of 250 second feet in the Spokane river; but, if we assume the delivery of only 200 second feet, its annual income from this source alone would aggregate \$60,000, and it is doubted whether the presumption should be indulged that it requires \$60,000 annually to maintain and operate an irrigating canal 18 miles in length, and to distribute therefrom to farmers along its course 200 second feet of water during the period of four months. May it not, with reason, be assumed that in establishing the annual maintenance and operating charge, the liability of the plaintiff to pay taxes was taken into consideration? But, however that may be, and whether the annual dues paid by water users are more than sufficient to pay the maintenance and operating charges or not, it is not made to appear that the result of a literal interpretation of the statute will necessarily be so absurd or unreasonable as to justify a strained construction, and, if we give to the language its natural and ordinary import, the case made by the complaint does not fall within the terms of the statutory provision. The landowners are not the owners of the canal; their right to use water is but an easement or servitude.

[3] It is expressly provided in the statute that, where a company "sells" water, the "canal or ditch shall be taxed to the extent of such sale." While exemption statutes are not to be read so literally as to thwart their purpose or destroy their spirit, as a general rule they are to be construed strictly, and substantial doubts touching their meaning and scope are to be resolved in favor of the public. *Cooley on Taxation* (3d Ed.) 356; *Murray v. Board*, 28 Colo. 427, 65 Pac. 26; *State v. Holcomb*, 81 Kan. 879, 106 Pac. 1030, 28 L. R. A. (N. S.) 251; *Ottawa University v. Franklin County*, 48 Kan. 460, 29 Pac. 599; *Hart v. Plum*, 14 Cal. 148; *Davenport National Bank v. Mittelbuscher* (C. C.) 15 Fed. 225; *Bailey v. Magwire*, 22 Wall. 215, 22

L. Ed. 850. In *Hoge v. Railroad Co.*, 99 U. S. 348, 25 L. Ed. 303, it is said that:

"The intention of the Legislature to grant the immunity must be clear beyond a reasonable doubt. It cannot be inferred from uncertain phrases or ambiguous terms. \* \* \* If a doubt arise as to the intent of the Legislature, it must be solved in favor of the state."

While there are to be found, in *Empire Land & Canal Co. v. Board of Commissioners*, 21 Colo. 244, 40 Pac. 449, and in *Idaho Fruit Land Co. v. Great Western Beet Sugar Co.*, 18 Idaho, 1, 107 Pac. 989, certain expressions tending to support the plaintiff's contention, the cases are wholly indecisive of the point under consideration. My conclusion is that, to the extent that the plaintiff has sold water rights, its canal systems are subject to assessment and taxation.

[4] 3. The two points already discussed are the only ones argued in the briefs; but others are stated in the demurrer, and they will now be briefly disposed of. It is to be inferred from the allegations of the complaint that some of the water distributed through the Spokane river canal is used upon lands owned by the plaintiff in Idaho. To that extent the system is exempt from taxation. But it is thought that the defendant is entitled to a description of such lands, and also to a statement of what proportion of the entire amount of water distributed by plaintiff is so used. It is further thought that if, in amending its pleading, the plaintiff does not abandon its present claims of exemption, its first cause of action, so far as it relates to the Fish Lake system, should be separately stated, so that there will be in the complaint three causes of action instead of two. In this connection, however, it is proper to suggest that the separate statement of the cause of action relating to the Fish Lake system will not, as counsel for the defendant seem to suppose, affect the question of jurisdiction. The value of the matter in dispute in the action is the aggregate prayed for, and not the amount of each cause of action. *Armstrong v. Ettlesohn* (C. C.) 36 Fed. 209; *Thompson v. Southern Ry. Co.* (C. C.) 116 Fed. 890; *Heffner v. Gwynne, etc.*, 160 Fed. 635, 87 C. C. A. 606.

Each cause of action should also contain a clear averment of the amount of water used upon Idaho lands, and the amount, if any, used upon Washington lands, and also the amount, if any, used upon lands belonging to the plaintiff in Idaho, so that, in accordance with the views hereinbefore expressed, it may be determined upon the face of the pleading itself what part of the total amount paid as taxes was illegally exacted. There should also be an averment to the effect that in valuing the property the revenue officers made no allowance or exemption on account of water used by plaintiff upon its own lands in Idaho.

The three several objections, that the court is without jurisdiction, and that there is a defect of parties, and that there is a misjoinder of causes of action, are overruled. The plaintiff is given 20 days in which to serve and file a second amended complaint.

## In re STOLP et al.

(District Court, E. D. Wisconsin. September 27, 1912.)

**1. BANKRUPTCY (§ 170\*)—CLAIMS—SERVICES OF ATTORNEY—PAYMENT—RE-EXAMINATION OF TRANSACTION.**

Bankr. Act July 1, 1898, c. 541, § 60d, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), provides that if a debtor, directly or indirectly, in contemplation of the filing of a petition by or against him, shall pay money or transfer property to an attorney and counselor at law for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor, and shall only be held valid to the extent of a reasonable amount, to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate. *Held*, that where insolvents, in contemplation of bankruptcy, executed a note secured by a chattel mortgage to their attorney to secure payment for services in arranging a composition with creditors, if possible, in order to prevent bankruptcy proceedings, and the trustee found that the transaction was an ordinary preference, and not one involving a payment for services to be rendered, the transaction was not within such section, and the referee was without jurisdiction to review the same thereunder, or to make any order, except one of dismissal without prejudice to the trustee's right to proceed with remedies given by the act relative to preferences or fraudulent conveyances.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 267, 271; Dec. Dig. § 170.\*]

**2. BANKRUPTCY (§ 170\*)—PREFERENCE TO ATTORNEY—RE-EXAMINATION—STATUTES.**

Bankr. Act July 1, 1898, c. 541, § 60d, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), provides that if a debtor, in contemplation of bankruptcy, shall pay money or transfer property to an attorney for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor, and shall be held valid only to the extent of a reasonable amount. *Held*, that such section refers to services to be rendered after the time of the payment or transfer objected to, within and germane to the general aims of the bankruptcy act, and actually rendered, if at all, before the institution of bankruptcy proceedings, and that the payment or transfer reviewable under such section cannot apply to services rendered under section 64b, providing for a preferential payment of the cost of administration, including one reasonable attorney's fee for services actually rendered to the petitioning creditors and to the bankrupt in involuntary proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 267, 271; Dec. Dig. § 170.\*]

**3. BANKRUPTCY (§ 170\*)—ATTORNEY FOR BANKRUPT—SERVICES.**

Bankr. Act July 1, 1898, c. 541, § 64b, 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), providing for an allowance to the bankrupt's attorney in involuntary proceedings for services rendered, relates only to services rendered after the bankruptcy proceedings are instituted to aid the bankrupt in performing his duties required by such act, and not to services rendered prior to bankruptcy in order to obtain a composition of creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 267, 271; Dec. Dig. § 170.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of Ernest Stolp and another. Petition by Leo Torbe to review proceedings before a referee for re-examination of a transaction with reference to an advance payment of fees by the bankrupts to petitioner as their attorney. Reversed, with directions.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The bankrupts were copartners. An involuntary petition was filed against them on June 21, 1911, which was pending until July 13, 1911, when they filed a voluntary petition, upon which an adjudication followed. It appears that on June 9th, or 12 days before the filing of the involuntary petition, one of the bankrupts executed and delivered to the petitioner, Torbe, an attorney, a promissory note for \$1,000, secured by a mortgage upon real estate owned by said bankrupt individually. The trustee filed a petition, representing that said mortgage was executed to said Torbe, and that the transaction was valid to the extent only of a reasonable amount which might become due to said attorney for services to be rendered, and praying for a re-examination of the transaction pursuant to section 60d of the Bankruptcy Act.

Some time in May, 1911, the bankrupts, being pressed by their creditors, sought the advice of Torbe, who immediately endeavored to effect a compromise or composition. His services consisted of conferences and consultations with the bankrupts and their creditors. Many of the creditors were agreeable to the composition, but it became apparent, at or about the time of the execution of the mortgage, that the effort to induce all creditors to accept would be fruitless. During this time no money had been paid to said attorney, excepting an amount to defray the expenses of a trip to Michigan. Such being the situation, and at the time when the necessity of resorting to bankruptcy proceedings had apparently been definitely determined by the bankrupts and the attorney, the note and mortgage above specified were given. The attorney, when asked respecting the arrangement under which such mortgage was given to him, stated that it was "to secure such fees as I had already earned and would earn, and also to secure the payment of counsel fees in the matter." He further stated, in answer to the question whether it was given in contemplation of bankruptcy, that it was given in contemplation "that there would not be any bankruptcy," and, further, that the bankrupts contemplated such proceedings as a possibility "to procure a better settlement of their affairs." Said attorney also produced before the referee a statement of his account covering services rendered from May 1, 1910, to June 17, 1911, which, including a claim on behalf of associate counsel, aggregates \$1,475.

The referee held the mortgage void as preferential, but that said attorney had rendered services to the bankrupts *in the bankruptcy proceeding since the filing of the petition*, the reasonable value of which latter is \$100, and adjudged that the mortgage was valid to secure such sum. This ruling is brought here for review.

Leo Torbe, of Milwaukee, Wis., in pro. per.

McCabe & Dahlman, of Milwaukee, Wis., for trustee.

GEIGER, District Judge (after stating the facts as above). Section 60d of the Bankruptcy Act is as follows:

"If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate."

Section 64b of the Bankruptcy Act, so far as pertinent to the questions presented, is as follows:

"The debts to have priority, except as herein provided, and to be paid in full out of the bankrupt estates, and the order of payment shall be: \* \* \* (3) The cost of administration, including \* \* \* one reasonable attorney's fee for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases as the court may allow."

The record discloses that the trustee by his petition sought re-examination of a transaction pursuant to section 60d. The hearing proceeded upon such petition, before the referee, by consent. The mortgage transaction was held to be void, because preferential, but sustained as valid security for the payment of \$100, the reasonable value of services rendered to the bankrupt *after* the institution of the bankruptcy proceedings; and the trustee was ordered to pay the same to Torbe, and the latter was directed to give to the trustee a satisfaction and discharge of the mortgage.

The preliminary question arises whether the referee could, under section 60d, make any adjudication other than one relating to the reasonableness of the amount for which the debtor sought to make payment; that is, assuming that under section 60d the services are such as are performed prior to bankruptcy, can the court under such section, when it appears that the payment was *not* for *services to be rendered*, but for some other account, proceed to adjudge the transaction void or voidable as preferential or fraudulent? I think this question must be answered in the negative. Whatever doubts have arisen as to the scope of the section, the Supreme Court, in considering whether it contains any special grant of jurisdiction, has declared that it is designed to provide a special and summary remedy to meet the precise situation therein referred to, viz., the re-examination of a payment or transfer to an attorney for services to be rendered.

"Section 60d added a feature to the bankruptcy act not found in former acts, regulating practice and procedure in bankruptcy, therefore adjudications upon other provisions of the bankruptcy act, or concerning the judiciary act giving jurisdiction to the courts of the United States have no binding effect in the construction of this section. This is not a case of preference, where part of the estate is transferred to a creditor, so as to give to him more of the estate than to others of the same class under section 60 of the bankruptcy act, nor is it a case of fraudulent conveyance under section 67. It is a transfer in consideration of future services, to be reduced if found unreasonable in amount. \* \* \* To undertake to bring within this definition of a preference, requiring a plenary action for its recovery, the protection given a bankrupt's estate, because of a transfer of property or money to an attorney or counselor for services to be rendered in contemplation of filing a petition in bankruptcy, is to add to the clearly defined preferences contemplated by the act, and is to include entirely different transactions, not embraced in the statutory definition of a preference as Congress has defined that term. \* \* \* These last-named sections have reference to suits to recover preferences or fraudulent conveyances. No attempt has been made to change the exercise of jurisdiction under section 60d. The transfer to counsel may be wholly sustained; it is entirely valid to the extent that it is reasonable. It is neither a preference nor a fraudulent conveyance, as defined by sections 60b or 67e of the act. It is to be noted that in this case, as the statement of the certificate shows, the District Court rendered no judgment against the defendant for a recovery of the excess, but directed the trustee to bring an action therefor. It simply assumed and exercised the jurisdiction conferred by section 60d to determine the amount of the excessive transfer for a counsel fee provided in view of filing a petition in bankruptcy. It may be that this order, though binding upon the parties, cannot be made finally effectual until a judgment is rendered in a jurisdiction where it can be executed." *Wood v. Henderson*, 210 U. S. 251, 253, 256, 28 Sup. Ct. 623, 52 L. Ed. 1046.

See, also, *Pratt v. Bothe*, 130 Fed. 670, 65 C. C. A. 48; *Haffenberg v. Title & Trust Co.*, 27 Am. Bankr. Rep. 708, 192 Fed. 874, 113 C. C. A. 198.

[1] I am of opinion, therefore, that when the referee concluded that the transaction was an ordinary preference, and not one involving a payment for services "to be rendered" (except as to services rendered after the bankruptcy, and which, for other reasons hereafter given, are not within the terms of section 60d), in other words, when he found that the transaction was not of the character claimed in the trustee's petition, he was powerless to make any order except one of dismissal—although without prejudice to the right of the trustee to proceed with remedies given by the act relative to preferences or fraudulent conveyances, should the transaction be deemed to be the one or the other.

Upon the merits of the matter the following questions arise:

1. Whether the services "to be rendered," as provided by section 60d, are such as are expected to be performed by the attorney in the future, or subsequently to the time when the payment or transfer is made; or whether such payment may cover services which the attorney has rendered or is rendering, subject only to the requirement that the debtor shall be in a situation of contemplating bankruptcy.

2. To what kind of service does section 60d refer? Does it refer to any professional services rendered by an attorney, counselor, or proctor, or must they be such as pertain to the contemplated bankruptcy, or to some purpose in harmony with the interests of the general creditors of the bankrupt?

3. Whatever the kind or character of the service, can the period of rendition thereof extend beyond the commencement of the bankruptcy proceedings—that is, can the payment or transfer be made available for or applicable to services rendered after the institution of bankruptcy proceedings?

4. The latter suggests or includes the question whether the "services to be rendered," for which payment may have been made as indicated in section 60d, may be in whole or in part the same services referred to in section 64b, and for which an allowance might otherwise be made as therein provided.

[2] The scope and meaning of these two sections can be determined by ascertaining, if possible, what situations they were designed to meet, what possible evil to remedy, or what right to recognize or protect. The language of 60d, on first reading, appears to place the legal advisers of failing debtors in a class by themselves, to be dealt with according to the prescribed provisions, no matter what the character of the service or when rendered; but, as indicated in *Wood v. Henderson*, *supra*, the section was intended to treat with a situation which involved neither a preference nor a fraudulent conveyance. If a payment or transfer for services to be rendered means, as stated (see 210 U. S. 251, 259, 263, 28 Sup. Ct. 624, 627, 629, 52 L. Ed. 1046), "in consideration of future services," "in expectation of proceedings in bankruptcy," or "prepayment," then the date of the transaction

must ordinarily be taken as the commencement of the period during which the contemplated services were "to be rendered"; and, having reference to the future, the transaction could not be treated as dealing with the ordinary relation of debtor and creditor, in which the latter received payment for a past or present consideration; nor, in view of the relation of attorney and client which has sanctioned compensating attorneys in advance, could it be deemed fraudulent or in fraud of creditors. The section is declared to be *sui generis*, and—

"recognizes the temptation of a failing debtor to deal too liberally with his property in employing counsel to protect him in view of financial reverses and probable failure. It recognizes the right of a debtor to have the aid and advice of counsel, and in contemplation of bankruptcy proceedings, which shall strip him of his property, to make provision for reasonable compensation to his counsel, and in view of the circumstances the act makes provision that the court administering the estate may, if the trustee or any creditor question the transaction, re-examine it with a view to a determination of its reasonableness." *Wood v. Henderson*, *supra*, 210 U. S. 253, 28 Sup. Ct. 624, 52 L. Ed. 1046.

It is difficult to see why Congress should have intended by these sections to provide comprehensive remedies to meet all situations which might arise between a debtor and his attorneys, both before and during bankruptcy. There is no reason why an attorney, being a creditor with a matured claim, or a creditor, having a claim for past services which the bankrupt has paid, should not at the moment of bankruptcy stand with other creditors; but, when the failing debtor secures counsel and favors him with prepayment for contemplated service, the transaction, being neither preferential nor fraudulent, should, in fairness to creditors, be subject to review by the court. It seems to me that the section is designed to reach the situation which arises out of the desire of both the debtor and his attorney to avoid the necessity of the latter's being charged with having received a preference, or of becoming a general creditor of the estate. It should not be construed to cover other transactions between a debtor and his attorney not fairly within this design, nor within the term of the statute. In other words, it refers to advance payments.

In meeting the second question, the language of section 60d, referring to an attorney, counselor, solicitor in equity, or a proctor in admiralty, presents considerable difficulty. Are the services to be rendered such as pertain to the contemplated bankruptcy, or may they be general professional services rendered by an adviser in any of the several capacities specified? On the one hand, it is argued that, being unrestricted, the language must be given a construction which will cover all situations fairly comprehended within its terms, and it therefore includes all instances where advance payments are made to professional legal advisers, no matter what the character or object of their service may be. On the other, the view is taken that Congress could not reasonably have intended to make a debtor's legal advisers the object of favorable or restrictive legislation, except to the extent that the contemplated service is germane to the general purpose of the bankruptcy law, namely, the subjection of the assets of the debtor to administration and distribution for his creditors.



In *Pratt v. Bothe*, 130 Fed. 670, 65 C. C. A. 48, it is intimated that the general language referring to solicitors and proctors "seems to indicate that the services contemplated were such as might be required in general litigation, or in the course of the debtor's business." This was said in considering whether section 60d referred to services rendered before or after the bankruptcy. On the other hand, the question as to the character of the services contemplated was directly involved in *Re Habegger*, 139 Fed. 623, 71 C. C. A. 607, 3 Ann. Cas. 276, and it was determined that they were such as were to be rendered in aid of the purpose sought to be accomplished by the Bankruptcy Act, to conserve and benefit the estate of the bankrupt, and therefore inure to the benefit of the creditors; and accordingly a payment or transfer from a failing debtor for services to be rendered in endeavoring to get a composition with creditors, and in defending the failing debtor in a criminal prosecution, was not within the terms of this section. In my judgment the purpose of the section was to meet situations most frequently arising, or likely to arise, and such situations are those arising between a failing debtor and his attorney in respect of services relative to his failing condition or the contemplated bankruptcy. While a failing debtor may have employed, or may wish to employ, attorneys for various purposes, it is not probable that the situations in which advance payments are made, or are likely to be made, to attorneys for an account other than his involved business affairs or contemplated bankruptcy, occur with sufficient frequency to have been made the object of special legislation. And if this is true, then it is fair to construe the section in question as excluding such other situations. Such section in question provides a new remedy, and, as above indicated, was intended to reach situations which under former bankruptcy acts, and under the present acts, could not be reached. It was desired to enable a debtor to pay his attorney in advance, to the end that he might procure the service, and not require such attorney to take the hazard of payment with general creditors. But a review of the transaction is provided. This appears to be the sounder construction, and should be accepted, rather than to presume an intention on the part of Congress to make provision for all cases where a failing debtor may pay his counsel in advance. It is true that this greatly narrows the language of the act, and, it may be said, eliminates a portion of it. It is also true that it may enable payments to counsel whose services are not to be rendered in furthering the objects of the act, and these will therefore be permitted to stand, unless possibly they can be attacked as fraudulent. But I think the act should have a construction which will effectuate an intention to deal with situations constantly arising, and which, under the former bankruptcy law, had to be met, either by making the debtor's counsel stand as a general creditor, or by yielding him a priority not awarded by the Bankruptcy Act, or by allowing possible excessive payments in advance to stand.

I am aware that this restricted view will also affect the application of the remedy provided in section 60d strictly to such cases as appear to be payments for services to be rendered, when such services

are admitted or adjudicated to be of the character specified, namely, services germane to the purposes of the Bankruptcy Act; and when it appears that the service to be rendered was not of such a character, the right to review cannot be exercised, but the transaction must either stand or be attacked under some other provision of the Bankruptcy Act.

In answering the third and fourth questions it must follow that section 60d refers solely to services of the character above described, which were to be and were in fact rendered *prior* to the bankruptcy. Under former bankruptcy acts the question arose repeatedly whether counsel rendering service prior to bankruptcy, and who had not been paid, should be treated as a general or a preferred creditor; and the uncertainty of receiving adequate compensation as a general creditor would naturally stimulate the practice of paying in advance. Therefore, it being possible to deal with attorneys who are general creditors, or with such as had in fact been paid for past services, in the same manner as other creditors had to be dealt with, section 60d not only embodies a design and remedy to reach the cases where advance payments have been made, but, to be effective, there must be a limit of time within which the contemplated future services are to be rendered. Such limit, as indicated in *Pratt v. Bothe*, *supra*, is the date of filing the petition in bankruptcy. Judge Severens there said:

"The Bankruptcy Act makes a final and sharply defined line in respect of the power of the bankrupt over his estate and the distribution of it as of the date of the filing of the petition against him. From that time his assets are in gremio legis, and he cannot, unless he compounds with his creditors, bind his assets. He may, of course, make new contracts, and incur new obligations; but they are not chargeable to the funds which have become vested in the trustee until they have subverted the purpose of the bankruptcy proceedings, when, if anything remains, he reacquires it. It would be wholly inconsistent with the scheme of the act that a debtor in contemplation of bankruptcy should be permitted to make an arrangement whereby he should have power, after his assets shall have gone into the hands of the trustee, to alter their disposition by appropriating them to the payment for services thereafter rendered to him, or, indeed, to satisfy the obligations of any executory contract. With respect to services rendered to the bankrupt in the present case after the creditor's petition was filed, it is to be observed that the compensation therefor was not due and owing at the time of the filing of the creditor's petition, and so was not a provable claim. It would be anomalous that the debtor, by preconcert with his attorney, could defeat that provision by an agreement for a benefit to accrue to the bankrupt after the proceedings should be inaugurated, and make the compensation therefor a privileged claim. By section 64b the law provides for compensation to an attorney who assists the bankrupt in performing the duties imposed upon him. But this is done for the purpose of facilitating the proceedings, and for the benefit of the estate. It is not done in recognition of any contract obligation of the bankrupt."

[3] Thus, if section 60d is construed as referring to services rendered prior to, and section 64b to services rendered after, the institution of the bankruptcy proceedings, remedies are provided for meeting distinct situations. The cases herein cited, as well as others (see, for example, *In re Kross* [D. C.] 96 Fed. 816; *In re Cummins* [D. C.] 196 Fed. 224), disclose a diversity of opinion upon

nearly every phase of these two sections, which, at least as to the character of services covered by section 60d, will probably exist until adjudication by the Supreme Court, or until amendment by Congress. However, if the construction herein will enable the accomplishment of a definite purpose through each section consistent with the general purpose of the Bankruptcy Act, it should prevail, rather than a broader construction covering situations which rarely occur, or for meeting which other provisions of the act provide ample remedies.

The general conclusions are that section 60d refers to the services to be rendered after the time of the payment or transfer; that such services must be germane to the general aims of the Bankruptcy Act; that they must be actually rendered, if at all, before the institution of bankruptcy proceedings, and that the payment or transfer specified in said section cannot apply to services rendered as specified in section 64b; that section 64b refers to services rendered after the bankruptcy proceedings are instituted, to aid the bankrupt in performing his duties under the act.

In the matter now here for review, the note and mortgage having been given 12 days before bankruptcy ensued, but when the proceedings were contemplated, and it appearing that services were to be rendered and were in fact rendered by the attorney to carry out the contemplated purpose, the referee should have ascertained the reasonable value of the service so rendered, and adjudged the note and mortgage valid as security for the payment thereof; but the value of any service rendered after bankruptcy was not the subject of inquiry upon this proceeding, being determinable only under section 64b.

The order of the referee is reversed, with directions to proceed in accordance with the foregoing.

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In re SILVIES RIVER.

(District Court, D. Oregon. October 7, 1912.)

No. 5,704.

**1. REMOVAL OF CAUSES (§ 4\*)—PROCEEDINGS SUBJECT TO REMOVAL—"SUITS AT COMMON LAW AND IN EQUITY."**

The phrase, "suits at common law and in equity," as used in Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1094 [U. S. Comp. St. Supp. 1911, p. 140]) § 28, providing for the removal of causes, embraces not only ordinary actions and suits, but includes all the proceedings in the ordinary law and equity tribunals, as distinguished from proceedings in military, admiralty, and ecclesiastical courts, but does not include a proceeding before the board of control of the state of Oregon on a petition by the users of the water in a stream for an investigation to determine the rights of appropriators as authorized by Laws Or. 1909, p. 319, in any event, not during the preliminary proceedings before the board and prior to an appeal to the courts, such proceeding being one in the

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

nature of a hearing before executive or administrative officers in the exercise of their functions to regulate and control the use of state waters.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 11-20; Dec. Dig. § 4.\*

For other definitions, see Words and Phrases, vol. 7, p. 6778.]

**2. REMOVAL OF CAUSES (§ 57\*)—PARTIES—CITIZENSHIP—"SEPARABLE CONTROVERSY."**

Under Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1094 [U. S. Comp. St. Supp. 1911, p. 140]) § 28, authorizing removal of certain causes to federal courts where there is a controversy wholly between citizens of different states which can be fully determined as between them notwithstanding the presence of other parties, a separable controversy does not exist so as to authorize removal, unless the whole subject-matter of the suit is capable of being fully determined as between citizens of different states, and complete relief afforded as to the separate cause of action without the presence of others originally made parties.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 109; Dec. Dig. § 57.\*

For other definitions, see Words and Phrases, vol. 7, p. 6412.

Removal of causes, separable controversy, see notes to Robbins v. Ellenbogen, 18 C. C. A. 86; Mecke v. Valletown Mineral Co., 35 C. C. A. 155; Pollitz v. Wabash R. Co., 100 C. C. A. 4.]

**3. REMOVAL OF CAUSES (§ 57\*)—SEPARABLE CONTROVERSY—DETERMINATION—PARTIES.**

Where in proceedings before the state board of control to determine water rights with reference to a river in Oregon, as authorized by Laws Or. 1909, p. 319, against both citizens and noncitizens claiming rights to water, each of the claimants was directly interested, not only in establishing the validity and extent of his own claim, but also in the correct determination of all the other claims the proceeding did not involve a separable controversy between petitioners and a citizen of another state, so as to authorize the latter to remove the proceeding as between it and petitioners to the federal court under Judicial Code, § 28.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 109; Dec. Dig. § 57.\*]

**4. REMOVAL OF CAUSES (§ 41\*)—NATURE OF PROCEEDING—PARTIES—STATE—"CITIZEN."**

A proceeding before the state board of control to determine water rights in a river as between various claimants under authority conferred by Laws Or. 1909, p. 319, is, in effect, a proceeding on behalf of the state, through an administrative or executive board, to have the rights of the various claimants determined, and the state, which is not a "citizen" within the removal statutes, being, in effect, a party to the proceeding, it was not removable to the federal court under Judicial Code, § 28.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 82½-84; Dec. Dig. § 41.\*

For other definitions, see Words and Phrases, vol. 2, pp. 1164-1174; vol. 8, pp. 7602, 7603.]

In Equity. In the matter of the determination of the relative rights to the waters of the Silvies river and its tributaries. An alleged separable controversy between petitioners and the Pacific Live Stock Company having been removed to the federal courts, the Attorney General of Oregon, in his official capacity, and as representing the petitioners and other claimants, moved to remand. Motion granted.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

A. M. Crawford, Atty. Gen., of Salem, Or., for petitioners.

Edward F. Treadwell, of San Francisco, Cal., and John L. Rand, of Baker, Or., for Live Stock Co.

BEAN, District Judge. In February, 1909, the Legislature of Oregon passed an act for the regulation, control, distribution, use, and determination of the existing rights to the use of the waters within the state. Laws 1909, p. 319. It divides the state into two water divisions, provides for election of a state engineer and a superintendent for each division, authorizes the creation of the necessary number of water districts, and the appointment of a water master for each district. All applications for the use of the unappropriated waters of the state are to be made to and approved by the state engineer. It is the duty of the water master to divide the water of the natural streams or other sources of supply in his district among the several ditches and reservoirs according to their respective rights, and in general to supervise and control the use and distribution thereof, subject to the general supervision of the superintendent and the board of control. The division superintendent is given general control over the water masters and the execution of the laws relating to the distribution of water within his division with authority to make such reasonable regulations to secure the equal and fair distribution thereof in accordance with the determined rights as may be needed, not inconsistent with the laws of the state. His actions are subject to appeal to the board of control. The state engineer and the two division superintendents constitute a board of control, and, under such regulations as may be prescribed by law, are given supervision over the application, distribution, and division of the waters of the state and the several officers concerned therewith. The decisions of the board are subject to appeal to the courts. Whenever a petition signed by one or more users of water on a stream is filed with the board of control, requesting the determination of the relative rights of the various claimants to the waters of such stream, it is made the duty of the board, if upon investigation it finds the facts and conditions such as to justify, to make a determination of such rights and to fix a time for the beginning of the taking of testimony and the making of such examination as will enable it to determine the rights of the various claimants. And, in case suit is brought for the adjudication of the right to the use of the water in any of the circuit courts of the state, it may be, in the discretion of the court, transferred to the board for consideration as in the act provided. In case the board concludes to proceed with the determination of the rights of various claimants to water on any stream, it is required to give notice by publication of the date when the state engineer will begin investigating the flow of the stream and the ditches diverting water therefrom, and the time and place where the division superintendent will begin the taking of testimony. Service of such notice is required to be made by registered mail on each person, firm, or corporation claiming a right to use any of the waters of the stream, or owning or being in possession of lands bordering on or having access thereto, in so far as they can reasonably be ascer-

tained, which notice must be mailed at least 30 days prior to the date of the making of the examination and the taking of testimony. There must be inclosed with each notice, sent by registered mail, a blank form on which the claimant or owner is required to state in writing the particulars necessary for the determination of his rights to the water to which he lays claim, including his name and address, the nature of the right or use on which the claim is based, the time of its initiation or the commencement of such use, and, if distributing works are required, the date of beginning the construction, when completed, the date of beginning and completion of enlargements, dimensions of the ditch as originally constructed and as enlarged, date when water was first used for irrigation or other beneficial purposes, and, if used for irrigation, the amount of land reclaimed the first and subsequent years, with the dates of reclamation, the amount and general location of the land such ditch is intended to irrigate, the character of the soil, the kinds of crops cultivated, and such other facts as will show compliance with the laws in acquiring the right. This statement is required to be verified and any claimant served with notice who fails to appear and submit proof of his claim as required shall be barred from subsequently asserting any rights theretofore acquired. At the time fixed in the notice, the state engineer or his assistant is to make an examination of the stream and the works diverting water therefrom, which examination is to include the measurement of the discharge of the stream, the carrying capacity of the various ditches and canals, an approximate measurement of the land irrigated or susceptible of irrigation from the various ditches and canals, and such other data and information as may be essential to the proper understanding of the relative rights of the parties interested. These observations and measurements are to be reduced to writing and made a matter of record in the office of the state engineer, and it shall be his duty to make or cause to be made a map or plat on a scale of not less than one inch to the mile showing with substantial accuracy the course of the stream, the location of each ditch or canal diverting water therefrom, the legal subdivisions of lands which have been irrigated or which are susceptible of irrigation from the ditches and canals already constructed. At the date named in the notice, the division superintendent is required to commence taking testimony and continue the same until it is completed, when he shall give notice by registered mail to the various claimants that at a time and place named all of the evidence shall be open for inspection for a specified length of time by the various claimants and owners. Any claimant desiring to contest any of the rights of any person, corporation, or association which has submitted its evidence may within five days after the expiration of the time fixed in the notice for the public inspection of the evidence notify the superintendent in writing the grounds of his proposed contest, and the superintendent is thereupon required to fix a time for the hearing of such contest before him, and to cause notice to be served upon interested parties. He may adjourn the hearing from

time to time, and is authorized to issue subpoenas to compel the attendance of witnesses to testify in such matters. After the evidence has all been taken, the superintendent is required to transmit the same to the office of the board of control, and, as soon as practicable after the necessary data has been compiled by the state engineer and the evidence filed, it is made the duty of the board to cause to be entered of record in its office an order determining and establishing the several rights to the waters of the stream, and to transmit the original evidence and a certified copy of its determination to the clerk of the circuit court of the county in which said stream or some part thereof is situated, and to procure an order from the circuit court or the judge thereof fixing a time at which the matter will be heard by the court, and thereafter the proceedings in the circuit court shall be as nearly as may be like that in a suit in equity, except that it may be heard and decided and a decree entered in vacation. Within 30 days after the filing of the evidence and the findings of the board in the circuit court, or within such further time as the court may allow, any person may file exceptions to the findings of the board, but, if no exceptions are filed, the court is to enter a decree affirming such findings. All parties are entitled to be heard by counsel on the consideration of the exceptions to the findings of the board, and the court may, if necessary, remand the matter for further evidence or consideration by the board. Pending the consideration of the matter by the court, the findings of the board shall be in force and effect, unless stayed by the giving of a bond as provided in the act. Immediately upon the entering of a decree by the circuit court, the clerk of such court is required to transmit a copy thereof to the board of control, and it is the duty of the state engineer to forthwith issue the necessary instructions to the water superintendent and masters for its enforcement.

Within six months from the date of the decree, or if appealed from, within six months from the decision of the Supreme Court, the board of control or any party interested may apply to the circuit court for a rehearing.

The determination of the board of control as confirmed or modified by the court is made conclusive as to all prior rights and the right of all existing claimants upon the stream or body of water lawfully embraced in such determination, and it is made the duty of the secretary of the board to issue to each person, corporation, or association represented in such determination a certificate signed by the president of the board and attested by its seal, setting forth its rights as so determined, and such certificate is entitled to record in the office of the county clerk of the proper county.

In November, 1911, R. R. Sitz, Fred Otley, and M. B. Hayes filed a petition with the state board of control, stating that they were users of the waters on Silvies river and its tributaries, and requesting a determination of the relative rights of the several claimants to such waters. The board thereupon made an order granting the petition and fixing a day when the state engineer

would make the examination and survey of the streams, and the division superintendent would commence the taking of testimony. Notice in the manner required by law was given to the several claimants, more than 200 in number, all of whom except the Pacific Live Stock Company and one other are citizens and residents of Oregon. Within the time fixed in the notice, the Pacific Live Stock Company filed a petition with the board, accompanied by a bond, for a removal of the matter to this court. Its petition sets out the proceedings theretofore had before the board of control, alleges that Sitz, Otley, and Hayes were at the time of the filing of their petition with the board and for many years prior thereto and ever since have been and now are residents of the state of Oregon, and are citizens and inhabitants of such state, and that the Live Stock Company is a citizen and resident of the state of California; that the controversy between Sitz, Otley, and Hayes and the Live Stock Company is wholly between citizens of different states which can be fully determined as between them, and in this behalf it is averred that the Live Stock Company claims to have heretofore taken and appropriated a large amount of the waters of Silvies river and its tributaries and applied the same to beneficial uses; that Sitz, Otley, and Hayes likewise claim that they have appropriated and taken from the river certain waters and applied the same to beneficial use; that the Live Stock Company claims that its appropriation was prior in time and in right to that of Sitz, Otley, and Hayes; that they deny the appropriation by the company of the amount of water which it claims to have appropriated, and deny that such appropriation was prior in time and prior in right to them, and deny that the controversy involves the extent of the appropriation by the Live Stock Company on the one hand and by Sitz, Otley, and Hayes on the other, and the relative priority thereof in point of time and therefore in point of right, and deny that such controversy is a severable one between the Live Stock Company and Sitz, Otley, and Hayes, and can be fully determined as between them, and, exclusive of interest and costs, exceeds in value the sum of \$3,000.

The Attorney General of the state in his official capacity and as representing Sitz, Otley, and Hayes and all the other claimants to whom notice has been sent except the Live Stock Company moves to remand the cause to the state board of control on the ground (1) that the proceeding before the board was not at the time the petition for removal was filed a suit of a civil nature at common law or in equity within the meaning of the federal statutes, because the board is essentially an administrative and not a judicial body; (2) that the Live Stock Company and Sitz, Otley, and Hayes are not the only parties whose rights are involved in the controversy, and that such controversy cannot be fully determined as between them, and complete relief afforded without the presence of all the other claimants to the water; and (3) the proceeding sought to be remanded is in effect one instituted by the state for a judicial determination of the rights of the various claimants to



the waters of Silvies river, and is, in effect, a suit brought by the state in its sovereign capacity for that purpose and therefore not removable.

[1] Section 24 of the Judicial Code provides that the District Courts of the United States shall have original jurisdiction "of all suits of a civil nature at common law or in equity \* \* \* between citizens of different states," where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000, and section 28 that suits of which the District Court is given jurisdiction by this title and "which are now pending or which may hereafter be brought in any state court may be removed into the District Court of the United States for the proper district by the defendant or defendants, being nonresidents of that state. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit to the District Court of the United States for the proper district." The phrase "suits at common law and in equity" embraces not only ordinary actions and suits, but includes all the proceedings carried on in the ordinary law and equity tribunals as distinguished from proceedings in military, admiralty, and ecclesiastical courts. It is a very comprehensive term, and is understood to apply to any proceedings in a court of justice by which an individual pursues a remedy which the law affords. Modes of proceeding may vary, but as it affects the right of removal any civil proceeding in a state tribunal in which a judgment or decree is sought as to the rights of the parties and presented by the pleadings for judicial determination is an action or suit within the meaning of the statute, regardless of the forum or tribunal before which the matter is pending. *Weston v. City Council of Charleston*, 2 Peters, 449-464, 7 L. Ed. 481; *Gaines v. Fuentes*, 92 U. S. 10, 23 L. Ed. 524. And the state cannot, by creating special proceedings or special tribunals, deprive the federal court of jurisdiction of such a suit or prevent a removal. *In re The Jarnecke Ditch* (C. C.) 69 Fed. 161. But a proceeding carried on by or before executive or administrative officers in the exercise of their proper functions cannot be regarded as a suit or action, although it may become such on appeal to a court having power to determine questions of law and fact either with or without a jury, and where there are parties litigant to contest the case on one side or the other. *Upshur Co. v. Rich*, 135 U. S. 467, 10 Sup. Ct. 651, 34 L. Ed. 196; *Waha-Lewiston L. & W. Co. v. Lewiston Sweetwater I. Co.* (C. C.) 158 Fed. 137.

Now the preliminary proceedings before the state board of control, in taking testimony and making findings of fact concerning the rights of the various claimants to the waters of a given stream, are, in my judgment, not judicial, but rather administrative. The powers of the board are not brought into action by the filing of a paper in the nature of a complaint setting up asserted rights, but

by the mere presentation to it of a petition or request by one or more users of the water without any allegations of issuable facts, other than that the petitioner is a water user on the stream, and a request for the determination of the relative rights of the various claimants to such waters. No affirmative relief is asked and no adverse pleadings are required or permitted, or issues joined until after the evidence taken by the board is open to the inspection of the various claimants and owners. After the filing of the petition, the proceedings are to be conducted by the board and upon its initiative. Neither the petitioner nor the claimants obtain any redress for an injury as the result of such proceedings, but merely evidence of their title or right to the use of the water. It is true the board is vested with power to issue notice to the various claimants requiring them to present their claims, to take testimony and make findings of fact, but these findings must be confirmed by the court. The board has no power to make an adjudication of the rights of the claimants. Its duty is to ascertain the facts and present them to the court for its consideration. After the evidence and determination of the board has been filed with the court, the proceeding probably becomes a suit or action, but, until the board has completed its examination, made its determination, and filed its report, the proceedings are purely administrative.

In so far as the board has jurisdiction over the adjudication of water rights, it is in effect a standing examiner, created by the state, charged with the duty, when requested by the users of water, of examining into and reporting to the court the facts on which the rights of the various claimants are based, so that such rights may be authoritatively settled and determined by a judicial tribunal. Until the report is made and filed with the court, there is no action or suit within the meaning of the removable statute.

[2] Again, a suit or action is not removable unless the controversy is one "wholly between citizens of different states which can be fully determined as between them." The settled rule of construction of this provision is that the whole subject-matter of the suit must be capable of being fully determined as between citizens of different states, and complete relief afforded as to the separate cause of action without the presence of others originally made parties to the suit. *Fraser v. Jennison*, 106 U. S. 191, 1 Sup. Ct. 171, 27 L. Ed. 131; *Hyde v. Ruble*, 104 U. S. 407, 26 L. Ed. 823.

[3] The proceeding in question in my opinion is not of this character. Its purpose is to have determined the rights of all the claimants to the waters of Silvies river. The controversy is not alone between the parties who invoked the powers of the board and the Live Stock Company nor can it be decided without the presence of the other claimants. The water is the res or subject-matter of the controversy. It is to be divided among the several claimants according to their respective rights. Each claimant is therefore directly and vitally interested, not only in establishing the validity and extent of his own claim, but in having determined

all of the other claims. The proceeding is essentially a suit for the partition of the waters of the stream among the respective owners, and as such is not removable to this court. *Torrence v. Shedd*, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528. It is not analogous to a suit to determine an adverse claim to real estate or to remove a cloud therefrom. It is a case where divers and sundry parties are entitled to use so much of the waters of a stream as they have put to beneficial use and the purpose is to ascertain their respective rights by a simple, economical, effective, and comprehensive proceeding, and is not a separable controversy between different claimants.

It seems to me, therefore, the motion to remand is well taken on the ground that the proceeding at the time the petition for removal was filed was not an action at law or suit in equity within the meaning of the statute, and the controversy is not wholly between the petitioners and the Live Stock Company, and is therefore not separable.

[4] I am also impressed with the soundness of the view that a proceeding for the adjudication and determination of the rights to the use of the waters within the state, instituted and conducted as provided in the legislative act of 1909, is in effect a proceeding on behalf of the state through an administrative or executive board to have judicially settled in an economical and practical way the rights of various claimants to the use of the waters of a stream or source of supply, and thus avoid the uncertainty as to water titles and the long and vexatious controversies concerning the same which have heretofore greatly retarded the material development of the state. If it is an action by a state, no removal can be had into this court on the ground of diversity of citizenship, because the state is not a citizen within the meaning of the removal statute. *State of Indiana v. Alleghany Oil Co.* (C. C.) 85 Fed. 871, and authorities cited. If, however, I am at fault in the view expressed, there is manifestly such a doubt on the subject as to make it the duty of the court to remand the cause to the state board of control in compliance with the established rule that, where there is a substantial doubt as to the right of this court to retain jurisdiction of a cause removed from a state tribunal, such doubt must be resolved against the jurisdiction here and in favor of the state tribunal. *Fitzgerald v. Mo. Pac. Ry.* (C. C.) 45 Fed. 812; *Plant v. Harrison* (C. C.) 101 Fed. 307; *Wrightsville Hdw. Co. v. Colwell* (C. C.) 180 Fed. 589.

Motion to remand is therefore allowed.

**EVANS v. VICTOR, U. S. Marshal, et al.**  
**(District Court, E. D. Oklahoma. August 30, 1912.)**

No. 1,852.

**1. INDIANS (§§ 34, 35\*)—INTRODUCTION OF LIQUOR INTO INDIAN TERRITORY—INDIAN COUNTRY.**

That portion of Oklahoma formerly Indian Territory did not cease to be Indian country on the admission of the state, nor did such admission affect the application to that part of the state of Rev. St. § 2139, or of Act Jan. 30, 1897, c. 109, 29 Stat. 506, relating to the sale of liquor to Indians and its introduction into the Indian country, at least so far as its introduction from points outside the state is concerned.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 60-62; Dec. Dig. §§ 34, 35.\*]

**2. INDIANS (§ 35\*)—INTRODUCTION OF LIQUOR INTO INDIAN TERRITORY—AUTHORITY TO MAKE SEARCH.**

Under Rev. St. § 2140, conferring on the superintendent of Indian Affairs and Indian agents or subagents authority to search for liquors suspected of having been unlawfully introduced into the Indian country, and Act March 1, 1907, c. 2285, 34 Stat. 1017, extending such authority to special agents of the Indian bureau for the suppression of the liquor traffic among the Indians and their deputies, such special agents and their deputies may make such searches in that part of Oklahoma formerly Indian Territory by virtue of their official position, and without the formality of search warrants or other process.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 61, 62; Dec. Dig. § 35.\*]

In Equity. Suit by W. E. Evans against S. G. Victor, United States Marshal, Eastern District of Oklahoma, and Henry A. Larsen, Chief Special Officer, United States Indian Service. On motion for preliminary injunction. Denied.

Denton & Cochran, of Muskogee, Okl., for complainant.

William J. Gregg, U. S. Atty., for defendants.

CAMPBELL, District Judge. The question arises on plaintiff's application for temporary injunction. The bill alleges that the plaintiff resides at Muskogee, in this district; that defendant Victor is United States marshal for this district; that the defendant Larsen is the duly appointed, qualified, and acting chief special officer of the United States Indian service, located at Muskogee, Okl., and charged with the duty of enforcing the laws of the United States prohibiting the introduction of intoxicating liquors from other states of the Union into the state of Oklahoma; that the plaintiff is owner and proprietor of the Fountain Drug Store, in Muskogee, engaged in the general retail drug business, including cigar stand, and soda fountain. It is alleged that on August 7, 1912, the defendant Victor, acting through his deputy, Joe Hubbard, and the defendant Larsen, acting under color of their said offices, entered plaintiff's place of business, over his protest, and without the authority of a search warrant or other process, and proceeded to search the same for intoxicating liquors; that thereby, for reasons set

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

out in the bill, the plaintiff has been damaged in the sum of \$3,100. It is further alleged that the defendants threaten to continue making such searches, without search warrant or other process, and the question is raised whether, by virtue of their said offices, they may lawfully do so.

[1] It appears from the response of the defendant Victor that said deputy, Joe Hubbard, was not acting as his deputy when the said search of plaintiff's place of business was made, but was acting as deputy special officer under the said Larsen. So that the question here is confined to whether the defendant Larsen, or his deputies, may make such searches in the Eastern District of Oklahoma by virtue of their official position and without the formality of search warrants or other process. That so far as the introduction of liquor is concerned the Eastern District of Oklahoma, in which this question arises, is "Indian country" is settled by the decision of the Circuit Court of Appeals for this circuit in *U. S. Express Co. v. Friedman*, 191 Fed. 673, 112 C. C. A. 37, unless, as contended by counsel for plaintiff, the later United States Supreme Court cases of *Ex parte Webb*, 225 U. S. 663, 32 Sup. Ct. 769, 56 L. Ed. 1248, decided June 10, 1912, and *Clairmont v. United States*, 225 U. S. 551, 32 Sup. Ct. 787, 56 L. Ed. 1201, decided the same day (neither of which has been officially reported), may be said to authorize a contrary holding. In the *Friedman* Case, *supra*, the Circuit Court of Appeals holds that that portion of Oklahoma formerly the Indian Territory (which this district now comprises) did not cease to be Indian country on the admission of the state, nor did such admission affect the application to that part of the state of Revised Statutes, § 2139, or of Act Jan. 30, 1897, c. 109, 29 Stat. 506, relating to the introduction of liquor into the Indian country.

In the *Webb* Case, the Supreme Court said, as to the *Friedman* Case:

"The Circuit Court of Appeals in *United States Express Company v. Friedman*, 191 Fed. 673 [112 C. C. A. 37], dealt with the question whether that portion of Oklahoma formerly known as the Indian Territory ceased to be 'Indian country' upon the admission of Oklahoma as a state, so that these acts were no longer applicable, and with the question whether the admission of Oklahoma as a state had the effect of repealing them so far as pertained to the introduction of liquors into the territory. Petitioner's application to this court for a habeas corpus was intended to bring that decision under review, and the agreed statement of facts was designedly so framed as to show the grounds of his contention that the locus in quo is no longer 'Indian country.'

"The government, however, in resisting the application, relied for support of the jurisdiction of the District Court, not only upon the acts just referred to, but also upon section 8 of 'An act to provide for the appointment of additional judges of the United States court in the Indian Territory, and for other purposes,' approved March 1, 1895 (28 Stat. 693, c. 145).

"The three enactments in question are set forth in chronological order in the margin.

"At the time of the passage of the act of 1895 the territory known as the Indian Territory was that which was described by metes and bounds in Act May 2, 1890, 26 Stat. 81, 93, c. 182, § 29. It included the lands of the Cherokee Nation, and the city of Vinita, where the petitioner's alleged

offense was committed. It is now, of course, a part of the state of Oklahoma.

"It is not open to serious dispute that, if the prohibition of the act of 1895 against 'carrying into said territory any such liquors or drinks' remains operative so far as pertains to the carrying of intoxicating liquors from another state into that part of Oklahoma which was the Indian Territory, the acts admittedly done by the petitioner constitute an offense thereunder, of which the United States District Court has jurisdiction. Whether the offense is sufficiently alleged in the indictment is another question, which, on familiar grounds, is not a proper subject-matter for inquiry on habeas corpus. *Ex parte Parks*, 93 U. S. 18, 23 L. Ed. 787; *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 676; *Ex parte Carll*, 106 U. S. 521 [1 Sup. Ct. 535], 27 L. Ed. 288; *Ex parte Belt*, 159 U. S. 95 [15 Sup. Ct. 987], 40 L. Ed. 88; *Ornelas v. Ruiz*, 161 U. S. 502 [16 Sup. Ct. 689], 40 L. Ed. 787. Recognizing this, counsel for the petitioner, upon the oral argument and in a supplemental brief, modified his original contentions, so as to deal with the act of 1895. As thus modified, the grounds upon which he relies are the following:

"First. That the act of 1895, being a special act applicable to the Indian Territory, had the effect of superseding as to that territory the existing general statute against the introduction and sale of intoxicating liquors in the Indian country.

"Secondly. That the act of 1897, being amendatory of the general statute against the introduction and sale of intoxicating liquors in the Indian country, did not apply to the Indian Territory, because that territory was covered by the special act of 1895.

"Thirdly. That the jurisdiction cannot be rested upon the act of 1897, because the place where the alleged offense was committed was not Indian country within the meaning of that act, since there was no Indian title remaining in the town site of Vinita; the insistence being that, where there is no Indian title, no inalienable land, and no allotted land held in trust, there can be no 'Indian country.'

"Fourthly. That, whether the act of 1895 or the act of 1897 would otherwise be applicable, these acts were both repealed, as to that part of Oklahoma which was formerly the Indian Territory, by the force of Oklahoma Enabling Act June 16, 1906, c. 3335, § 34 Stat. 267, under the authority of which the Constitution of Oklahoma was adopted and a state government established, covering the territory previously known as Oklahoma and the Indian Territory, and pursuant to which certain statutes were afterwards enacted by the state Legislature, viz., an act of March 24, 1908, known as the 'Billups Law' being sections 4156-4209 of the Compiled Laws of Oklahoma of 1909, and an act passed March 11, 1911 (Session Laws of Oklahoma, 1910-1911, pp. 154-156).

"The contentions of the government, on the other hand, are:

"First. That the act of 1895 prohibits the liquor traffic in the Indian Territory, regardless of any question concerning the term 'Indian country,' or concerning the title to particular lands, or the race or color of the persons affected.

"Secondly. That the extinguishment of the Indian land title to the particular locus in quo did not remove it from the operation of section 2139, R. S., as amended by the acts of 1892 and 1897, because (among other reasons) a contrary intent is manifested in the treaties and statutes under which that title was extinguished.

"Thirdly. That neither by admitting Oklahoma to statehood, nor by anything in the Enabling Act, did Congress renounce its control over the interstate liquor traffic in what had been the Indian Territory.

"The question whether the act of 1895 was superseded by the act of 1897 was not much discussed in the argument. It is a question of nicety, having an importance extending beyond the exigencies of the present case. In the view we take of the other questions, however, we may simplify the discussion by assuming (without conceding) that petitioner's first two points are well taken, and that the act of 1897 did not apply to the Indian Territory

because that territory was covered by the special act of 1895. This at the same time renders it unnecessary for us to consider his third contention, viz., that the locus in quo was not Indian country within the meaning of the act of 1897, because of the extinguishment of the Indian title. We may thus proceed at once to the question of the effect upon the act of 1895 of the Oklahoma Enabling Act of June 16, 1906 (34 Stat. 267, c. 3335), and the admission of the state of Oklahoma into the Union pursuant thereto. Since the government concedes that the act of 1895 has been thereby repealed saving so far as it prohibited the carrying of intoxicating liquors, etc., from another state into the territory, the matter to be discussed is still further narrowed.

"Before passing, however, it should be noted that section 2139, R. S., and the act of 1897, contain prohibitions respecting the sale of intoxicating liquor to Indians, and in this, and perhaps in other important respects, cover ground not covered by the act of 1895. We must not be understood as deciding that these prohibitions are no longer in force within what was the Indian Territory, either because of the assumed effect of the act of 1895 in superseding the previous general statute of which the act of 1897 was amendatory, or because of the Oklahoma Enabling Act and the admission of the state thereunder. The assumption we make in favor of the petitioner is for the purposes of the present argument only."

This does not amount to a holding that the act of 1897 does not also apply, nor that this is not Indian country. In the Clairmont Case it was held that the railroad right of way involved had ceased to be Indian country, because the Indian title thereto had been extinguished, and there was no provision of any treaty or any act of Congress indicating the intention of Congress that as to the right of way in question its status as Indian country should continue. On the question of what is Indian country, the court, in the Clairmont Case, *supra*, say:

"The proper criterion to be applied was considered in *Bates v. Clark*, 95 U. S. 204, 207, 208 [24 L. Ed. 471], where Mr. Justice Miller, delivering the opinion of the court, said: 'Notwithstanding the immense changes which have since taken place in the vast region covered by the act of 1834, by the extinguishment of Indian titles, the creation of states and the formation of territorial governments, Congress has not thought it necessary to make any new definition of Indian country. Yet during all this time a large body of laws has been in existence, whose operation was confined to the Indian country, whatever that may be. \* \* \* The simple criterion is that as to all the lands thus described it was Indian country wherever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress a different rule was made applicable to the case.'"

It is true that in this district the "Indian title" to a great portion of the land, as that term is used, has been extinguished. This is particularly true of the town site of Muskogee, where this action arises, and, were that the only fact from which to determine its status, it might well be said that this is not now Indian country, and hence not subject to the operation of the laws of the United States, relating to the suppression of the liquor traffic among the Indians. But in addition to that fact there are the provisions of the various treaties and acts of Congress referred to in detail in both the Friedman and Webb Cases, *supra*, whereby Congress

makes plain its purpose to continue to protect the Indians of the Five Tribes against the introduction of liquor into what was the Indian Territory, making, as suggested in the case of *Bates v. Clark*, supra, a different rule applicable to this district.

It follows that, so far as the introduction of liquor is concerned, all that portion of the state which formerly comprised the Indian Territory still continues to be Indian country, and the site of the city of Muskogee, in which the acts complained of were committed, being included therein, is therefore Indian country.

[2] Section 2140 of the Revised Statutes of the United States provides:

"If any superintendent of Indian affairs, Indian agent or subagent, or commanding officer of a military post, has reason to suspect or is informed that any white person or Indian is about to introduce or has introduced any spirituous liquor or wine into the Indian country in violation of law, such superintendent, agent, subagent, or commanding officer, may cause the boats, stores, packages, wagons, sleds, and places of deposit of such person to be searched; and if any such liquor is found therein the same, together with the boats, teams, wagons, and sleds used in conveying the same, and also the goods, packages, and peltries of such person, shall be seized and delivered to the proper officer, and shall be proceeded against by libel in the proper court, and forfeited, one-half to the informer and the other half to the use of the United States; and if such person be a trader, his license shall be revoked and his bond put in suit. It shall moreover be the duty of any person in the service of the United States, or of any Indian, to take and destroy any ardent spirits or wine found in the Indian country, except such as may be introduced therein by the War Department. In all cases arising under this and the preceding section Indians shall be competent witnesses."

By Act March 1, 1907, c. 2285, 34 Stat. 1017, it was provided that:

"The powers conferred by section 2140 of the Revised Statutes upon Indian Agents and subagents and commanding officers of military posts, are hereby conferred upon the special agent of the Indian bureau for the suppression of the liquor traffic among Indians, and in the Indian country, and duly authorized deputies working under his supervision."

As it appears that the defendant Larsen was such officer and the defendant Hubbard such deputy, and that the acts committed were in the exercise of their respective duties as such officer and deputy, after having reason to suspect that there were upon said premises intoxicating liquors which had been unlawfully introduced into this district, it follows that they were acting within their official authority and the temporary injunction will, therefore, be denied. *Bates v. Clark*, 95 U. S. 204, 24 L. Ed. 471.

It is so ordered.



INTERSTATE CONST. CO., Limited, v. REGENTS OF THE  
UNIVERSITY OF IDAHO.

(District Court, D. Idaho, C. D. August 20, 1912.)

## 1. COLLEGES AND UNIVERSITIES (§ 10\*)—STATE BOARD OF REGENTS—CONTRACTS—LIABILITY TO SUIT.

The Regents of the University of Idaho, created by an act of the territorial Legislature of January 30, 1889 (Laws 1888-89, p. 17), and made a body corporate, with power to make contracts, may be sued on its contracts in a court of general jurisdiction.

[Ed. Note.—For other cases, see Colleges and Universities, Cent. Dig. §§ 29-31; Dec. Dig. § 10.\*]

## 2. COURTS (§ 303\*)—JURISDICTION OF FEDERAL COURTS—SUIT AGAINST STATE BOARD.

A state may waive the privilege given it by the eleventh constitutional amendment of not being subject to suit in a federal court, and does so as to a state board, where it creates it a body corporate, with power to sue and be sued generally.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 844, 844½; Dec. Dig. § 303.\*]

What are suits against states within the meaning of Const. U. S. Amend. 11, see note to Murray v. Wilson Distilling Co., 92 C. C. A. 25.]

## 3. STATES (§ 208\*)—COMPLAINT—SUFFICIENCY.

The complaint in an action against a state board on a contract which was within the scope of its general authority is not required to anticipate a defense of ultra vires.

[Ed. Note.—For other cases, see States, Cent. Dig. § 199; Dec. Dig. § 208.\*]

At Law. Action by the Interstate Construction Company, Limited, against the Regents of the University of Idaho. On demurrer to complaint. Overruled.

C. J. Orland, for plaintiff.

Forney & Moore, for defendant.

DIETRICH, District Judge. The plaintiff prays for judgment against the defendant in the sum of \$15,554.49, on account of the alleged breach of a contract entered into between the parties on the 24th day of June, 1909, by which the plaintiff was to construct for the defendant an addition to the administration building of the University of Idaho. By its demurrer the defendant asserts, first, that it is not subject to the jurisdiction of this court; second, that there is a defect of parties plaintiff; and, third, that the complaint does not state facts sufficient to constitute a cause of action.

[1] 1. The defendant is a corporation created by the Legislature of Idaho (Laws 1888-89, p. 17), and recognized by the Constitution of the state, for the purpose of holding the property and administering the affairs of the State University. Its legal status, for jurisdictional purposes, is discussed at some length, and defined, in a written opinion filed in this court on September 8, 1908, in the case of Phoenix Lumber Company, a Corporation, v. Regents of the University of

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Idaho, 197 Fed. 425, and it is not thought necessary here to restate the law upon that head. However, while it was decided in that case that the court had jurisdiction, some new considerations are now advanced, and for that reason the point merits further discussion. There are two branches to the question as now presented. In the first place, assuming that the defendant is a corporation organized only to perform certain public functions of the state, and that it is therefore, in a sense, but an arm of the state, is it subject to the process of any court? And, in the second place, if it be held that it is subject to the process of the state courts, is it, in view of the eleventh amendment to the Constitution of the United States, amenable to the process of the federal courts?

Were it not for certain decisions of the Supreme Court of the state, rendered since the filing of the opinion in *Phoenix Lumber Company v. Regents, etc.*, supra, it would be sufficient to say that the first phase of the question is ruled by that case. But, inasmuch as this court must follow the construction placed upon the Constitution and statutes of the state by the highest court of the state, respect must be had to the recent decisions of that tribunal. At the time the *Phoenix Lumber Company* decision was rendered, the Supreme Court of the state had entertained jurisdiction upon appeal of a suit similar thereto, but the decision was not thought to be conclusive, for the reason that the precise point was not raised. *American Bonding Co. v. Regents of University*, 11 Idaho, 163, 81 Pac. 604. By way of argument in the *Phoenix Lumber Company* Case, and as tending to support the view that it was the general policy of the state to permit corporate bodies having the management and control of public institutions to be sued in courts of law, reference was had to the charter provisions of certain of the educational institutions, including the two State Normal Schools, in the case of each of which there is an express provision of law to the effect that they may sue and be sued. Thereafter, one of these schools, namely, the one at Albion, was drawn into litigation, the final upshot of which was that the Supreme Court of the state held that the corporate body having control of the school could not be sued in a court of general jurisdiction, and that the only remedy of a contractor was to seek a recommendatory judgment in the Supreme Court of the state under the provisions of section 10 of article 5 of the Constitution, which provides that:

"The Supreme Court shall have original jurisdiction to hear claims against the state, but its decision shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the Legislature for its action."

And it was further held that the statutory language, providing that the "Board of Trustees [of the Albion Normal School] may sue and be sued," was subject to the limitations of this constitutional provision. *Thomas v. State*, 16 Idaho, 81, 100 Pac. 761. If this decision stood alone, I should have no hesitation in reaching the conclusion that the application of the principle upon which it rests requires that it be held that the defendant here is exempt from ordinary judicial process. But later the *Moscow Hardware Company*, a corporation,

having a claim against the Regents of the University, apparently assuming that, under the Thomas decision, its only remedy was an application to the Supreme Court for a recommendatory judgment, under the constitutional provision above quoted, filed its petition in the Supreme Court, and thereafter, upon a reference, the evidence was reported, whereupon the Supreme Court, of its own motion, held that it was without original jurisdiction in the premises, and that the constitutional provision did not apply. *Moscow Hardware Co., Ltd., v. Regents of the University of Idaho*, 19 Idaho, 420, 113 Pac. 731. Unfortunately there is, in the majority opinion, no reference to the Thomas Case, and it is not distinguished or expressly overruled; but counsel have not attempted to reconcile the two cases, and I have not been able to do so. The cause of action here presented is, from a legal standpoint, identical with that involved in the *Moscow Hardware Company Case*, and in the majority opinion there it is said:

"Although the question of the jurisdiction of this court to hear and determine this case is not raised, it is clear that this court has no jurisdiction to render a recommendatory judgment herein. \* \* \* Under the provisions of section 3 of an act of the territorial Legislature approved January 30, 1889, entitled 'An act to establish University of Idaho,' the Board of Regents was made a body corporate by the name of 'The Regents of the University of Idaho,' and under the provisions of section 10, art. 9, of the Constitution of the state, the regents have the general supervision of the University and control and direction of all of the funds of, and appropriations to, the University, under such 'regulations as may be prescribed by law.' The Board of Regents is a body corporate, and when it enters into a contract for the erection of buildings, if it fails to comply therewith, an action may be maintained against it to compel it to do so, which action may be prosecuted in the district court. Under the foregoing provisions of the Constitution and statutes, there can be no doubt but that the Board of Regents is a body corporate, and may sue and be sued, and that, when they enter into a contract, they are liable to the process of the district court the same as any other corporation organized under the laws of the state."

It will thus be seen that the conclusion of the Supreme Court in its most recent decision is identical with that announced by this court in the *Phoenix Lumber Company Case*, *supra*, and therefore furnishes no reason why we should now adopt a different view.

[2] Passing to the other branch of the jurisdictional question, the language of the eleventh amendment is that:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the states by citizens of another state, or by citizens or subjects of any foreign state."

The defendant, in response to the process of this court, appeared upon the 13th day of November, 1911, and filed simultaneously a demurrer and a motion. As already indicated, the demurrer not only asserts want of jurisdiction, but puts forward other objections to the complaint, and by its motion the defendant seeks to have stricken from the complaint several different paragraphs thereof. It is confidently argued upon behalf of the plaintiff that, by raising other questions and making other objections than those which relate to the jurisdiction, the defendant has waived the jurisdictional question, which relates, not to the subject-matter, but to the per-

son of the defendant alone, and, under the authorities, the point would seem to have much merit. *St. Louis & San Francisco R. Co. v. McBride*, 141 U. S. 127, 130, 11 Sup. Ct. 982, 35 L. Ed. 659; *Texas & Pacific R. R. Co. v. Cox*, 145 U. S. 603, 12 Sup. Ct. 905, 36 L. Ed. 829. However, I am reluctant to hold that the right of the defendant, if any there be, to claim exemption from the process of this court, has been waived in this manner, and, without deciding, I shall assume that it has all the rights which it had when the action was commenced.

But has it not waived the exemption provided by the eleventh amendment in another way? It is familiar law that a sovereignty may forego its privilege and consent to be sued. Such consent may be limited, as where the right is conferred upon claimants to wage their claims against the state in some designated tribunal created exclusively for that purpose, or the consent may be general, as where it is provided that it may be sued in courts of general jurisdiction, as are natural persons, and private corporations. It might have been provided by the Legislature that the Regents of the State University could be sued in the state courts of general jurisdiction, but not in the federal courts, or in the federal courts, and not in the state courts, or exclusively in some special tribunal of limited jurisdiction. In short, the whole matter is within the discretion of the state, as to whether it will permit itself to be sued at all, and, if at all, in what tribunals. As we have already seen, under the construction placed upon the Constitution and statutes of the state by the highest court thereof, "the Board of Regents is a body corporate, and may sue and be sued, and that when they enter into a contract they are liable to the process of the district court the same as any other corporation organized under the laws of the state."

While the phrase "district court," as here used, doubtless refers to the state district court, it is not thought that the Supreme Court intended to limit the rights of contractors to the state tribunals. The state district court was referred to, because it is the court of original general jurisdiction in the state. The holding of the Supreme Court seems to be that the defendant, a body corporate, may sue and be sued as any other corporation organized under the laws of the state. In that view, the sovereign has consented that, in so far as it is represented by the "Regents of the University of Idaho," it may be sued in this court. *Beers v. Arkansas*, 20 How. 527, 529, 15 L. Ed. 991; *Clark v. Barnard*, 108 U. S. 436, 447, 2 Sup. Ct. 878, 27 L. Ed. 780; *Railway Co. v. Whitton*, 13 Wall. 270, 286, 20 L. Ed. 571; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 391, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Smyth v. Ames*, 169 U. S. 466, 516, 18 Sup. Ct. 418, 42 L. Ed. 819; *Smith v. Reeves*, 178 U. S. 436, 440, 20 Sup. Ct. 919, 44 L. Ed. 1140. Accepting as correct the construction placed upon the Constitution and statutes by the Supreme Court of the state, it is not apparent how we can, with propriety, decline to take jurisdiction of the plaintiff's claim.

2. The second objection raised by the demurrer is a defect of parties; the point being that in the contract sued upon, a copy of which is attached as an exhibit to the complaint, the Interstate Construction Company is designated as a corporation, whereas by the first paragraph of the complaint it is alleged that it is a special and limited copartnership, organized under the laws of the state of Michigan. At the oral argument it was suggested by counsel for the plaintiff that the inconsistency had first been called to his attention by the demurrer, and he desired leave to amend by interlineation upon the face of the complaint, and such leave will be granted.

[3] 3. The third objection is that the complaint does not state facts sufficient to constitute a cause of action against the defendant. The reasoning in support of the objection is, in brief, that, the corporate powers of the defendant being limited, to state a cause of action against it, it is requisite that the plaintiff affirmatively show by its complaint that the moneys required to discharge the obligation arising out of its contract with the plaintiff were, under the law, available for that purpose at the time the contract was executed. In support of the argument reference is made to the case of *Moscow Hardware Company v. Regents*, *supra*, where, in the course of the opinion, it was said:

"In entering into said contracts—that is, for the construction of the Agricultural Building and the foundation of the Administration Building—the Board of Regents had no authority to carry an indebtedness against the state which the Board of Regents had not the funds to pay. They have no authority whatever to incur any indebtedness against the state, directly or indirectly, in the erection of University buildings for which they have no funds to pay. They have no authority to erect a building with the hope or expectation of thereafter securing appropriation from the Legislature or a recommendatory judgment from this court."

To what extent, if at all, this principle should be held to conclude the rights of the plaintiff, cannot, in my judgment, be properly decided at the present time. The complaint states a cause of action. It was within the general scope of the authority of the defendant to erect the building, and hence to enter into a contract like that referred to in the complaint. The demurrer, therefore, is, in effect, a plea of *ultra vires*. Usually, where the transaction pleaded is within the general scope of the authority of the defendant, *ultra vires* is a defense, to be pleaded and proved by the defendant, and need not be anticipated and avoided by the plaintiff. There are cogent reasons for such a rule; but they need not be stated, because the rule is well settled. The contract, therefore, being within the general scope of the authority of the Regents, if, for some special reason, or if, because of the existence of some special conditions, they were unauthorized to enter into such contract, they may plead and prove the same as a defense to the action.

The demurrer will therefore be overruled, except as to the second point, and in respect to that the plaintiff will be permitted to amend upon the face of the complaint.

It may be added that a motion to strike has been submitted, together with the demurrer; but, as I understand, it raises no questions other than those raised by the demurrer, and it will therefore be overruled.

### THE EVOLUTION.

(District Court, D. Massachusetts. January 30, 1912.)

No. 561.

1. COLLISION (§ 71\*)—SCHOONER BREAKING FROM ANCHORAGE—DEFECTIVE APPLIANCES.

A schooner, which drifted from her anchorage during a storm not more violent than might ordinarily be expected, by reason of the parting of an anchor chain, which was old and insufficient, *held* solely in fault for a collision with another anchored vessel to her leeward.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. § 71.\*]

2. SALVAGE (§ 13\*)—SALVAGE SERVICES—TOWING SCHOONER TO SAFE ANCHORAGE—COMPENSATION.

A tug, which voluntarily went to the assistance of a schooner in an exposed outer harbor during a storm, where, her anchor chains having parted, she was held by lines made fast to another anchored schooner, and in response to her signals for assistance towed her to a safe anchorage in the inner harbor, *held* entitled to a salvage award of \$50; the service requiring about two hours.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 23-25; Dec. Dig. § 13.\*]

Salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.]

3. SALVAGE (§ 7\*)—SALVAGE SERVICES—HOLDING DRIFTING VESSEL IN STORM.

The schooner *Evolution*, lying anchored at night in an exposed outer harbor, during a storm, parted one of her anchor chains, and, dragging her other anchor, fouled the schooner *M. D. S.*, and after parting from her second anchor made fast by another line, furnished by the *M. D. S.*, which so held her until morning, when she was taken away by a tug. There were no other means of assistance at hand, and, but for that of the *M. D. S.*, she would undoubtedly have drifted on the rocks and been wrecked. *Held*, that the service of the *M. D. S.* entitled her to a salvage reward.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 13, 26; Dec. Dig. § 7.\*]

4. SEAMEN (§ 27\*)—PRIORITIES OF LIENS—WAGES OF SEAMEN AND COLLISION DAMAGES.

The lien for wages earned prior to a collision by the crew of the vessel in fault is inferior to that for the damages caused by the collision.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 4, 157-169; Dec. Dig. § 27.\*]

In Admiralty. Suit by Alexander Watson, owner of the schooner *M. D. S.*, against the schooner *Evolution*, for salvage and collision damages; also petition for salvage by the Mariners' Towboat Company, owner of the tug *Eveleth*. Decree for both libelants.

Carver, Wardner & Goodwin, for libelant and petitioner.

Blodgett, Jones & Burnham, for claimant.

DODGE, District Judge. The libelant is the owner of the British schooner M. D. S. On November 12, 1911, while bound on a voyage, under charter, from Hantsport to Vineyard Haven for orders, then to discharge in Long Island Sound or at New York, she anchored in Gloucester outer harbor, just inside the breakwater. On November 16, the Evolution, also a British vessel, came into the harbor and anchored near by. Both vessels remained at anchor until the night between Saturday, November 18th, and Sunday, November 19th, when the wind began to blow strong from the southwest, and increased in force until it became a considerable gale. Soon after 1 a. m., the Evolution, being to windward of the M. D. S. and having two anchors down, broke adrift from one anchor, dragged the other, came down upon the M. D. S., and fouled her, carrying away her jib boom, bowsprit, with the rigging and head gear attached. After getting clear, the Evolution swung to her port anchor and also made herself fast with a line to the quarter of the M. D. S. Thus the vessels lay until about 3:15 a. m., when the Evolution broke adrift a second time, from her port anchor, still holding, however, by the line fast to the M. D. S. Another line was passed to her from the M. D. S., and she lay astern of that vessel, secured by these two lines, until nearly 5 a. m., when the Evolution's line parted, and another part of the line belonging to the M. D. S. had to be used instead. This held her till after 7 a. m., when the tugboat Eveleth came down from Gloucester to where the vessels lay, and towed the Evolution to a safe anchorage in the inner harbor. The wind had continued to blow heavily from the time she first broke adrift until she was safely anchored as above.

The owner of the M. D. S. claims salvage for keeping the Evolution from going ashore during the time she remained attached to his vessel, and claims damages for the collision. The master and crew of the M. D. S. join as libelants for salvage. The Mariners' Towboat Company, which owns the Eveleth, has presented a claim for salvage. No claim to the Evolution has been filed, nor is there any answer to the libel on her behalf. She was sold by the marshal on December 16th for \$650, and \$583.71, being the net proceeds of her sale, is in the registry. Ernest Eye and three others, claiming to have been the crew of the Evolution, have presented claims for wages due them, which they ask to have paid out of these proceeds.

The hearing has been ex parte so far as the Evolution is concerned, but the libelant has contested the claim of the towboat and the wages claim.

[1] I have no hesitation in finding the Evolution in fault for the collision. She is presumptively in fault for fouling a vessel at anchor, and there is evidence sufficient to show that both the anchor chains which she was using parted because they were old, insufficient, and unsafe. Although the wind was strong at the time, there is nothing to show that either the wind or the sea caused by it were heavier than ought ordinarily to be expected on such a voyage, or heavier than reasonably sufficient tackle would have resisted.

Passing for the present the claims of the Evolution's crew, if the

Eveleth has a salvage claim, it is entitled to precedence as against the proceeds, because her salvage services were latest in order; and if the M. D. S. has a salvage claim, it ranks next. If salvage compensation is due either or both these vessels, the fact that there are now proceeds in court, available for the payment either of collision damages or wages, is partly or wholly because of the services for which such compensation is to be made.

[2] As to the Eveleth's services, I cannot hold that they were mere towage services, deserving only the ordinary towage compensation of \$6. The tug, learning that there was a schooner in the outer harbor which might need assistance, voluntarily went down there to look for her, found the Evolution signaling for assistance, and tendered her services, which were accepted without inquiry or bargain. The Evolution's peril lay in the prospect that the M. D. S. might, for her own safety, be forced to decline to hold the Evolution longer by the strong wind and sea, which did not then appear likely to diminish, or in the prospect that the lines connecting the two vessels might part. The evidence does not satisfy me that the immediate danger of either event happening was very great, but it was impossible to tell at the time just how great the danger was. The Evolution, once adrift, was helpless to navigate by herself, and the rocky shore to leeward was close at hand, as was also another vessel, still nearer to leeward. There was no prospect of any other immediate assistance. Though the actual time occupied by the tug's services was only about two hours, and the actual distance traversed by her in rendering them only about  $2\frac{1}{2}$  miles in all, I think the circumstances, though not justifying any great addition to the towage value of the services, entitle her to an award of \$50.

[3] The services of the M. D. S. consisted in permitting the Evolution to be made fast to her for several hours, and thus holding her safe from the fate of drifting ashore. Extra strain was, of course, thereby put upon the M. D. S. and her anchor, which had to hold both vessels during the time. One of the lines used, as has been stated, belonged to the M. D. S., and this line was passed to the Evolution, at the time her own line parted, by some of the crew in the boat of the M. D. S. It was dark during the greater part of the time while the vessels remained fast to each other, so that there was no opportunity to signal for or obtain other assistance. Counsel have not cited, nor have I found, any case in which services similar to these have been compensated as salvage services; but the M. D. S. was under no legal obligation to render them, and they benefited the Evolution. Having voluntarily permitted another vessel thus to make use of and endanger her, it can hardly be just to deny her any claim to compensation. The often quoted statement in *The Blackwall*, 10 Wall. 1, 11, 19 L. Ed. 870, "Useful services of any kind, rendered to a vessel or her cargo, exposed to any impending danger and imminent peril of loss or damage, may entitle those who render such services to salvage reward," covers this case. The benefit derived by the Evolution from these services seems to me, on the whole, not less considerable than that derived from those rendered by the tug, but



not materially greater, and I shall award for them the same amount of \$50.

[4] Unless the Evolution's crew have a prior claim for wages, all that remains of the proceeds must go to the owners of the M. D. S. in satisfaction of their damage claim, which will, in any event, much exceed the entire proceeds in amount. Whatever the decisions may have been in other districts, in this district the lien for wages earned prior to the collision, by the crew of the vessel in fault, has always been postponed to the lien for damages caused by the collision. The *Enterprise*, 1 Lowell, 455, Fed. Cas. No. 4,498. We are dealing here with a British vessel, as was Judge Lowell in *The Enterprise*. Judge Lowell made a later similar decision in *Veazie v. The Frank Herbert*, decided at the June term, 1878 (No. 700), but not reported, in which case the vessel was American. The only Court of Appeals decision upon the question is to the same effect. *The F. H. Stanwood*, 49 Fed. 577, 1 C. C. A. 379. See *The John G. Stevens*, 170 U. S. 113, 119, 18 Sup. Ct. 544, 42 L. Ed. 969. I must follow the decisions in this court, and give priority to the collision claim. It may be remarked that neither the mate, cook, nor two seamen who have signed and sworn to the petition for wages have appeared to testify; that the greater part of their claims are for wages long overdue, particularly in the case of the mate and one seaman, who have been making successive voyages in the schooner since the early part of 1911; and that the only evidence in support of their claims was given by the master, who it appears is really the only person interested in the schooner, though she stands in the name of his brother. The master and all the crew live in Nova Scotia. He has collected about \$500 freight, and about \$450 insurance since the 1st of November, 1911. I should, in any event, hesitate to accept his unsupported testimony.

What will then remain of the fund in court must be paid to the libelant in satisfaction of his collision damages. As no defense is interposed to his libel, the decree cannot bind the owners of the *Evolution* beyond the fund with which I am dealing. It will, therefore, be unnecessary to determine with precision the amount which he might recover, were those owners before the court. In his original libel, sworn to November 20, 1911, the amount of damages alleged for injuries to the M. D. S., and for expenses of the master and crew, and otherwise, was \$2,000. In his amended libel, sworn to by him December 1, 1911, the allegations are that the cost of the schooner's repairs, in his estimate, will be about \$2,200, that she has been and will be detained by reason of them, that he was sustained other damages by reason of the expense incurred in having her surveyed, and by reason of her detention, which he estimates at about \$700. The evidence which he has introduced, standing uncontradicted, would, I think, justify an assessment of these damages at nearly or quite \$2,000. It will be sufficient, however, for the purposes of this case, to direct in the decree that the libelant recover the balance of the proceeds in court.

The evidence, as it stands, does not seem to me to afford the material for making any apportionment between owners and members

of the crews of the amounts awarded for salvage, and, unless it appears that such an apportionment by the court will be really necessary, the decrees may run in favor of the respective libelants generally.

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UNITED STATES v. CHAVEZ.

(District Court, W. D. Texas, El Paso Division. October 5, 1912.)

No. 1,590.

NEUTRALITY LAWS (§ 5\*)—VIOLATION—MUNITIONS OF WAR—"EXPORT."

Joint Congressional Resolution No. 89, March 14, 1912 (37 Stat. —), provides that, whenever the President shall find that in any American country conditions of domestic violence exist which are promoted by arms or munitions of war procured from the United States, and shall make proclamation thereof, it shall be unlawful to "export," except under such limitations as shall be prescribed by the President, any arms or munitions of war from any place in the United States to such country, until otherwise ordered by the President. *Held*, that the word "export" was limited to a transportation of arms or munitions of war from any place in the United States to "such country"; and hence a charge that accused, with intent to export munitions of war from the city of El Paso to a place in Mexico, in violation of a proclamation by the President pursuant to such resolution, did make a shipment of cartridges, etc., by transporting them on his person from one point to another in the city of El Paso, did not charge a violation of the resolution. (Citing 3 Words and Phrases, 2600-2602.)

[Ed. Note.—For other cases, see Neutrality Laws, Cent. Dig. §§ 14-17; Dec. Dig. § 5.\*]

Arnulfo Chavez was indicted for violating Joint Resolution March 14, 1912, relating to the exportation of munitions of war from any place in the United States to a country in which conditions of domestic violence existed. On demurrer to indictment. Sustained.

The question to be decided is whether the indictment in this case charges an offense under the law. The charging part of the indictment is as follows:

"That heretofore, to wit, on the 3d day of May, A. D. 1912, in the city and county of El Paso, in the state of Texas, in the Western district of Texas, and within the jurisdiction of this court, one Arnulfo Chavez, alias Arnuto Chavez, late of said district, did unlawfully, knowingly, willfully, and with intent to export the munitions of war hereinafter described from the said city of El Paso to Ciudad Juarez in Mexico, make a certain shipment of certain munitions of war, to wit, two thousand (2,000) Winchester cartridges, of the caliber 30-30; that is to say, did make a shipment of said munitions of war from said city of El Paso, and with said Ciudad Juarez in Mexico as the destination of said shipment, by transporting the same on his person from a point, the exact location of which is to your grand jury unknown, and hence not here given, near the intersection of North El Paso and San Francisco streets, in said city of El Paso, to a point, the exact location of which is to your grand jury unknown, and hence not here given, but which is near the intersection of South Stanton and Fifth streets, in the said city of El Paso."

A motion to quash is interposed by the defendant, based upon the following ground: "Said indictment is insufficient in this: That it fails to charge that the defendant exported munitions of war from the United States."

The charge against the defendant is predicated upon a joint resolution of Congress, approved March 14, 1912, and the proclamation of the President, issued the same day. The proclamation, containing the essential features of the joint resolution, is in the following language:

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Whereas, a joint resolution of Congress approved March 14, 1912, reads and provides as follows: 'That whenever the President shall find that in any American country conditions of domestic violence exist which are promoted by the use of arms or munitions of war procured from the United States, and shall make proclamation thereof, it shall be unlawful to export, except under such limitations and exceptions as the President shall prescribe, any arms or munitions of war from any place in the United States to such country until otherwise ordered by the President or by Congress.'

"And whereas, it is provided, by section 2 of the said joint resolution, 'that any shipment of material hereby declared unlawful after such a proclamation shall be punishable by fine not exceeding ten thousand dollars or imprisonment not exceeding two years, or both':

"Now, therefore, I, William Howard Taft, President of the United States of America, acting under and by virtue of the authority conferred in me by the said joint resolution of Congress, do hereby declare and proclaim that I have found that there exist in Mexico such conditions of domestic violence, promoted by the use of arms or munitions of war procured from the United States, as contemplated by the said joint resolution; and I do hereby admonish all citizens of the United States and every person to abstain from every violation of the provisions of the joint resolution above set forth, hereby made applicable to Mexico, and I do hereby warn them that all violations of such provisions will be rigorously prosecuted. And I do hereby enjoin upon all officers of the United States, charged with the execution of the laws thereof, the utmost diligence in preventing violations of the said joint resolution and this my proclamation issued thereunder, and in bringing to trial and punishment any offenders against the same."

Charles A. Boynton, U. S. Atty., and S. Engelking, Asst. U. S. Atty.  
Robert L. Holliday, of El Paso, Tex., for defendant.

MAXEY, District Judge (after stating the facts as above). Rejecting unnecessary verbiage, the real charge against the defendant is that he made a shipment of certain munitions of war, by transporting on his own person, from one point in the city of El Paso to another point within said city, with intent to export the same to the republic of Mexico. Does the act thus charged offend against the law? By the first section of the joint resolution, fully set forth in the statement of the case, it is provided that, after proclamation has been made, "it shall be unlawful to export \* \* \* any arms or munitions of war from any place in the United States to such country"; the last two words referring, as applied to the allegations of the indictment, to the republic of Mexico. The offense being thus defined, the second section of the resolution proceeds:

"That any shipment of material hereby declared unlawful after such a proclamation shall be punishable by fine not exceeding ten thousand dollars, or imprisonment not exceeding two years, or both."

It is thus seen that by the terms of the first section of the resolution the act denounced as unlawful is the exportation (to export) arms or munitions of war from the United States to the country where domestic violence exists, etc. The language is plain and without obscurity. If a doubt could be entertained as to the meaning of the word "export," such doubt is removed by the very words of the resolution. The exportation must be from any place in the United States to "such country." And this is the generally accepted definition of the word "export." *United States v. Forsythe*, 25 Fed. Cas. 1152; *Kidd v. Flagler* (C. C.) 54 Fed. 367; *Dooley v. United States*, 183 U. S. 154, 22

Sup. Ct. 62, 43 L. Ed. 128; 3 Words and Phrases, 2600-2602; 1 Bouvier's Law Dict. p. 564; Webster's Dictionary. In *Kidd v. Flagler*, supra, the court used the following language:

"The authorities seem to be unanimous on the point that merchandise is exported from this country when it is landed in a foreign country."

Having ascertained the meaning of the first section of the resolution, it remains to consider the second section. The important words are the following:

"That any shipment of material hereby declared unlawful after such a proclamation shall be punishable," etc.

We have seen that the exportation of arms and munitions of war is the only act declared unlawful by the first section, and it would appear naturally to follow that such act only is made punishable by the second section. If the word "material" referred solely to arms or munitions, without regard to their exportation, then every removal of arms or munitions of war from place to place within the city of El Paso would be embraced within the denunciation of the law. But it is obvious that such a construction of the resolution would be repugnant to common sense, and hence that it was never intended by the Congress. Nor would the addition of the words in that connection, "with intent to export to Mexico," employed by the pleader in the indictment, render an offense an act which is not denounced as a crime, because (1) the word "intent" is not used in the resolution, and therefore does not appear to be an ingredient of the offense; and (2) the transportation or shipment from place to place within El Paso of arms and munitions of war, with intent to export the same to Mexico, would amount to the mere unexecuted purpose—that is, attempt—on the part of the person charged to commit the forbidden act, and would fall short of the overt act essential to complete the offense.

The resolution cannot be construed to include an attempt to export without doing violence to its language, and without disregarding the accepted rules for the construction of statutes. And, in addition, such construction would import into the resolution an offense for which the Congress has failed to provide. The distinction between attempt to commit an offense and its actual commission is so well recognized that citation of authority in its support is altogether unnecessary. In this immediate connection, however, it may be instructive to note what was said by the Supreme Court in the smuggling case of *Keck v. United States*, 172 U. S. 444, 445, 19 Sup. Ct. 257, 43 L. Ed. 505. In that case Mr. Justice (now Chief Justice) White, as the organ of the court, used this language:

"Whatever may be the difficulty of deducing solely from the text of the statute a comprehensive definition of smuggling or clandestine introduction, two conclusions arise from the plain text of the law: First. That whilst it embraces the act of smuggling or clandestine introduction, it does not include mere attempts to commit the same. Nothing in the statute by the remotest possible implication can be found to cover mere attempts to commit the offense referred to. It was, indeed, argued at bar that, as the concealment of goods at the time of entering the waters of the United States tended to render possible a subsequent smuggling, therefore such acts should be considered and treated as smuggling; but this contention overlooks the plain distinction

between the attempt to commit an offense and its actual commission. If this premise were true, then every unlawful act which had a tendency to lead up to the subsequent commission of an offense would become the offense itself; that is to say, that one would be guilty of an offense without having done the overt act essential to create the offense, because something had been done which, if carried into further execution, might have constituted the crime."

What was said by the learned justice in the Keck Case has peculiar significance when applied to the case at bar. The allegations of the indictment, as understood by the court, charge in effect that the defendant attempted to export munitions of war—nothing more; and as the joint resolution is directed against actual exportation, and not merely the attempt to export, the acts charged against the defendant are not embraced within the prohibition. The word "shipment," employed in connection with the words "material hereby declared unlawful," can only refer, in the judgment of the court, to material shipped, exported, to the country where the disturbance exists, since it is only such material that is declared to be unlawful by the first section of the resolution, defining the offense. Viewing the question from any standpoint, it is difficult to conceive how the acts charged against the defendant can be construed to be within the meaning of the law.

Being of the opinion, therefore, that the indictment fails to charge an offense, it follows that the motion to quash should prevail. It is deemed proper to state that, owing to the aggravated condition of affairs existing on our border, and to the number of cases here pending against parties charged with the violation of the joint resolution, the question discussed is regarded as one of unusual importance, and for this reason the court has given to it careful and anxious consideration. If error has been committed, the appropriate appellate tribunal may apply the proper corrective. Act March 2, 1907, c. 2564, 34 Stat. 1246. If, on the other hand, the ruling be affirmed, then the Congress may, in its discretion, enact such additional legislation as may by that body be deemed wise and proper.

For the reasons stated, the motion should be sustained, and the indictment dismissed; and it is so ordered.

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### THE GREYSTOKE CASTLE.

(District Court, N. D. California. September 14, 1912.)

#### 1. COLLISION (§ 94\*)—OVERTAKING VESSEL—NEGLECT TO KEEP LOOKOUT.

A steamship which overtook and ran down a tug, which was preceding her in San Francisco Bay for the purpose of docking her at the city, held solely in fault for not keeping out of the way as required by the rules, and for not keeping a lookout forward; it appearing from the evidence that the tug maintained her course and speed as was her duty.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 197-199; Dec. Dig. § 94.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**2. COLLISION (§ 105\*)—FAULT—EVIDENCE.**

Where one vessel was guilty of a clear violation of the rules sufficient to account for a collision, she cannot escape liability by raising a mere doubt as to the conduct of the other vessel.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 105.\*]

**3. COLLISION (§ 52\*)—OVERTAKING VESSELS—DUTY OF OVERTAKEN VESSEL.**

An overtaken vessel is under no duty to keep a lookout aft to prevent being run down by the overtaking vessel, but has a right to act on the presumption that the latter will keep out of her way.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 62; Dec. Dig. § 52.\*]

Collision with overtaking vessels, see note to *The Rebecca*, 60 C. C. A. 254.]

In Admiralty. Suit by the Shipowners' & Merchants' Tugboat Company, owner of the tug *Sea Prince*, against the steamship *Greystoke Castle*. Decree for libellant.

Ira A. Campbell, of San Francisco, Cal., for libellant.

Nathan H. Frank, of San Francisco, Cal., for respondent.

BEAN, District Judge. This is a case of a collision. It occurred in San Francisco Bay between the steamship *Greystoke Castle* and the tug *Sea Prince* about 5 o'clock in the afternoon of November 18, 1910. The tug had been employed by the steamship to undock her at Port Costa and redock her at the city. After the steamer had been undocked at Port Costa, the two vessels proceeded down the river and bay, each on its own power. The tug was in advance. The steamer had no outlook forward, and the officer on the bridge could not see the water within 200 or 300 feet of her stem. When they arrived off the lower end of Angel Island, the tug was run into and sunk by the steamer, and all her crew except the captain drowned. The owners of the tug, claiming that the *Greystoke Castle* was at fault, because she did not have a proper lookout and because she failed to keep a safe distance from the tug, in violation of the rules of navigation requiring her to keep out of the way of the tug, brought this proceeding to recover the damages caused thereby. The claimant maintains that there was no fault on the part of the steamship, but that the tug reversed just as she was entering the strong tide running to starboard, suddenly throwing the tug under the bow of the steamer, and thus causing the collision.

[1] At the hearing I was impressed with the view that the steamer was at fault, and a careful re-examination of the record and the briefs of counsel confirm me in that opinion. There is an irreconcilable conflict in the testimony as to the speed and movement of the two vessels after they left Port Costa and up to the time of the collision. The master of the *Greystoke Castle* says that he did not make to exceed 8 knots, and the captain of the tug testifies that his speed was from 9 to 9½ knots, and that it was not reduced. Manifestly both of these statements cannot be true. It would be an impossibility for a vessel making no more than 8 knots an hour to overtake and run down a vessel ahead going at the rate of 9 or 9½ knots an hour, as long as both boats kept their speed. If, therefore, the case had to

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

be determined from the testimony of interested parties alone, its solution would be difficult. However, it does not depend on the absolute speed of the two vessels, nor the testimony of their officers. There were eyewitnesses to the collision and the movement of the vessels prior thereto, who are wholly disinterested, and whose testimony I think unmistakably fixes the fault. At the time the Greystoke Castle and the Sea Prince were approaching the upper end of Angel Island, the Monticello swung out from the Immigration Wharf on her regular voyage to San Francisco. The captain of the Monticello testifies that at that time the tug was about 400 feet ahead of the steamer; that the Monticello came in on the starboard side of the two vessels, and ran on a course parallel and about 200 or 300 feet distant from them until the collision; that when off Point Simpton the Monticello was abreast of the Greystoke Castle, and was ahead of her about 150 feet when they reached Quarry Point; that at that time the tug was about 150 or 200 feet ahead of the Greystoke Castle; that the Greystoke Castle commenced to crawl up on the tug, and continued to do so until the moment of the collision; that he observed their positions particularly, because he was watching the General Frisbie, which was on the port side; that—

"I commenced to watch them more after leaving Quarry Point, because the Frisbie is on the same run as we are. I had a lot of Chinese on board that day, with their baggage, which we had to get off. It was low water, and we had all the baggage down on the lower deck of the Monticello. If the Frisbie beat me in, I should have to take the low deck, and I thought we might be able to beat her in, and I thought I would watch the Frisbie to see where she was, because she was on the other side of the Greystoke Castle. I happened to be watching and see when she got across the bow of the Greystoke Castle, to see what position she was in. \* \* \* I was on the port side of the Monticello"

—and was watching the Greystoke Castle and the tug all the time. That at the time of the collision—

"the big steamer seemed to lift the small one on her quarter, and shove her around his bow about 15 feet, and turn her clear over. Her fore foot shot out of the water, and her stern went under just like that (illustrating). She went right over. I never see nothing of her stern after the big boat hit her and forced her down. Her fore foot shot out of the water just like a porpoise. Just as it happened I stopped and commenced backing." The tug did not "seem to lose any more speed than she had previous to that, and I had been watching the speed. \* \* \* She was going about the same speed I noticed right along. I was watching on the opposite side. I was watching for the Frisbie. She was going on the Oakland side, and did not seem to be losing any. She had the same bone in her mouth that she had previously."

Now, no one had a better opportunity of seeing and observing the movement of the vessels and all that occurred at the time of the collision than this witness, and his testimony, I think, is entitled to great weight. Moreover, he is corroborated by Gardner, Kennah, Trumbly, and Harrington, who were passengers aboard the Monticello, and who were observing the movements of the Greystoke Castle and the tug from the time they passed the upper end of Angel Island to the collision. So I take it to be clearly established that during that time that Greystoke Castle was continually crawling up on the tug. She was therefore the overtaking vessel and obligated to keep out of the

way. Article 24, Inland Rules. The burden of proof is upon her to show that the collision was caused by no fault on her part, but by some fault or neglect of duty on the part of the tug. *The Governor*, Fed. Cas. No. 5,645; *The Sif* (D. C.) 181 Fed. 412; *The Cephalonia* (D. C.) 29 Fed. 332. And this I think she has wholly failed to do. It was the duty of the tug to keep her course and speed, and she was not at fault for doing so. *The Delaware*, 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771.

It is insisted by the respondent that the tug changed her course and speed, so as to bring her suddenly under the bow of the *Greystoke Castle* and thus caused the collision; but this defense is not sustained by the evidence. The captain of the tug testified that he was maintaining the same course and speed at the time of the collision that he had been going for some considerable time prior thereto, and had not veered therefrom nor slackened the same; and he is corroborated, as we have seen, by the testimony of the captain of the *Monticello* and the passengers aboard that vessel. An attempt is made to discredit the testimony of the eyewitnesses by inferences or conclusions sought to be drawn from the condition of the engines of the tug when she was raised. At that time her throttle was found wide open and clamped, the steam was shut off from the reversing engine, the reversing lever was a little beyond the center and slightly clamped, the links were in full reverse position, and the hawser was in the wheel. It is argued that this shows that the engine must have been reversed before the collision and under the bow of the steamer.

[2] Different theories were advanced by experts to account for these facts, and much testimony was given by the respective parties in reference thereto; but at the most it only suggests a doubt as to the conduct of the tug, and that is not sufficient to relieve the *Greystoke Castle* from liability. The tug was a privileged vessel. It was her duty to keep her course and speed, and it was the duty of the *Greystoke Castle* to keep out of her way and not run her down. She was closely following the tug, with no lookout, and apparently without taking any precaution to ascertain the position of the tug or her distance. She was therefore guilty of a clear violation of the rules of navigation sufficient to account for the collision, and cannot escape liability by raising a mere doubt as to the conduct of the tug. Doubts should be resolved in favor of the tug and against the *Greystoke Castle*. *The Pocomoke* (D. C.) 150 Fed. 193.

[3] The claim is made that the tug was at fault because her crew were not at their stations at the time of the collision. The bodies of three of the crew of five were found in the messroom when the tug was raised, and there was evidence that just a short time before the collision some one was seen by one of the passengers of the *Monticello* to go from the engine room to the stern of the tug and return. But this was not a fault contributing to the collision. The tug had a right to assume that the burdened vessel would discharge her duty, and to make her course and keep her speed on that assumption. *The Britannia*, 153 U. S. 130, 14 Sup. Ct. 795, 38 L. Ed. 660; *The Free State*, 91 U. S. 200, 23 L. Ed.



299; *The Delaware*, 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771; *Hutchinson v. The Northfield*, 154 U. S. 629, App'x, 14 Sup. Ct. 1184, 24 L. Ed. 680. It was not her duty to keep a lookout aft to prevent being run down by the steamer, so long as she performed her duty in holding her course and speed. *The Fannie*, 11 Wall. 238, 20 L. Ed. 114; *The Eider* (D. C.) 37 Fed. 903; *The Havana* (D. C.) 54 Fed. 411; *The Anna W.* (D. C.) 181 Fed. 604; *The Fannie Hayden* (D. C.) 137 Fed. 280.

Again, it is claimed that at the time of the collision the tug had just passed into a tide rip caused by the opposing and cross-currents of the river and Oakland tide, and that her speed was thereby retarded, while the steamer was still under the influence of the down current, and thus the collision is accounted for, without the fault of the *Greystoke Castle*. The evidence does not support this theory. The captain of the tug testified that his boat was not affected either in her course or speed by the tide rip, and the captain of the *Monticello* says that both vessels had passed through and were out of the effect of the tide rip at the time of the collision. I can find no satisfactory evidence that the tide rip materially affected either the speed or course of the vessel.

Upon the whole testimony I am clearly of the opinion that the collision was caused by the fault of the *Greystoke Castle* and she is liable for the damages arising therefrom. The usual order of reference will be made.

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PITTSBURGH-BUFFALO CO. v. CHEKO.

(District Court, W. D. Pennsylvania. June 19, 1912.)

No. 382.

1. MASTER AND SERVANT (§ 103\*)—DUTY TO EMPLOYÉ—SAFETY OF TOOLS, ETC.  
One owes one's employé a nontransferable duty to furnish them with reasonably safe appliances.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 175; Dec. Dig. § 103.\*]

2. MASTER AND SERVANT (§ 103\*)—COAL MINES—SAFETY OF APPLIANCES—STATUTORY PROVISION.

That Act Pa. May 15, 1893 (P. L. 52), which requires a bituminous coal mine operator to employ a certified mine foreman, with control over the mine, does not relieve an operator from liability for injury to a miner resulting from failure of a boss to have a defective appliance repaired, though the boss was employed by that foreman.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 175; Dec. Dig. § 103.\*]

At Law. Action by John Cheko against the Pittsburgh-Buffalo Company. On motion by defendant for judgment. Motion overruled.

Stone & Stone, of Pittsburgh, Pa., for plaintiff in error.

Brown & Stewart, of Pittsburgh, Pa., for defendant in error.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

BUFFINGTON, Circuit Judge. The plaintiff, John Cheko, operated a coal-cutting machine in defendant's mines. These machines were moved from place to place as required on compressed air motors operated by regular motormen. The verdict establishes the fact that in the absence of motormen and with the knowledge of defendant the operators of coal-cutting machines were accustomed to themselves operate the motors to move their cutting machines. On the day of the accident Cheko took one of the motors to so move his machine, and when nearing a closed ventilating door in the mine he was unable to stop the car by reason of its defective brake, and was badly injured by a collision with said door. The proofs on behalf of the plaintiff tended to show that Williams, a regular motorman, a day or so before the accident, found the brake on this motor was defective and would not take hold. He reported the fact to Murphy, the motor boss, who had charge of repairing the motors and of the machine shop where such repairs were made. The motor, however, was left on the switch, where it was accustomed to stand. On the day following, or possibly the second day, Cheko, not knowing the brake was defective, took and used the machine as above stated.

[1] Of the primary, nontransferable duty of an employer to furnish an employé with reasonably safe tools and appliances there is no question, and as to that duty the jury was charged in reference to the facts of this case in language to which no objection was then or now made. The verdict may therefore be assumed to settle the question of negligence against the defendant in that regard.

[2] But from liability therefor defendant contends to be relieved by reason of the act of Pennsylvania of May 15, 1893 (P. L. 52), entitled "An act relating to bituminous coal mines, and providing for the lives, health, safety and welfare of persons employed therein." Its contention in that regard, in substance, is that said act compelled the defendant to employ a certified mine foreman, who had exclusive control of the mine; that the said mine foreman employed Murphy and Williams; that the state, having compelled the defendant to employ such mine foreman, has in effect taken the control of the mine out of the defendant's hands, and therefore for the negligence of Murphy in failing to repair this motor the defendant is not answerable.

To this contention we cannot accede. The act in question, while creating the office of mine foreman and defining his duties, nowhere confers on him the right or duty of furnishing or overseeing the furnishing of appliances for transporting coal. That act by article 6, § 1, provides that:

"In order to better secure the proper ventilation of the bituminous coal mines and promote the health and safety of the persons employed therein, the operator or superintendent shall employ a competent and practical inside foreman for each and every mine, to be called mine foreman; said mine foreman shall have passed an examination and obtained a certificate of competency or of service as required by this act. \* \* \* Said mine foreman \* \* \* shall keep a careful watch over the ventilating apparatus and air-

ways, traveling ways, pump and pump timbers and drainage, and shall often instruct and as far as possible, see that as the miners advance their excavations all dangerous coal, slate and rock overhead are taken down or carefully secured against falling therein, or on the traveling or hauling ways, and that sufficient props, caps and timbers of suitable size are sent into the mine when required, and all props shall be cut square at both ends, and as near as practicable to a proper length for the places where they are to be used, and such props, caps and timbers shall be delivered in the working places of the mine."

Other sections provide in detail for the mine foreman's carrying out these requirements. The only statutory provision enabling him to hire employes is the seventh, which provides that, where unable personally to carry out all the requirements of the act:

"He shall employ a competent person or persons not objectionable to the operator, to act as his assistant or assistants, who shall act under his instructions, and in all mines where firedamp is generated the said assistant or assistants shall possess a certificate of competency as mine foreman or fire boss."

Now it is quite clear that before this act was passed a mine foreman, when thereto authorized, could employ persons to work in the mines, for which employe's negligence the mine owner was responsible. Such being the case, did the state, by requiring such foreman to be of certified capacity and imposing on him certain statutory duties in overseeing the ventilation, timbering, and working of the mines, relieve the operator, for example, of the duty of providing reasonably safe tools and appliances, or from the negligence of its employes in relation thereto? If, in pursuance of his employment, a certified mine foreman did or omitted to do any act relating to the furnishing of tools or appliances, it is manifest that he must have been acting in pursuance of some duty or work the operator employed him to do, since the act in question imposed no such statutory duty upon him. Speaking of a mine foreman under the Anthracite Mines Act (Act June 2, 1891 [P. L. 176]) the Supreme Court in *Durkin v. Kingston*, 171 Pa. 201, 33 Atl. 238, 29 L. R. A. 808, 50 Am. St. Rep. 801, said:

"The state insists on his employment by the mine owner, and in the name of the police power turns over to him the determination of all questions relating to the comfort and the security of the miners, and invests him with the power to compel compliance with his directions."

And in *Wolcutt v. Erie Co.*, 226 Pa. 208, 75 Atl. 198:

"The internal workings of the mine are in his control and subject to his direction and management. His duty, in a word, is to see that the interior of the mine is kept in a proper and safe condition, so as not to endanger the health, safety, or lives of the miners. In this position he is supreme, and the superintendent, who is the representative of the owner, cannot interfere with him in the discharge of his duties."

So, also, in the case of *Hood v. Connell*, 231 Pa. 651, 81 Atl. 58, referring to the "underground workings of the mine," it is said:

"Both statutes clearly contemplate that the underground workings shall be under the exclusive charge and supervision of a mine foreman, and when the mine foreman has the exclusive supervision of the inside workings, the owner is relieved from responsibility for anything that may occur in the mines. In

other words, the mine foreman, with a certificate of competency from the commonwealth and a knowledge of the statutory duties imposed upon him, is answerable for the safe conduct of the mining operations. He should be, and in contemplation of law is, the absolute master of the interior workings of the mine over which he has charge as mine foreman."

So, also, in *Dempsey v. Buck Co.*, 227 Pa. 578, 76 Atl. 748:

"Anything and everything that affects the health and safety of the workmen while engaged at their work is in the keeping and charge of the mine foreman. He is especially charged with ventilating the mine, and whatever is necessary to be done to accomplish the purpose is a statutory duty imposed upon him. \* \* \* It is upon this theory and for this reason that the statute gives him charge of the ventilation of the mine, with authority to compel obedience to his orders, and prohibits the superintendent from interfering with him in the discharge of his duties."

From these authorities it will be seen that while, in his statutory sphere of supervising the ventilating and working of the mine, the mine foreman is supreme, yet as a statutory officer he is restricted to the performance of statutory duties. Thus in *Wolcott v. Erie*, supra, the court quotes as applicable to the act of 1893 what was said by the Supreme Court in *Delaware & Hudson Canal Co. v. Carroll*, 89 Pa. 374, viz.:

"There is no room for the allegation that a mining boss (mine foreman) under the Mine Ventilation Act of 1870 [Act March 3, 1870 (P. L. 3)] is an agent of the mine owner or coemployé. He is clothed with no powers of engaging and discharging miners and laborers at pleasure. \* \* \* His duties are specified in the same manner that the duties of the engineer are specified in the eleventh section, and as the duties of other employés are defined in other sections. He has no general power of control. His duties are confined to special matters."

Applying these principles to the case in hand, it is clear that while the defendant has wisely confided the entire control of the interior of its mine to the certified mine foreman, and by virtue of such control the latter engaged Murphy as motor boss and Williams as motorman, it is equally clear that such engaging of these men by the mine foreman was not by virtue of any statutory power, but by virtue of the fact that the mine owner had conferred on the mine foreman powers the act did not confer on him. Moreover, the work of these men, the transportation of coal, was a matter over which the statute gave the foreman no statutory power save the implied one of preventing it from in any way interfering with the statutory duties imposed on the foreman in the ventilating and working of the mine. It is therefore clear to us that Williams and Murphy were the employés of the defendant, that knowledge by them of the defective brake was knowledge of the defendant, and that by reason of defendant's said knowledge, its failure to repair the brake, and its leaving such defective motor standing, without warning of its defective condition, at a place that invited the plaintiff's use, the liability of the defendant is established.

For these reasons, its motion for judgment non obstante verdicto is denied, and the clerk is directed to enter judgment in favor of the plaintiff on the verdict.

## NEWCOMB v. BIWER et al.

(District Court, D. South Dakota, C. D. October 15, 1912.)

**1. BANKRUPTCY (§ 293\*)—ACTION BY TRUSTEE—RECOVERY OF PROPERTY—JURISDICTION—FEDERAL COURT.**

Bankr. Act July 1, 1898, c. 541, § 70e, 30 Stat. 566 (U. S. Comp. St. 1901, p. 3452) as amended by Act Cong. June 25, 1910, c. 412, 36 Stat. 842 (U. S. Comp. St. Supp. 1911, p. 1511), provides that a bankrupt's trustee may avoid any transfer by the bankrupt of his property which any creditor might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he is a bona fide holder for value prior to adjudication. The amendment of 1903 (Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1911, p. 1506]) added that, for the purpose of such recovery, any court of bankruptcy, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction. *Held* that, since the amendment of section 23b by Act Cong. June 25, 1910, gave jurisdiction to federal courts of all suits brought for the recovery of property under specified sections of the Bankruptcy Act, including section 70e, actions may be brought by a bankrupt's trustee in courts of bankruptcy, in cases within the terms of section 70e, without the consent of the defendant.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 411, 417; Dec. Dig. § 293.\*]

**2. BANKRUPTCY (§ 293\*)—ACTION TO RECOVER PROPERTY—JURISDICTION.**

A bankrupt's trustee sued the bankrupt's wife to recover certain real property and assets alleged to belong to the bankrupt, the title to which had always been in the defendant; the trustee claiming that she held in secret trust for the bankrupt. It was conceded that the wife was an adverse claimant, that her claim was not by way of a preference, nor by fraudulent transfer made within four months before bankruptcy, or at all, and that her possession had not been obtained after bankruptcy from the officer of the bankruptcy court. *Held* that, there being no diversity of citizenship, the suit was not within the jurisdiction of the bankruptcy court, within Bankr. Act July 1, 1898, c. 541, § 70e, 30 Stat. 566 (U. S. Comp. St. 1901, p. 3452), providing for suits to recover property transferred by a bankrupt, nor was it within the jurisdiction of a federal court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 411, 417; Dec. Dig. § 293.\*]

Jurisdiction of federal courts in suit relating to bankruptcy, see note to *Bailey v. Mosher*, 11 C. C. A. 313.]

In Equity. Suit by Clarence O. Newcomb, as trustee in bankruptcy of the estate of John Biwer, bankrupt, against Mary M. Biwer and another. On plea to the jurisdiction of the court. Sustained.

Chas. E. Deland and Sutherland & Payne, all of Pierre, S. D., for complainant.

Gaffy, Stephens & Fuller, of Pierre, S. D., for defendants.

ELLIOTT, District Judge. This is a bill in equity, filed in the District Court of the United States for the Central Division of the District of South Dakota, in bankruptcy, by Clarence O. Newcomb, a citizen of the state of South Dakota, as trustee in bank-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
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ruptcy of the estate of John Biwer, who has by this court been adjudged a bankrupt upon his own petition. The action is against Mary M. Biwer and said John Biwer, both residents of the state of South Dakota, to recover, as property and assets belonging to the said bankrupt, John Biwer, a certain real property described in the said bill of complaint, which property is situated in the county of Hughes, in the state of South Dakota, and is alleged to be of record in the name of said Mary M. Biwer, who received title thereto long prior to four months before the filing of the petition in bankruptcy.

No question of preference is involved. Possession of the property has never been in the bankrupt or trustee. It is further conceded that the bankrupt, John Biwer, never had the legal title to any of this property, and never made any transfer of same, or any part thereof, to said Mary Biwer; it being alleged, however, in the bill of complaint, that Mary M. Biwer holds said property as trustee in secret trust for said bankrupt.

The defendant Mary M. Biwer appeared specially and demurred to the complaint, on the ground that this court is without jurisdiction to hear and determine the suit, specifying (a) want of diverse citizenship sufficient to confer jurisdiction, and (b) because it appears that the trustee in bankruptcy, complainant, alleged that said defendant is an adverse claimant, and it appears—

“that such adverse claim is not by way of a preference, nor by way of a fraudulent transfer made within the four months preceding the bankruptcy, nor by way of a transfer by the bankrupt that would have been voidable at the suit of any creditor, had there been no bankruptcy, and that possession has not been obtained by this defendant after bankruptcy from an officer of the bankruptcy court.”

Upon the first question, as to the jurisdiction of this court, involved in specification (a), it is admitted that there is no diversity of citizenship.

It is conceded by all parties to this action that it cannot be maintained under the provisions of subdivision “b” of section 60, or subdivision “e” of section 67, of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 562, 564 [U. S. Comp. St. 1901, pp. 3445, 3449]), and, further, that it can only be maintained in this court, if at all, by virtue of the provisions of subdivision “e” of section 70, as amended. Said subdivision “e” of section 70, as amended by the act of Congress of June 25, 1910 (Act June 25, 1910, c. 412, 36 Stat. 842 [U. S. Comp. St. Supp. 1911, p. 1511]) reads as follows:

“The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value.”

And there was added to this, by the amendment of 1903 (Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1911, p. 1506]):

"For the purpose of such recovery any court of bankruptcy as hereinbefore defined and any state court which would have had jurisdiction, if bankruptcy had not intervened, shall have concurrent jurisdiction."

Section 23 of the Bankruptcy Act is the section which confers jurisdiction upon the United States and state courts. Prior to the amendment of section 23b in 1903, suits by a trustee under subdivision "b" of section 60, subdivision "e" of section 67, or subdivision "e" of section 70 could not be brought in the United States District Courts, unless by consent of the proposed defendant. And in 1903 the words "except suits for the recovery of property under section sixty, subdivision 'b,' and section sixty-seven, subdivision 'e,'" were added. By the act of Congress of June 25, 1910, subdivision "b" of section 23 was amended by adding to the exception named in the amendment of 1903, above set forth, the words "and section seventy, subdivision 'e.'"

If this is a case that comes within the provisions of subdivision "e" of section 70 of the Bankruptcy Act, it is within the exception provided by the amendment of June 25, 1910, to section 23, subd. "b," of the bankruptcy law. It seems that the only purpose of these amendments was to make exceptions to the limitation on the jurisdiction of the District Courts, and thereby extend their jurisdiction to such cases as were brought under the authority provided by subdivision "b" of section 60, "e" of 67, and "e" of 70. I think it is very clear that section 23 of the Bankruptcy Act, as amended by the acts of 1903 and 1910, gives jurisdiction to this court of all suits brought "for the recovery of property under section sixty, subdivision 'b,' section sixty-seven, subdivision 'e,' and section seventy, subdivision 'e.'"

[1] No good purpose can be served by an analysis of the relation of section 23 to section 70e. It is sufficient to state that this conclusion of the court is reached, in the light of the interpretation heretofore applied to these provisions of this bankruptcy statute, as evidenced by various decisions, including the opinions in the following cases: *Bardes v. Hawarden Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175; *Harris, Trustee, v. First National Bank of Mt. Pleasant*, 216 U. S. 382, 30 Sup. Ct. 296, 54 L. Ed. 528; *Hull v. Burr*, 153 Fed. 949, 83 C. C. A. 61; *Hurley v. Devlin* (D. C.) 149 Fed. 268; *Gregory v. Atkinson* (D. C.) 127 Fed. 183; *Lynch v. Bronson et al.* (D. C.) 160 Fed. 140; *In re Mullen* (D. C.) 101 Fed. 413; *In re Rochford et al.*, 124 Fed. 182, 59 C. C. A. 388. I therefore hold that actions may be brought by trustee in the courts of bankruptcy in cases coming within the terms of section 70, subd. "e," without the consent of the defendant, since the amendment of section 23b by the act of Congress of June 25, 1910.

[2] As to specification (b) in the demurrer, it is admitted upon the face of the bill of complaint: (1) That defendant Mary M. Biwer is an adverse claimant; (2) that such adverse claim is not by way of a preference; (3) that such adverse claim is not by way of a fraudulent transfer made within four months preceding the filing of the petition in bankruptcy; (4) that such adverse

claim is not by way of a transfer by the bankrupt to said Mary M. Biwer; (5) that possession of the property named in the bill of complaint has not been obtained by the defendant Mary M. Biwer after bankruptcy from an officer of the bankruptcy court. The foregoing appearing upon the face of the bill of complaint, is this an action authorized by and within the provisions of the terms of section 70e of the bankruptcy law?

It is very clear that there is no alleged "transfer by the bankrupt of his property." In this action no such transfer is alleged. No attack is made upon a transfer by the bankrupt which would have been void as to creditors. *Harris v. First National Bank*, 216 U. S. 382, 30 Sup. Ct. 296, 54 L. Ed. 528. The petition seeks to recover property held by defendant Mary M. Biwer, if the allegations of the bill of complaint are true, which in truth and in fact belonged to the bankrupt, and consequently passed to the trustee as a representative of the bankrupt's estate. *Harris v. First National Bank*, supra.

It is insisted by complainant that Mary M. Biwer holds the property described in the bill of complaint, as trustee, in secret trust for said bankrupt; the record title being in her, but the real ownership of the property being in the bankrupt. This being true, the recovery sought is of property held for the bankrupt estate, which the defendant Mary M. Biwer refused to surrender, and is not within the provisions of subdivision "e" of section 70 of the bankruptcy law. *Harris v. First National Bank*, supra.

Trust property belonging to the bankrupt, but never in his possession nor "transferred" by him, cannot be reached in the federal courts. *Remington on Bankruptcy*, vol. 1, § 1694, p. 1043; *Remington on Bankruptcy*, vol. 3, § 1692, p. 504; *Drew v. Myers*, 22 Am. Bankr. Rep. 656, 81 Neb. 750, 116 N. W. 781, 17 L. R. A. (N. S.) 350. The citations from *Remington* are persuasive only so far as one is disposed to give the writer credit for a proper interpretation of these provisions of the bankruptcy law, in the light of the decisions that have been rendered, admitting that no citation is given directed to the particular question at issue here.

I was disposed to give to the language of section 70e a broader view than that expressed in *Harris v. First National Bank*, supra. However, this being the opinion of the Supreme Court of the United States, and it being the judgment of this court that its reasoning is directly applicable to the conditions revealed by the bill of complaint in this case, it follows that the demurrer of the defendant Mary M. Biwer should be sustained, but without prejudice to the right of the trustee to begin an action in a court having jurisdiction.

Let such order be entered.



## In re NEW GALT HOUSE CO.

## Petition of MUTUAL BENEFIT LIFE INS. CO.

(District Court, W. D. Kentucky. October 9, 1911.)

**1. BANKRUPTCY (§ 350\*)—CLAIMS—PRIORITY—WHAT LAW GOVERNS.**

Under Bankr. Act July 1, 1898, c. 541, § 64b, 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), providing that debts owing to any person who by the laws of the states or of the United States is entitled to priority, shall have priority and be paid in full out of the estates of bankrupts, the priority of a claim of a bankrupt's mortgagee to the proceeds of a sale of after-acquired property was determinable by the law of the state.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 537; Dec. Dig. § 350.\*]

**2. BANKRUPTCY (§ 345\*)—CLAIMS—PRIORITY—CHattel MORTGAGEES—CORPORATE MORTGAGOR—AUTHORITY.**

A hotel company's charter authorized it to borrow money to be secured by mortgage on all its property. In pursuance of such authority it executed a mortgage to claimant of all the furniture, equipment, and fixtures, etc., and all other appliances, and equipment then on hand or that might be purchased and used in operating and conducting the hotel during the continuance and existence of the mortgage. *Held*, that the corporation had no power under its charter to mortgage after-acquired property and that the mortgagee was not entitled to priority of claim from the proceeds of such property as against the hotel company's general creditors in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 531, 532, 539, 540; Dec. Dig. § 345.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of the New Galt House Company. On petition for review of a referee's order denying the Mutual Benefit Life Insurance Company priority under a mortgage with reference to after-acquired property. Affirmed.

W. O. Harris, Jr., and Richards & Harris, all of Louisville, Ky., for Mutual Ben. Life Ins. Co.

Gifford & Steinfeld, of Louisville, Ky., for trustee in bankruptcy.

EVANS, District Judge. This case comes before us upon a petition for a review of an order of the referee. There appears to be no dispute between the parties as to the facts. The bankrupt, the New Galt House Company, was incorporated under a charter which provided as follows, viz.:

"That the said New Galt House Company be and it is hereby authorized and empowered to borrow and secure by mortgage on all of its property the sum of \$150,000, evidenced by a single or by any number of bonds issued by the said company, and signed by its president, and countersigned by the secretary, and payable at such time and place as its board of directors may deem proper, and at such rate of interest, not exceeding 6 per cent, per annum, evidenced by a coupon, or by coupons, attached to the said bonds, signed by the secretary alone, and payable semiannually as the board of directors may determine."

The bankrupt borrowed a large sum of money from the Mutual Benefit Life Insurance Company (which we shall, for brevity, call the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Insurance Company), to secure the payment of which it executed to the Insurance Company a mortgage, dated April 1, 1893. The mortgage covered the bankrupt's real estate and the other property owned by the bankrupt at that time. It also contained a further provision in this language, namely:

"Also all the furniture, equipments, and fixtures of every kind contained in said Galt House, including carpets, beds, beddings, linens, tables, chairs, tableware, ranges, cooking stoves and utensils, chandeliers, and other gas fixtures, mirrors, engines, heating apparatus, safes, and all other appliances and equipments now on hand, and that may be purchased and used in operating and conducting the said hotel during the continuance and existence of this mortgage."

In its proof of debt the Insurance Company asserted a lien upon the property to the bankrupt acquired after the execution and delivery of the mortgage, and a consequent right to priority of payment out of the proceeds of its sale. Those proceeds amounted to about \$7,000. The referee denied the right thus claimed by the Insurance Company, and held in effect that as between it and the other creditors the right to priority did not exist, because, as between them, the clause of the mortgage which attempted to extend its operation to property acquired after it was executed was not authorized by the bankrupt's charter, and consequently was void under the law of Kentucky as between the Insurance Company and the other creditors of the bankrupt. The Insurance Company seeks a review by the court of this ruling of the referee, and a reversal of his order denying it priority of payment out of the fund arising from the sale of the after-acquired property.

[1] Obviously the clause we have copied from the charter does not, in terms, authorize the corporation to mortgage after-acquired property; but it is contended that the decisions of the Court of Appeals of Kentucky nevertheless show that it could be and was lawfully done. The question thus presented is interesting and important, and must be determined according to the law of Kentucky, inasmuch as section 64, cl. "b," of the Bankruptcy Act so provides. The language of the section, so far as applicable, is as follows:

"The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be: \* \* \* (5) Debts owing to any person who by the laws of the states or the United States is entitled to priority."

It has often been held that this provision requires us to follow the law of this state in ascertaining the rights and priority of creditors here. Indeed, the proposition seems obvious. Where there is a state statute or an established judicial rule in the premises, we have no difficulty; but there is no Kentucky statute by the provisions of which we may be guided in determining the question involved. We must, therefore, be guided by any judicial rule which may have been established by the Court of Appeals of the state. It has not been difficult to find the rule, though no case has been referred to by counsel nor found by the court which expressly relates to property required to keep up the operations of a hotel.

[2] We think, however, that the following cases and those referred to in the court's opinions in them clearly and unmistakably support the ruling of the referee: *Ross v. Wilson*, 7 Bush (Ky.) 31-34; *Patterson v. Louisville Trust Co.*, 30 S. W. 872, 17 Ky. Law Rep. 234; and *Wender, etc., Co. v. Louisville Property Co.*, 137 Ky. 347, 348, 125 S. W. 732. In *Phillips v. Winslow*, 18 B. Mon. (Ky.) 442, 446, 68 Am. Dec. 729, the charter of the mortgagor appears to have expressly authorized it to mortgage after-acquired property. This, of course, made its act in doing so perfectly valid.

In another case cited by counsel for the Insurance Company, viz., *Westinghouse, etc., Co. v. Street Railway Company*, 68 S. W. 463, 24 Ky. Law Rep. 334, the Court of Appeals said nothing specially applicable to this case, though it did announce its concurrence in the general doctrine that, where after-acquired property so specifically united to that which had been previously acquired as to become an actual part of it, it would necessarily go with the latter. This rule would doubtless apply to the case of new rails put into an old railroad or street car track, or where new brick or logs were put into the old walls of a house.

Without going more into detail it may suffice to say that we are of opinion that the Insurance Company is not, under the law of Kentucky, entitled to the priority it claims in the proceeds of the after-acquired property, there being many other creditors of the bankrupt.

The order of the referee must be affirmed, and the petition for a review must be dismissed.

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WOERHEIDE v. H. W. JOHNS-MANVILLE CO.

(District Court, E. D. Pennsylvania. September 20, 1912.)

No. 875, June Sess. 1912.

COURTS (§ 264\*)—JURISDICTION OF FEDERAL COURTS—INFRINGEMENT SUITS—JOINDER OF SEPARATE CAUSES OF ACTION.

The fact that a federal court, under Judiciary Act March 3, 1911, c. 231, § 48, 36 Stat. 1100 (U. S. Comp. St. Supp. 1911, p. 149), has jurisdiction of a suit between citizens of different states for infringement of a patent, because charged to have been committed within the district, where defendant has a regular and established place of business, although neither party is a citizen or resident of the district, does not give it incidental or ancillary jurisdiction of a separable cause of action for unfair competition, not growing out of the same acts, as to which, under section 51, defendant could not be separately sued, except in the district of the residence of either the plaintiff or the defendant.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 801; Dec. Dig. § 264.\*]

In Equity. Suit by William H. Woerheide against the H. W. Johns-Manville Company. On demurrer to bill. Sustained.

Fraley & Paul, of Philadelphia, Pa., for complainant.

A. Parker Smith, of New York City, for respondent.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

THOMPSON, District Judge. The plaintiff is a citizen of the state of Missouri, and the defendant corporation is a citizen and inhabitant of the state of New York, having a place of business in the city of Philadelphia, in the state of Pennsylvania. The bill complains of the infringement by the defendant at Philadelphia of the plaintiff's patent for an improvement in cleats for securing prepared roofing, and further claims that the plaintiff is selling his patented cleats under the name of "Kant-Leak-Kleets," and charges the defendant with unfair competition in trade in selling its infringing cleats under the name of "Never-Leak-Kleets," with direction sheets printed upon the same color of paper and containing the same pictures and the same printed matter as had been used by the plaintiff for its patented cleats.

The defendant demurs upon two grounds: First, that this court has no jurisdiction to hear and determine the controversy in relation to unfair competition, because that is not a federal question, and, while the plaintiff and defendant are citizens of different states, neither party is a resident of the Eastern district of Pennsylvania; and, second, that the bill is multifarious, because joining two distinct causes of action. The defendant appears especially for the purpose of demurrer, and without waiving its privilege of being sued for unfair competition in trade only in the district of the residence of the plaintiff or the defendant.

It is well settled that, even if a corporation has a usual place of business in one state, it is a citizen and inhabitant of the state in which it has been incorporated. *Ex parte Shaw*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; *Macon Grocery Co. v. Atlantic Coast Line*, 215 U. S. 508, 30 Sup. Ct. 184, 54 L. Ed. 300. It has been decided by Judge Holland, in this district, in the case of *Mecky v. Grabowski* (C. C.) 177 Fed. 591, where the plaintiff and defendant were citizens and inhabitants of the same state, that the jurisdiction of the court over a cause of action for infringement of a patent did not give the court ancillary jurisdiction of unfair competition in trade. In his opinion Judge Holland says:

"This principle, however, that a court of equity, having taken cognizance of a case, will dispose of the whole controversy, even though there may be phases of it as to which, by themselves, it would not have jurisdiction, has application, not to the jurisdiction of the court under the Constitution and statutes, but to its jurisdiction as a court of equity, and relates principally to the application of legal as well as equitable remedies, where there is one ground of proper equity jurisdiction. The contention of the defendant as to the unfair competition is sustained in the case of *Cushman v. Atlantis Fountain Pen Co. et al.*, 164 Fed. 94, in which it was held by Judge Lowell, of the Circuit Court, that a bill to restrain the infringement of a patent, which presents a federal question, does not draw within the jurisdiction of the Circuit Court a further issue as to unfair competition in trade, although it grows out of the same acts of defendant. In the case at bar, the question of unfair competition can be fully and properly determined by the proper tribunal, entirely independent of a question of patent infringement, and the complainant has full recourse to the state courts for that purpose."

It remains to be determined whether the diversity of citizenship of the parties will give this court jurisdiction over a cause of ac-

tion for unfair competition in trade, because this court has jurisdiction of the patent controversy, although the defendant, for the unfair competition alone, could not without its consent be sued in this district.

Judiciary Act March 3, 1911, c. 231, § 24, 36 Stat. 1091 (U. S. Comp. St. Supp. 1911, p. 135), provides that the District Courts shall have original jurisdiction where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000 and is between citizens of different states. Section 51 of the act provides as to civil suits that, where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant. Under section 48, in suits brought for the infringement of letters patent, the District Courts have jurisdiction in the district of which the defendant is an inhabitant, or in any district in which the defendant shall have committed acts of infringement and have a regular and established place of business.

While, therefore, this court has full jurisdiction in the patent controversy, and the federal courts have original jurisdiction over controversies within the limitations of section 24, in case of diversity of citizenship, the defendant's right under section 51 is to be sued only in the district of the residence of the plaintiff or the defendant. This court is therefore without power to compel him to answer here a cause of action based only upon diversity of citizenship, unless such cause of action is such an allied and cognate part of the claim of infringement of patent as to render it fairly maintainable as a part of that cause of action. *Slater Trust Co. v. Randolph-Macon Coal Co.* (C. C.) 166 Fed. 170; *Whittaker v. Illinois Cent. R. Co.* (C. C.) 176 Fed. 130.

It is apparent that the plaintiff's bill sets out two separable causes of action. The use by the defendant of the words "Never-Leak-Kleets" in connection with its sale of the alleged infringing cleats is a distinct and separable matter from the infringement of the patented article, and is not based upon the same acts of the defendant as those constituting infringement of the patent. The bill prays that the defendant may be enjoined, not only from making and selling cleats made in accordance with or containing or embodying the patented invention, but also that it may be enjoined from selling cleats in connection with the trade-name "Never-Leak-Kleets." In the case of *Globe-Wernicke Co. v. Fred Macey Co.*, 119 Fed. 696, 56 C. C. A. 304, decided by the Circuit Court of Appeals for the Sixth Circuit, the court said:

"The bill of complaint was not founded upon two separate matters or transactions. The conduct of the appellee complained of consisted of the same acts. The legal qualities of those acts were in some respects different, and the result was that the facts presented a double aspect. It is upon this consideration that such a bill can be sustained against an objection that it is multifarious. Upon such a bill as this, successive final decrees are not pronounced."

Although there are some cases holding that, where the court has jurisdiction of a patent controversy, it may determine under the same bill a cause of action for unfair competition arising out of the same acts, the weight of the authorities is in support of Judge Holland's decision in *Mecky v. Grabowski*, supra. While cases might arise in which the acts constituting the unfair competition were so closely allied to the patent controversy as to justify the court in disposing of the whole controversy in the one suit, the case at bar does not, in my opinion, come within that class of cases. I do not think that the alleged unfair competition in trade is so allied to the patent controversy as to draw to the jurisdiction of this court under the patent cause jurisdiction of that part of the controversy involving unfair competition.

The demurrer is therefore sustained.

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DAVIS et al. v. SMITH et al.

(District Court, D. Massachusetts. April 3, 1912.)

No. 563.

ADMIRALTY (§ 124\*)—COSTS—MILEAGE OF WITNESSES.

Under the rule in the First circuit that mileage may be taxed for a witness in admiralty suits beyond a point where he could be reached by a subpoena, the taxation of mileage for travel one way by a witness from the Cape de Verde Islands affirmed, where it was shown that his home was there, that he actually traveled from there to the trial, and that he was a material witness.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 836-857; Dec. Dig. § 124.\*]

In Admiralty. Suit by Cornelius A. Davis and others, owners of the schooner *Gov. Ames*, against the schooner *Lejok*; Charles L. Smith, claimant. On appeal from clerk's taxation of costs. Affirmed.

Benjamin Thompson, of Portland, Me., for libelants.

Blodgett, Jones & Burnham, of Boston, Mass., for respondents.

DODGE, District Judge. This case, with No. 562, *Smith v. Davis*, claimant, relating to the same collision, has been before the Court of Appeals, is covered by the opinion of that court (187 Fed. 40, 109 C. C. A. 94), and is now here under its mandate. The direction given regarding this case is that the decree in favor of *Davis et al.* for damages and costs be modified "by a revision, to be made by the District Court, of the taxation of costs for travel of witnesses on behalf of the *Gov. Ames*." Except as thus modified, the decree is affirmed, with interest.

In revising the taxation as directed, the clerk has heard certain further evidence, and in view of it, in connection with whatever else appears regarding the matter in the record, has reaffirmed his former taxation, so far as it deals with the travel of the witnesses in question.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

Smith et al. contend that the taxation now made does not comply with the mandate.

As to the amount taxable for travel of the witness Lima, being the item principally in question, the clerk puts it at \$369.10, which is 5 cents per mile for 7,382 miles, the distance from Cape de Verde Islands to Boston. This was originally based on a certificate in the usual form, sworn to by Davis, that the witnesses therein named, including Lima, had traveled from the places set against their respective names as witnesses in the case.

The Court of Appeals observed in its opinion that the amount allowed was evidently far in excess of the probable cost to Lima of making the voyage, and while not intimating that travel may not be allowed beyond a point where the witness might have been reached by subpoena, according to the usual rule followed in this circuit, declared that this must be done, if at all, as the result of proofs which strictly accord with law. 187 Fed. 50, 109 C. C. A. 94.

I do not understand from the opinion that I am necessarily required to disallow the amounts which have been taxed, either in whole or in part. On the contrary, the opinion leaves the revision to this court, "without being controlled by any further suggestions" from the Court of Appeals. Nor do I understand that the opinion overrules anything in *U. S. v. Sanborn* (C. C.) 28 Fed. 299, 303, 304, or in *The City of Augusta*, 80 Fed. 297, 303, 304, 25 C. C. A. 430, to which it refers, or requires anything more in the way of proofs strictly in accordance with law than is required to support the taxation upon the principles recognized in this circuit ever since *U. S. v. Sanborn*, above cited.

That Lima was lookout on board the Gov. Ames appears from the record. It is not, and could hardly be, suggested, in view of this fact, that his attendance at the trial as a witness for that vessel was unnecessary or unreasonable. It further appears from the record that, when the taxation of his travel fees was first made, there was no specific objection on the ground that Lima had not traveled from his "residence," or had traveled an unreasonable distance. The objection was only to the taxation of more than 100 miles for any one witness. Had there been objection on any of the grounds which the Court of Appeals has since suggested, it would, of course, have been dealt with at the time.

The taxation of the travel fees was made on a certificate, found in the record, which the court rejects because it gives the "place from which each came to attend the trial," instead of his "place of residence," as in Rev. St. § 848 (U. S. Comp. St. 1901, p. 655). Without inquiring whether or not, if this objection had been raised at the time, the certificate might have been so amended as to avoid any ambiguity, I proceed to inquire what the record shows about Lima, his residence, and his travel to the place of trial, independently of the certificate.

His testimony in the record shows him to have been a Portuguese sailor, born in the Cape de Verde Islands, and it shows, also, that his English was imperfect. It is true that to an early question, "Where do you live?" he answered, "New Bedford." But he also testified

that, having spent six months on board another schooner, he went to the Cape de Verde, in the September following the collision, to see his people; that he did not intend to return here so soon, when he returned here to testify, though he did intend to come back at some time; and that he intended after the trial to get back as soon as he could. Asked if he intended to go back to live, to stay, he said he did, and that he might come back here again or not. He further said that in coming to Boston for the trial he went to St. Vincent, thence to Bremen, thence to New York, and that there was no other way in which he could have come at the time.

For the purposes of the present revision, the evidence was introduced before the clerk of a Portuguese resident of Boston, who knew Lima and with whom he stopped whenever in this city. According to this evidence, Lima's parents live in Brava, Cape de Verde, he is married, his wife is there, that is his home, he sails from Boston, New Bedford, Providence, or New York, wherever he gets a chance, and the same is true of the other Cape de Verde witnesses in this case. Every three years they go home, and stay the fall, and come back.

It seems to me that I am not required, in view of all the evidence, to conclude, from the fact that when Lima answered "New Bedford" to the question where he "lived," his residence was there within the meaning of section 848, Rev. Stats. The evidence seems to me to warrant the finding that the witness really resided in the Cape de Verde Islands, and came from there, in good faith, to testify. If so, I think the mileage allowed him conforms to legal proofs. Travel only one way has been in fact taxed.

As to the other Portuguese witnesses, if their real residence is to be inquired into, I think it would appear to be the same as Lima's; but they claim only to have come from their temporary residences in this country to the trial, and I do not understand that there is any real controversy regarding the amounts taxed for their travel. Under the directions given in the mandate, I do not see that any inquiry into the actual cost of journeys made by the witnesses, or the amounts of money which have been paid them, are relevant.

The clerk's taxation is therefore affirmed.

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#### DE BENEDETTO v. ALPHA PORTLAND CEMENT CO.

(District Court, E. D. New York. October 2, 1912.)

INFANTS (§ 82\*)—GUARDIAN AD LITEM—APPOINTMENT—VACATION—DISMISSAL OF SUIT.

An injured infant was supported for a time through a benevolent society, which caused the appointment of a friend as guardian ad litem, who instituted suit against defendant for the injuries sustained, which was removed to the federal court. Thereafter the infant was taken charge of by certain relatives, who obtained a different attorney and secured the appointment of a different guardian ad litem, under whose direction another action was brought in the Supreme Court of New York county against the same defendant for the same relief. *Held* that, there being no valid objection to the appointment of the first guardian

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



*ad litem*, a motion on behalf of the attorney for the guardian in the second action to vacate the former appointment would not be granted, nor would such action be dismissed, except on terms affording proper protection to the attorney who represented the guardian *ad litem* in the first suit for the services rendered.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 230; Dec. Dig. § 82.\*]

Action by Francesco De Benedetto, an infant, by Peter Santees, his guardian *ad litem*, against the Alpha Portland Cement Company. Application by the attorney for a guardian *ad litem* appointed in another action to vacate the appointment of a guardian *ad litem* in the pending action and to discontinue the same. Denied.

Rosario Maggio, of New York City, for plaintiff on the motion only.

Gilbert E. Roe, of New York City, for Hobart S. Bird.

Everett, Clarke & Benedict, of New York City, for defendant.

CHATFIELD, District Judge. The plaintiff, an infant of 20 years, was injured in the state of Pennsylvania. He came to New York and took up his residence, bringing an action, through a guardian *ad litem*, in the Supreme Court of the state of New York, in Richmond county, which was removed into this court. The guardian *ad litem* was an acquaintance and friend of the infant, and the infant seems to have been supported for a time through a benevolent society, which also caused the appointment of the guardian *ad litem* and the beginning of the litigation. Subsequently thereto the infant plaintiff was taken charge of by certain relatives, who retained a different attorney, and secured the appointment of a different guardian *ad litem*, under whose direction an action was brought in the Supreme Court of New York, in New York county. The responsibility of the infant for his conversations with the different parties, and the amount of understanding which he had as to whether an action was being brought in his behalf, cannot be determined upon this application.

The defendant in the action in New York county made a motion to vacate the appointment of the guardian *ad litem*, upon the ground that the infant plaintiff had already proceeded to bring an action which was pending in this court. Whether or not this would have been a valid defense, or whether, if the appointment of the guardian *ad litem* in that action had been vacated, it would have availed more than to require a renewal of the application, under proper recitals, provided the present action were out of the way, need not be considered, for the Supreme Court of New York county has withheld action on that application until some proceeding can be taken in this court, so that the infant may prosecute the action which he really desires to have carried on, and to dispose of the other, so that but one shall be pending.

The present motion, therefore, was made by the attorney for the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

guardian ad litem in the action in New York county. This motion was to vacate the appointment of a guardian ad litem in this court, and to discontinue the action. It was based upon allegations that the original request for the appointment of a guardian ad litem and the institution of the action were unauthorized. But these charges do not seem to be substantiated, and it must be held that the infant had sufficient knowledge of the facts, or gave such general authorizations, that the appointment of the guardian at the beginning of the action should not be vacated, except upon affording proper protection to the attorney who did the work, for the services which he has rendered up to the present time. In other words, if the infant wishes to continue with his subsequent action, he may discontinue the present action in this court, upon proper terms.

The defendant has appeared, and has stated in open court that it is willing to proceed in either action, provided it is not called upon to defend two actions at the same time. It does not oppose the motion to discontinue this action, if the plaintiff puts himself in such position that the defendant's rights will be protected. Under these circumstances, the motion must be denied in the form in which it was presented. The court cannot find that the proceedings in the action in this court were entirely fraudulent; nor so unauthorized as to be null and void. But, on the other hand, the plaintiff now expresses a wish to proceed with his present attorney and through his present guardian ad litem.

Some doubt is thrown upon the ability of the guardian ad litem in the action in this court to satisfactorily represent the plaintiff, and this is an additional reason why the appointment should be vacated. But the plaintiff will have to apply to this court for the substitution of the guardian ad litem in the New York action, or of some other person as a party to act on his behalf, and then that party will have to move for the substitution of attorneys or the discontinuance of this action upon terms, and an order may then be made protecting the rights of the defendant and of the attorneys who have started the present action.

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#### THE ALERT.

MALLOCH v. ADAMS et al.

(District Court, D. Massachusetts. March 26, 1912.)

Nos. 353, 354.

1. BANKRUPTCY (§ 285\*)—TRUSTEES—PROSECUTION OF SUITS COMMENCED BY BANKRUPT—LEAVE OF COURT.

Under Bankr. Act July 1, 1898, c. 541, § 11c, 30 Stat. 549 (U. S. Comp. St. 1901, p. 3426), which provides that a trustee may, "with the approval of the court," be permitted to prosecute any suit commenced by the bankrupt prior to the adjudication, the court whose approval is required is the one which appointed the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 285.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

## 2. BANKRUPTCY (§ 285\*)—SUITS BY BANKRUPT—SUBSTITUTION OF TRUSTEE AS PARTY.

Under Bankr. Act July 1, 1898, c. 541, § 2 (20), as amended by Act June 25, 1910, c. 412, § 2, 36 Stat. 838, 839 (U. S. Comp. St. Supp. 1911, p. 1491), which authorizes courts of bankruptcy to exercise ancillary jurisdiction in aid of a trustee appointed by another court, a District Court may permit a trustee appointed in another district to intervene in the bankrupt's place in any suit before it to which the bankrupt was a party; but whether, when the estate has little or no assets aside from what may be recovered in such suit, he should be permitted to sue without the customary requirement of giving security for costs, is a matter of discretion, to be determined in view of all the circumstances.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 285.\*]

In Admiralty. Suits by W. Irving Adams and others against the schooner *Alert*, and by Almon D. Malloch, owner of the *Alert*, against said Adams and others. On petition of Cyrus R. Tupper, foreign trustee in bankruptcy of Adams and others, complainants in the first suit and respondents in the second, for leave to intervene in the place of the bankrupts, without giving security for costs or damages. Petition granted.

Benjamin Thompson, of Portland, Me., for trustee in bankruptcy. Carver, Wardner & Goodwin, of Boston, Mass., for Malloch.

DODGE, District Judge. The libel in No. 353 was filed October 28, 1910, by Adams & Son, copartners, of Boothbay, in the district of Maine. The owner of the *Alert*, libelant in No. 354, filed his claim on the same day, and with it a motion that the libelants, being non-residents, give security for costs. The vessel was released on stipulations given by him. His libel in No. 354, filed November 2, 1910, is brought against Adams & Son, under admiralty rule 53 (29 Sup. Ct. xiv). On January 10, 1911, he filed his answer in No. 353. No answer has been filed in No. 354.

Tupper, the present petitioner, sets forth in his petition, filed February 10, 1912, that Adams & Son were adjudicated bankrupts in Maine February 25, 1911, and that he was duly appointed and qualified as trustee in bankruptcy of their estate April 28, 1911. He annexes a duly certified copy of the referee's order approving his bond.

[1] Assuming that the alleged adjudication and appointment are sufficiently established by this certificate, the petitioner may, as provided by section 11c of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426])—

"with the approval of the court, be permitted to prosecute \* \* \* any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him."

The court whose approval this section requires is the court who appointed the trustee. Woodman, *Trustees in Bankruptcy*, § 74 (b) p. 98. The petition does not show that this approval has been obtained.

Assuming it to have been obtained, this court may no doubt permit the petitioner to intervene in the bankrupt's place. It is now expressly

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

authorized, under the amendment of 1910 (Act June 25, 1910, c. 412, § 2; 36 Stat. 838, 839 [U. S. Comp. St. Supp. 1911, p. 1491]), now forming clause 20 of section 2 of the Bankruptcy Act, to exercise ancillary jurisdiction here in aid of his administration. But, if it does so, he will be none the less a nonresident within this jurisdiction. He will take up the case in the same situation which existed at the time of his intervention; that is, in No. 353, with a motion pending to order a nonresident libellant to secure the claimant's costs in case the libel is dismissed, and in No. 354, under the obligation to give security as provided by rule 53.

The bankrupts have never made any application to the court under Act July 20, 1892, c. 209, 27 Stat. 252 (U. S. Comp. St. 1901, p. 706). Four months after they filed their libel they became bankrupt, and nothing has since been done in either case, except the filing of the present petition. The trustee, if allowed to intervene, will incur no liability for costs accrued before his intervention, nor will he become personally liable for any costs whatever, so long as his acts are in good faith. *Norton v. Switzer*, 93 U. S. 355, 366, 23 L. Ed. 903. His petition alleges that, apart from the cause of action set forth in No. 353, the estate in his hands is only \$118.50, and that this sum will be insufficient to meet the expenses of the administration. Practically, therefore, he stands as would a libellant permitted to sue in forma pauperis under the act of 1892.

[2] Whether to let him intervene on these terms or not is conceded to be a question for the court's discretion. Many considerations for and against such an exercise of discretion are discussed in *Re Barrett* (D. C.) 132 Fed. 362, where a bankruptcy receiver was allowed to sue in equity, without the usual security for costs, in the court which had appointed him. In *Osborne v. Pa. R. R.* (C. C.) 159 Fed. 301, the court declined to set aside its standing rule requiring security from a nonresident plaintiff in favor of a bankruptcy trustee appointed in another jurisdiction. This court has no express rule, though its practice is to require security from a nonresident, if the defendant requests it. It appears that a nonresident bankruptcy trustee has been allowed to sue in admiralty in the Maine district without furnishing security. Under all the circumstances, I think I am justified in granting the application to intervene without security in No. 353; and the considerations which lead me to take this course I also regard as sufficient to justify me in exercising the discretion expressly reserved by rule 53, so far as to permit the petitioner to defend case No. 354 without furnishing the security called for by the rule.

In reaching this result, no weight has been given to the allegation by the petitioner that the claim made in the cross-libel is without foundation. His information and belief are insufficient to support such an allegation regarding a claim which, if the case proceeds, the court must hear and determine on its merits.

Whether the petitioner ought to be, or may properly be, required to obtain an ancillary appointment in this jurisdiction, is reserved for consideration hereafter, should occasion require.

**METROPOLITAN STOCK EXCHANGE v. GILL, Internal Revenue Collector.**

(Circuit Court of Appeals, First Circuit. October 24, 1912.)

No. 957.

**INTERNAL REVENUE (§ 19\*)—WAR REVENUE ACT—CONTRACTS FOR PURCHASE AND SALE OF STOCKS—TAXATION.**

Plaintiff, a stockbroker, was engaged in the purchase and sale of stocks, within War Revenue Act June 13, 1898, c. 448, § 25, subd. 3, Schedule A, 30 Stat. 458 (U. S. Comp. St. 1901, p. 2302), providing a stamp tax on the memorandum of such agreements. Under the circumstances of the case stated in the opinion, *held*, that Municipal Co. v. Ward, 138 Fed. 1006, 70 C. C. A. 284, and Eldridge v. Ward, 174 Fed. 402, 98 C. C. A. 619, do not apply, and there is only one stamp tax payable.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 39-44; Dec. Dig. § 19.\*]

In Error to the Circuit Court of the United States for the District of Massachusetts.

Action by the Metropolitan Stock Exchange against James D. Gill, Collector of Internal Revenue. Judgment for defendant, and plaintiff brings error. Reversed.

Gilbert F. Ordway, of Boston, Mass. (Clark & Ordway, of Boston, Mass., on the brief), for plaintiff in error.

William H. Garland, Asst. U. S. Atty., of Boston, Mass. (Asa P. French, U. S. Atty., of Boston, Mass., on the brief), for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This was a suit brought by the corporation plaintiff below, which we will call the plaintiff here, against the collector of internal revenue for the district of Massachusetts, on a claim arising under paragraph 3 of Schedule A of the War Revenue Act, so called, of June 13, 1898 (Act June 13, 1898, c. 448, 30 Stat. 458), as amended by Act March 2, 1901, c. 806, § 8, 31 Stat. 943, 944 (U. S. Comp. St. 1901, p. 2302). This is the same statute, and the suit was of the same general nature, as shown and appeared before the courts in the Second circuit in Municipal Telegraph & Stock Co. v. Ward (C. C.) 133 Fed. 70, affirmed by the Circuit Court of Appeals in 138 Fed. 1006, 70 C. C. A. 284, and Eldredge v. Ward (C. C.) 155 Fed. 253, affirmed by the Circuit Court of Appeals in 174 Fed. 402, 98 C. C. A. 619.

There was a motion in the Circuit Court to dismiss the case for want of jurisdiction, which was refused; and the action of the Circuit Court in that respect was so clearly right that we need not comment upon it.

Judgment in the Circuit Court on the merits was entered for the collector, on the strength, as we understand, of these decisions of the Circuit Court of Appeals for the Second circuit, and, ac-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
199 F.—35

cording to our usual practice, we should feel bound to follow the results in that circuit, if the facts here were the same as there; but they are essentially different. The issue involved in the Second circuit, which the United States claimed is the same as that involved here, is best stated by quoting the syllabus in *Municipal Telegraph & Stock Co. v. Ward* (C. C.) 133 Fed. 70, already referred to, as follows:

"Plaintiff corporation was engaged in business as a stockbroker, in conducting transactions respecting the purchase and sale of stocks to be settled with reference to the public market quotations of prices, within subdivision 3 of Schedule A of the War Revenue Act of July 13, 1898, c. 448, § 25, 30 Stat. 458, as amended by Act March 2, 1901, c. 806, § 8, 31 Stat. 943 (U. S. Comp. St. 1901, p. 2302). Its business was transacted with numerous correspondents, on whose telegraphic orders it would report a purchase or sale, and forward the correspondent a memorandum such as is required by the statute. The correspondents were also dealing with customers, and their orders to plaintiff generally represented orders from their own customers, to whom they delivered a memorandum of each purchase or sale bearing a stamp as required by the act, but stating the transaction between the correspondent and the customer only. The customer was not named or known in the transaction between the correspondent and plaintiff. Held, that such transactions were transactions between principals, separate and distinct from those between the correspondents and their customers, and that plaintiff was subject to the tax on each memorandum given thereon."

It was there found as a matter of fact that the transactions were between the Municipal Telegraph & Stock Company and its correspondents dealing with it, and that each was acting as an independent dealer, so that there were two purchases and sales, namely, one between the Mutual Telegraph & Stock Company and its respondents, and one between each correspondent and his customers. These were of the character described on page 72 of the opinion of the court, as follows:

"In no sense were the correspondents agents of the plaintiff. They stood in no fiduciary relation to the plaintiff. They had no duties to perform for the plaintiff. They were not employed or paid by the plaintiff; their relations were none other than that of principal. When they made a contract to buy or sell with the plaintiff, they were at liberty to treat the contract as their own, and the plaintiff understood that they were at liberty to do so."

The Circuit Court of Appeals, in affirming this decision in 138 Fed. 1006, 70 C. C. A. 284, said as follows:

"We do not think it necessary to add anything to the opinion of the Circuit Judge. The evidence entirely warrants the finding of facts therein set forth, and upon those facts we fully concur in the conclusion that the dealings between plaintiff and its correspondents were dealings between principals and independent of the correspondents' dealings each with his own customers. The judgment is affirmed."

Thus these courts found that, as a matter of fact, the plaintiff there and its correspondents were independent principals, and their transactions were independent of the correspondents, each dealing with its own customers.

We need not examine particularly *Eldredge v. Ward*, because essentially the findings of the facts and the law were the same as in the other case referred to, the details having merely got turned

The facts here were of an entirely different character. They show that the entire line of dealings between the plaintiff and its correspondents' customers constituted only one purchase and one sale. The correspondents had stamped their contracts, and thus had discharged the tax on the entire chain of dealings from beginning to end; so that what the plaintiff afterwards paid was merely a second tax on the same thing, which it is entitled to recover back.

This case was sent by the Circuit Court to an auditor, and what we state further is fully sustained by what was found by the auditor.

The first step in each transaction was that the plaintiff "had contracts, mostly oral, with certain brokers," called "correspondents," and that by virtue of these contracts these correspondents turned into the plaintiff all orders for the purchase and sale of certain stocks. This gave shape and color to whatever followed, and governed the whole of what followed, as far as this case is concerned.

The next step was that one of the plaintiff's correspondents, for example, Varina, received orders from a customer, for example, Brown, to buy certain stocks. Varina testified that he did no business, except to transmit the orders to the plaintiffs as their correspondent by wire, which they furnished him. He also testified that sometimes customers would give orders for themselves directly, but "usually the customer came to the office and gave an order, and this order was transmitted to the plaintiff; and on its acceptance by the plaintiff he issued a contract to the customer," as shown in the case. He also testified:

"The plaintiff had a city office in Boston, where a board for the marking of quotations thereon was maintained, and it there conducted a general business for the buying and selling of stocks, grains and cotton. It also maintained a general office in Boston, where the bookkeeping and management of its country business, so called, occurred.

"The plaintiff had contracts, mostly oral, with certain brokers in various cities in New England, New York state, and in Canada by which these brokers, or, as they were called, 'correspondents,' turned in all orders for the purchase and sale of the above stocks and commodities to the plaintiff. The plaintiff had no personal dealings with the customers, and did not know their names. The correspondents saw the customers, who gave them orders for the purchase of certain stocks or commodities at certain prices. The correspondents thereupon entered the names of the customers in a book, and against each name a certain serial number was placed, and they then transmitted the orders of the customers without the customers' names to the plaintiff by telegraph over private wires which were furnished free to the correspondents by the plaintiff, and for which the plaintiff paid. If the terms of the orders were such as the plaintiff thought advisable to accept, such acceptance was wired back to the correspondents by the plaintiff, using the serial number for each transaction which had been transmitted by the correspondent in the first instance; whereupon the correspondent would complete the purchase with the customer and have him sign a contract therefor. The customer at the same time would make a deposit with the correspondent of a certain sum of money, which was to protect the correspondent from an adverse fluctuation of the stock in the market to the extent of a certain number of points. This margin was generally for three points, and, when the security was exhausted, the plaintiff would sell the stock to protect itself, unless the correspondent had marked the order 'Protect,' in which case the

plaintiff would wire for more margin, which the correspondent would get from the customer. The same procedure was followed if the customer, instead of buying in the first instance, wanted to sell a certain stock short.

"If the terms of the order of purchase or sale were such that the plaintiff could not accept them, it wired its refusal back to the correspondent, who thereupon informed the customer. If the customer, after purchasing the stock, wished at a later time to sell, the correspondent wired that order to sell to the plaintiff, who made the sale, wired back 'Sold,' and if there was a balance in favor of the customer, it was paid by the correspondent to him. In such cases, the plaintiff did not actually buy or sell these stocks for the customers, but entered them as bought and sold on its option ledgers, so that the transaction was really one of bookkeeping. At the time the order was accepted, the correspondent charged and took from the customer a commission of one-quarter of 1 per cent. of the market values of the stocks purchased or sold, which commission was divided equally between the plaintiff and the correspondents, and no further commission was charged when the transaction was concluded, either by a sale of the stock purchased or by a covering of the stock sold short.

"At first the plaintiff company sent its statements of the day's transactions to the correspondent, stamped for the amount of such business, but after a ruling by the Treasury Department the correspondents bought the stamps and affixed them to the contract with the customer, and canceled them, and the customer repaid the correspondent the amount of the stamps. The plaintiff, after said ruling, did not stamp any of the papers in regard to these transactions."

Under these circumstances, the contract was absolutely finished when the plaintiff accepted the order; and the sale was then made, and not till then, subject to giving the memorandum referred to, which merely put it in a form not to be disputed. That memorandum, when given, showed what was the actual fact, that the contract was between Varina, as agent of the customer, and the plaintiff. There was no other contract, and therefore no other sale.

All the other matters were purely incidents, not affecting the substance of the transaction; as, for example, while the memorandum already quoted showed for itself that Varina made the purchase in his own name, and the plaintiff did not necessarily know the name of the customer, this did not affect the substance of the contract, because generally brokers' contracts are made in that way, leaving, under the well-settled rules of law, the two parties whom the broker represents, principals towards each other whenever their identity becomes known. So, also, the fact that Varina for certain purposes became the agent for both parties involves no difficulty, because, where it is known, as, for example, in the case of a broker, that the agent is acting for both parties, there is nothing in law or in usage which questions the transaction.

Also, the fact that Varina guaranteed the plaintiff against default on the part of the customer is not of importance, because in that respect Varina stood the same as the ordinary commission merchant who receives a guaranty commission. So the fact that Varina kept an account current of all the transactions, and settled with the plaintiff only the balance, is in accordance with the custom of brokers having many transactions for the same principal, is a mere matter of convenience, and is undisputably the practice of all clearing houses. In truth, the situation is so simple, and so much



in accordance with the fundamental rules of commercial dealings, that it is hardly possible that any extent of reasoning or citation of authority could affect it. The agency from both parties to Varina is established; and a sale was effected by the meeting of the minds of the two principals, and there was only one contract and only one sale.

With reference to the decisions in the Second circuit which the United States insist are conclusive, it is true that the fact stated in *Eldredge v. Ward*, that the principal house and the correspondents stipulated that they did not stand in the relation of principal and agent, was in no way controlling, as was shown in *Board of Trade v. Hammond Co.*, 198 U. S. 424, 25 Sup. Ct. 740, 49 L. Ed. 1111. The Supreme Court in that case found, however (198 U. S. at pages 437, 439, 25 Sup. Ct. 740, 49 L. Ed. 1111), on facts almost identical with those here, that the relation of principal and agent existed between the correspondents and the principal house in such a way that it would seem to prevent the possibility of establishing here any relation which would justify a double tax. The facts here are so simple and controlling, and the conclusions of the law therefrom so clear, that there is no opportunity to be governed by any of the authorities cited.

We leave it for the District Court to determine, on the agreement referred to in the record, whether the plaintiff should recover interest and costs taxed in the court below.

The judgment of the Circuit Court is reversed, and the case is remanded to the District Court for further proceedings in accordance with law and the agreement of the parties; and the plaintiff in error recovers its costs in this court.

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BILGER v. NUNAN et al.

(Circuit Court of Appeals, Ninth Circuit. September 4, 1912.)

No. 2,020.

**1. MORTGAGES (§ 213\*)—MORTGAGEE IN POSSESSION—EJECTMENT.**

Under B. & C. Comp. Or. § 233, by which a mortgage of real estate is a lien only, the title and right of possession remaining in the mortgagor until his rights are foreclosed, a mortgagee in possession without foreclosure can defend an action of ejectment by one claiming under the mortgagor only where his possession is with the assent of the owner of the legal title, or through acts of such owner which create an estoppel.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 482-491; Dec. Dig. § 213.\*]

**2. WILLS (§ 439\*)—CONSTRUCTION—RULES GOVERNING.**

In the construction of a will, the first and paramount duty of the court is to ascertain from its terms, if possible, the intention of the testator.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 952, 955, 957; Dec. Dig. § 439.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

### 3. WILLS (§ 600\*)—CONSTRUCTION—DEVISE OF REAL PROPERTY—OREGON STATUTE.

Testator devised and bequeathed all of his property, real and personal, to his wife, "to have, hold, use, and dispose of as she may see fit during her life, hereby giving her full power and authority to sell, convey, deed, and transfer all or any part of said property fully and absolutely, so as to pass complete title to purchasers or grantees from her as she may see fit." The will further provided that "whatever of my said property and the proceeds thereof" which should remain in the hands of his wife at her death should go to their daughters. Testator resided and owned real estate in Oregon, and by B. & C. Comp. Or. §§ 5336, 5573, it is provided that "the term 'heirs' or other words of inheritance shall not be necessary to create or convey an estate in fee simple," and that "a devise of real property shall be deemed and taken as a devise of all the estate or interest of the testator therein subject to his disposal, unless it clearly appears from the will that he intends to devise a less estate or interest." *Held* that, construing the will as required by such statutes, it conferred on testator's wife full power to sell or mortgage any of the real estate during her lifetime.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1335-1339; Dec. Dig. § 600.\*]

### 4. WILLS (§ 747\*)—ACTION BY DEVISEE—RIGHT OF POSSESSION.

A devisee of land in Oregon cannot maintain ejectment therefor while the estate is in process of administration in the county court and there is an acting executor or administrator de bonis non, who, under B. & C. Comp. Or. § 1147, is entitled to possession of the property, both real and personal, until the administration is completed or the land is surrendered to the devisees by order of the court.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1918-1933; Dec. Dig. § 747.\*]

In Error to the Circuit Court of the United States for the District of Oregon.

Action at law by Sallie Bilger against Jeremiah Nunan and O. Harbaugh. Judgment for defendants, and plaintiff brings error. Affirmed.

For opinion below, see 186 Fed. 665.

This is an action in ejectment, brought by Sallie Bilger to recover possession of an undivided one-sixth interest in and to a tract of land in Jackson county, Or., described as containing 292 acres, but excepting therefrom a small tract of 3 acres deeded to a third party, with respect to which there is no issue. Plaintiff is the daughter of James A. Cardwell, deceased, and claims title and right of possession under a will executed by him February 18, 1890. The defendant Jeremiah Nunan claims title and right of possession: (a) By virtue of a sheriff's deed to defendant, executed in pursuance of a decree and order of sale obtained under the foreclosure of a mortgage executed by Caroline Cardwell, the widow of James A. Cardwell, upon the real property in controversy. (b) By the right of a mortgagee in possession. The defendant Harbaugh claims no right, title, or interest in the premises other than that of a tenant under the defendant Nunan.

J. A. Cardwell, a resident of Jackson county, state of Oregon, died at Jacksonville, Or., on the 16th day of April, 1890, leaving an estate of real and personal property, shown by the inventory and appraisement to be of the value of \$17,500, of which the personal property was appraised at \$2,500, and the real property at \$15,000. The real property is the subject of this litigation. At the time of his death Cardwell left his last will and testament as follows:

"I, James A. Cardwell, of Jackson county, state of Oregon, being of sound and disposing mind and not under any restraint whatever, do make, publish

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and declare this my last will and testament, namely, I give, devise, and bequeath to my wife, Caroline Cardwell, all of my property and estate, both real and personal, of every kind of which I shall die possessed, to have, hold, use and dispose of as she may see fit during her life, hereby giving her full power and authority to sell, convey, deed and transfer all or any part of said property fully and absolutely so as to pass complete title to purchasers or grantees from her as she may see fit.

"And it is my will that whatever of my said property and the proceeds thereof which remains in the hands of said Caroline Cardwell at her death shall go to our daughters, hereinafter named.

"On account of our daughter Medora L. Berry and her husband having heretofore left some property with me which entitles her to more of my estate than the others it is my will that she shall receive, out of what remains undisposed of at the death of my wife, the sum of two hundred and fifty dollars, and the rest of whatever so remains shall be divided equally among my daughters Medora L. Berry, Maria Kahler, Sallie Bilger, Della Fink, Rose Cardwell and Laura Cardwell, share and share alike.

"And inasmuch as my sons, Alvin B. Cardwell, C. D. Cardwell and Wm. W. Cardwell, have already received advancements and pecuniary assistance from me equal to their shares of my estate, they are not to receive any portion of my estate under this will."

This will was duly proved and admitted to probate, and Caroline Cardwell was duly appointed (on June 9, 1890) the executrix, and on June 27th qualified as such executrix and entered upon the discharge of her trust, and during her lifetime acted as such executrix. At the time of the death of James A. Cardwell he was indebted to defendant Jeremiah Nunan, for goods, wares, and merchandise furnished for and used by Cardwell and his family, in the sum of about \$759.99. In the semiannual account of the executrix, showing the claims that had been presented against the estate, was the claim of Nunan for the sum of \$759.99. This report was received by the court and approved on February 22, 1892. Subsequently Nunan furnished the executrix, at her instance and request, other goods, wares, and merchandise aggregating the additional sum of about \$541.42, and on February 8, 1892, the claim of Nunan aggregated the value of \$1,301.41, including the pre-existing claim so presented by him against the estate and allowed by the court. Caroline Cardwell thereupon gave her promissory note to Nunan to cover this indebtedness, and at the same time executed and delivered to Nunan a mortgage upon the real estate in controversy, which mortgage was duly acknowledged and recorded in the office of the county recorder for Jackson county.

Thereafter, this promissory note having become due and being wholly unpaid, principal and interest, Nunan, on March 16, 1894, commenced a suit in the circuit court of the state of Oregon for Jackson county for the foreclosure of the mortgage, by filing his complaint therein. On September 25, 1894, a decree of foreclosure and judgment was duly entered in said court against Caroline Cardwell in favor of Nunan for the sum of \$1,657.12. On September 28, 1894, execution was issued, and on October 3, 1894, the sheriff made a levy and seizure of the land and premises described in the complaint, and on November 3, 1894, the property was sold and bid in by defendant Nunan. This sale was confirmed, and sheriff's deed executed and delivered to Nunan on April 15, 1895, and ever since the execution and sale he has been in the undisputed and absolute possession of the premises, except a small tract conveyed to a third party, with respect to which there is no issue.

Prior to any of the transactions heretofore mentioned, and on the 8th day of March, 1884, Cardwell and his wife, for a valuable consideration, executed and delivered to the Board of Commissioners for the sale of school and university lands, and for the investment of the funds arising therefrom, a mortgage conveying the premises in controversy, and certain other property owned by the said Cardwell, to secure the payment of a certain promissory note, dated March 8, 1884, for the sum of \$4,160, payable one year after date to the said Board of Commissioners, with interest thereon at the rate of 8 per cent. per annum until paid. This mortgage was duly acknowledged and recorded as required by law. On February 12, 1895, no portion of the principal or interest of said note and mortgage having been paid, and the whole

sum being fully due and owing, the defendant Nunan, for the purpose of protecting his rights and interests in said premises, paid said note, in the sum of \$4,160 and interest, making in all the sum of \$5,189.82, and obtained a release of said mortgage, duly executed by the said Board of Commissioners.

On March 26, 1896, Caroline Cardwell died, leaving the estate unsettled. Thereafter the plaintiff in error here (being one of six heirs at law of James A. Cardwell) and other residuary legatees under the will brought separate actions in ejectment to recover the property in controversy.

On March 18, 1910, the complaint in this action was filed in the Circuit Court of the United States for the District of Oregon by Sallie Bilger, alleging, among other things, that plaintiff was a citizen and resident of, and domiciled in, the state of Washington; that defendants were citizens and residents of, and domiciled in, the state of Oregon; that plaintiff was, and had been for more than six years prior thereto, the absolute owner in fee simple of an undivided one-sixth of, in, and to the property in dispute; that defendants wrongfully withhold, and had continuously for more than six years prior to that time wrongfully withheld, the real estate of plaintiff, and the possession of the whole and every part of said property from plaintiff; that the value of the rents, issues, and profits of this property during the period of six years, and damages for the wrongful withholding of the possession from plaintiff during that time, amounted to the sum of \$5,000, and defendants refused and neglected to pay any part of this to plaintiff. Plaintiff demanded judgment that she was the absolute owner in fee simple of an undivided one-sixth of, in, and to the property, that she was entitled to the immediate possession of the whole of said real property, and that she have and recover from defendants the possession of the same, and the sum of \$5,000 damages, and for costs.

An answer was filed by Jeremiah Nunan, defendant, on April 20, 1910, and an amended answer on October 4, 1910. The answer, as amended, contained a general denial of the allegations of the complaint, set up fee-simple title and right of possession in defendant in error, and pleaded the statute of limitations, the making of permanent betterments, improvements on said lands, at a cost of \$1,617, the payment of all taxes, amounting to \$1,916.33, the holding of possession of the premises under the judgment entered upon the mortgage foreclosure, and payment of the principal and interest of the prior school and university mortgage, amounting to \$5,189.82, heretofore referred to, and that defendant in error was a mortgagee in possession.

The cause was tried before the court without a jury. Findings of fact and conclusions of law were filed May 29, 1911, and judgment was entered the same date, in which it was adjudged that plaintiff was not entitled to the possession of the premises described in the complaint, but that defendant Nunan was the owner in fee simple and entitled to the exclusive possession of all of said premises, except a certain conveyed portion. The case is brought to this court by writ of error to reverse the decision of the Circuit Court for the District of Oregon.

W. E. Crews, of Medford, Or., James E. Fenton, of San Francisco, Cal., and W. W. Cardwell, of Medford, Or., for plaintiff in error.

H. D. Norton, of Grants Pass, Or., and Dolph, Mallory, Simon & Gearin, of Portland, Or., for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). [1] It is contended on behalf of the defendant in error that he is a mortgagee in possession, and that he can hold his possession until his debt is paid. This right of possession by the mortgagee, when interposed as a defense to an action of ejectment, brought by one claiming the right of possession under the mortgagor, is necessarily dependent upon the question whether the mortgagor had title to the premises. "An

action of ejectment involves both the right of possession and the right of property." *Coles v. Meskimen*, 48 Or. 54, 56, 85 Pac. 67, 68. If the mortgagor had no right of property, then the mortgagee could acquire no right of possession under the mortgage. A mortgage of real estate under the law of Oregon, as in many states of the Union, is a mere lien, and does not convey the legal title. The mortgagor retains the legal title as well as the possession. Section 233, B. & C. Codes & Statutes of Oregon. Hence it follows that in that state the possession of the mortgaged premises obtained by the mortgagee with the assent of the mortgagor—the mortgagor having the right of property—is a good defense to an action of ejectment by the latter so long as the mortgage debt remains unpaid. *Roberts v. Sutherlin*, 4 Or. 219; *Cooke v. Cooper*, 18 Or. 142, 22 Pac. 945, 7 L. R. A. 273, 17 Am. St. Rep. 709; *Coles v. Meskimen*, supra. The assent of the mortgagor in such a case is the application of the law of estoppel, and this is a good defense in Oregon to an action of ejectment in both the federal and state courts. *Coles v. Meskimen*, supra; *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. Ed. 618; *Kirk v. Hamilton*, 100 U. S. 68, 26 L. Ed. 79.

The defendant in error entered in possession of the lands in controversy by virtue of the foreclosure proceedings and decree in the action of *Jeremiah Nunan v. Caroline Cardwell*. Whether Caroline Cardwell, the mortgagor, had the right of property when she executed the mortgage, is the controlling question in the case, and this question is to be determined by examination of the will of James A. Cardwell, deceased, under which Caroline Cardwell claimed title to the property. At the time Nunan obtained possession of the land by purchase at the sale in the foreclosure proceedings, there was outstanding a promissory note executed by James A. Cardwell on the 8th of March, 1884, for the sum of \$4,160 to the Board of Commissioners for the sale of school and university lands in the state of Oregon. There was also outstanding a mortgage of the same date, executed by James A. Cardwell, to secure the payment of the promissory note and covering the lands in controversy. The note and mortgage were outstanding when Cardwell died on April 6, 1890, when the mortgaged premises passed with the other property to the devisee or devisees under his will. The school and university mortgage was still outstanding when Nunan took possession of the land on November 3, 1884, under the foreclosure sale.

On November 12, 1895, Nunan paid the school and university note and mortgage, and the court below found as a fact that he thereby became subrogated to the rights of the mortgagee under the mortgage. What were the rights of the mortgagee? The mortgage being due and unpaid, it had the right to foreclose the mortgage and have the property sold to pay the debt for which the mortgage was given as security. It also had the right to bid in the property in the foreclosure sale for the amount of the debt, if a better price could not be obtained. Nunan, subrogated to the rights of the mortgagee, did not exercise the right of foreclosure with respect to this mortgage. The mortgage was

not foreclosed. No sale was made, and there was no transfer of title. Nunan, therefore, acquired no right of possession under that mortgage. The right of property with respect to this mortgage remained in the mortgagor, and passed to the devisee or devisees under the Cardwell will; and as with respect to the Nunan mortgage, so with respect to this mortgage, we must now look to the will to ascertain the right of possession to the lands in controversy.

It is contended by the plaintiff in error that under the will Caroline Cardwell took a life estate only, that her mortgage of the title in fee to Nunan was void, that plaintiff in error, on the death of Caroline Cardwell in March, 1896, being one of the devisees of the remainder of the estate, became the absolute owner in fee of an undivided one-sixth of the property, and by reason of that ownership is now entitled to the possession of the same. The defendant in error contends, on the other hand, that the devise to Caroline Cardwell was an absolute title in fee, that the mortgage by her of the fee was valid, and that under the sale in the foreclosure proceedings the title was vested in the defendant in error, and that he is now entitled to retain the possession of the same.

[2] In the construction of a will the first and paramount duty of the court is to ascertain from its terms, if possible, the intention of the testator. It was said by Chief Justice Marshall in *Smith v. Bell*, 6 Pet. 68, 74 (8 L. Ed. 322):

"The first and great rule in the exposition of wills, to which all other rules must bend, is that the intention of the testator, expressed in his will, shall prevail, provided it be consistent with the rules of law. 1 Doug. 322; 1 W. Bl. 672. This principle is generally asserted in the construction of every testamentary disposition. It is emphatically the will of the person who makes it, and is defined to be 'the legal declaration of the man's intentions, which he wills to be performed after his death.' 2 Bl. Com. 499. These intentions are to be collected from his words, and ought to be carried into effect, if they be consistent with law."

The court then proceeds to state other rules which should not be disregarded. It says:

"In the construction of ambiguous expressions, the situation of the parties may very properly be taken into view. The ties which connect the testator with his legatees, the affection subsisting between them, the motives which may reasonably be supposed to operate with him, and to influence him in the disposition of his property, are all entitled to consideration, in expounding doubtful words, and ascertaining the meaning in which the testator used them. No rule is better settled than that the whole will is to be taken together, and is to be so construed as to give effect, if possible, to the whole. \* \* \* Notwithstanding the reasonableness and good sense of this general rule, that the intention shall prevail, it has been sometimes disregarded. If the testator attempts to effect that which the law forbids, his will must yield to the rules of law. But courts have sometimes gone farther. The construction put upon words in one will has been supposed to furnish a rule for construing the same words in other wills, and thereby to furnish some settled and fixed rules of construction, which ought to be respected. We cannot say that this principle ought to be totally disregarded; but it should never be carried so far as to defeat the plain intent, if that intent may be carried into execution, without violating the rules of law. It has been said truly (3 Wills. 141) 'that cases on wills may guide us to general rules of construction; but, unless a case cited be in every respect directly in point, and agree

in every circumstance, it will have little or no weight with the court, who always looks upon the intention of the testator as the polar star to direct them in the construction of wills.'"

Applying these rules to the construction of the will before the court in that case, it was determined that the will vested a life estate only in the wife, and the remainder over to the son. The case is one of the cases relied on by the plaintiff in error in the present case as an authority for the construction of the Cardwell will, that the devise to Caroline Cardwell was a life estate only, with a remainder over to her children. The property involved in the case of *Smith v. Bell* was personal property, and consisted of five slaves. There was no real estate. The case arose in Tennessee, where the personal property of the wife became the property of the husband, if reduced to possession. Under the rule that had been stated by the court, that in the construction of ambiguous expressions the situation of the parties might very properly be taken into view, and the ties which connect the testator with his legatees be considered, the court, referring to this situation and relationship, said:

"No principle in our nature could prompt him to give his property to the future husband of his wife, to the exclusion of his only child."

This was a plain, simple, and natural reason why the testator's devise of his personal property to his wife, "to and for her own use and benefit and disposal, absolutely, the remainder of said estate, after his decease, to be for the use of the said Jesse Goodwin," should be construed as a life estate only to his wife, and the remainder in fee to his only child. But we do not find any such situation in the present case, and no reason of that character calling for a similar construction of the will before this court. It follows that another of the fundamental rules stated by Chief Justice Marshall should be observed in considering the value of this as well as other cited cases, namely, that:

"Unless a case cited be in every respect directly in point, and agree in every circumstance, it will have little or no weight with the court, who always looks upon the intention of the testator as the polar star to direct them in the construction of wills."

[3] The plaintiff in error also invokes a statutory rule of construction provided in the laws of Oregon (section 7343, Lord's Oregon Laws; section 5572, Bellinger & Cotton's Codes and Statutes of Oregon) as follows:

"If any person by last will devise any real estate to any person for the term of such person's life, and after his death, to his or her children or heirs, or right heirs in fee, such devise shall vest an estate for life only in such devisee, and remainder in fee simple in such children."

The defendant in error invokes a provision of the statute law of Oregon (section 7103, Lord's Oregon Laws; section 5336, B. & C. Codes and Statutes of Oregon) as follows:

"The term 'heirs' or other words of inheritance shall not be necessary to create or convey an estate in fee simple; and any conveyance of any real

estate hereafter executed shall pass all the estate of the grantor unless the intention to pass a less estate shall appear by express terms or be necessarily implied in the terms of the grant."

He also invokes a statutory rule of construction provided in the same laws (section 7344, Lord's Oregon Laws; section 5573, B. & C. Codes and Statutes of Oregon) as follows:

"A devise of real property shall be deemed and taken as a devise of all the estate or interest of the testator therein subject to his disposal, unless it clearly appears from the will that he intends to devise a less estate or interest."

These rules of construction and modification of the common law must be construed together, and, being so construed, we have no difficulty in understanding that where it is claimed, as, for example, in this case, that the testator had devised by will an estate or interest in real property for life only, and this estate or interest was less than the estate he had subject to his disposal in such real property, it must clearly appear from the will that he intended to devise such less estate or interest. It is conceded that James A. Cardwell, the testator in this case, had a fee-simple title to the real property in controversy at the time of the execution of the will and at the time of his death. This brings us to the consideration of the controlling question in this case:

What did Cardwell intend to do with his estate? Did he intend to devise to his wife, Caroline Cardwell, less than a fee-simple estate? Referring to his will, we find his devise in the following terms:

"I give, devise, and bequeath to my wife, Caroline Cardwell, all my property and estate, both real and personal, of every kind of which I shall die possessed, to have, hold, use and dispose of as she may see fit during her life, hereby giving her full power and authority to sell, convey, deed and transfer all or any part of said property fully and absolutely so as to pass complete title to purchasers or grantees from her as she may see fit.

"And it is my will that whatever of my said property and the proceeds thereof which remains in the hands of said Caroline Cardwell at her death shall go to our daughters, hereinafter named.

"On account of our daughter Medora L. Berry and her husband having heretofore left some property with me which entitles her to more of my estate than the others, it is my will that she shall receive, out of what remains undisposed of at the death of my wife, the sum of two hundred and fifty dollars, and the rest of whatever so remains shall be divided equally among my daughters Medora L. Berry, Maria Kahler, Sallie Bilger, Della Fink, Rose Cardwell and Laura Cardwell, share and share alike.

"And inasmuch as my sons Alvin B. Cardwell, C. D. Cardwell and Wm. W. Cardwell have already received advancements and pecuniary assistance from me equal to their shares of my estate, they are not to receive any portion of my estate under this will."

It must be admitted that the intention to pass only a life estate to the widow does not clearly or distinctly appear in the will in express terms. We must, therefore, dismiss that provision of the statute from consideration as a ground for holding that a life estate only was intended. We then have this question to deal with: Is such an estate necessarily implied by the terms of the will? The first clause of the will is a gift, devise, and bequest to



the widow of all the testator's property and estate, both real and personal, of every kind of which he shall die possessed. These words do not necessarily or at all imply the granting of a life estate. On the contrary, they not only do not imply the grant of a life estate, but they clearly and distinctly grant the whole estate at the disposal of the testator at the time of his death, namely, an estate in fee. But the controversy is with respect to the words that follow:

"To have, hold, use and dispose of as she may see fit during her life."

Do these words necessarily imply a life estate? Standing alone, they are, perhaps, susceptible of that interpretation; but, construed with the words that follow, that does not appear to be a satisfactory interpretation. The testator provides:

"Hereby giving her full power and authority to sell, convey, deed and transfer all or any part of said property fully and absolutely so as to pass complete title to purchasers or grantees from her as she may see fit."

Here we have a grant of the full and unlimited power of alienation, which is only consistent with the granting of an estate in fee, and this grant is entirely consistent with the terms of the previous clause when so construed; so that, taking the whole paragraph together, there is a clear and distinct expression on the part of the testator that he intended to grant to his widow an estate in fee.

The next paragraph is equally consistent with his intention. He provides:

"That whatever of my said property and the proceeds thereof which remains in the hands of said Caroline Cardwell at her death shall go to our daughters."

These daughters were not to have all the property or the whole estate after a technical life estate had been enjoyed by the widow, but whatever property and the proceeds thereof remained in her hands at her death; that is to say, whatever property or estate or proceeds not disposed of by her during her lifetime should go to the daughters. This provision of the will, dealing not only with the property undisposed of, but with the "proceeds" of property sold, is manifestly inconsistent with any other intention than the devise to the widow of an absolute estate in fee simple. It was the "power and authority to sell, convey, deed and transfer all or any part of said property fully and absolutely," as provided in the first clause of the will, that made it consistent with the testator's purpose to provide for the disposition of whatever of the property or proceeds which might remain unsold and undisposed of at the time of the death of the widow.

This consistent purpose is maintained in the next clause of the will, where it is provided that, on account of the daughter Medora and her husband having left some property with the testator, which entitles her to more of the estate than the others, she is to receive "out of what remains undisposed of at the death of my wife the

sum of two hundred and fifty dollars," and, repeating the provision of the previous clause concerning the daughters, he provides:

"And the rest of whatever so remains shall be divided equally among my daughters."

We find, then, in each and all of the paragraphs of this will the clearly expressed intention of the testator, as declared in the first clause of the will, to give to the wife all his property and estate, both real and personal, of any kind of which he shall die possessed; that is to say, an estate in fee simple.

There are numerous cases in the books involving the construction of wills where the conditions were substantially the same as in this case; but we do not deem it necessary to review those cases and discuss the various questions entering into the application of common-law rules or statutory provisions in their construction. We think that an examination of one case referred to by the court below is sufficient authority to establish the correctness of the construction we place on the provisions of this will. The case referred to is that of *Roberts v. Lewis*, 153 U. S. 367, 14 Sup. Ct. 945, 38 L. Ed. 747. But to understand this case fully the preceding cases of *Giles v. Little* (C. C.) 13 Fed. 100, *Giles v. Little*, 104 U. S. 291, 26 L. Ed. 745, and *Little v. Giles*, 25 Neb. 313, 41 N. W. 186, should be considered, and the decisions in those cases kept in view.

In the case of *Roberts v. Lewis* a statute of Nebraska in substantially the same terms as that of Oregon was finally held by the Supreme Court of the United States to be controlling in the construction of a will, and making it clear that the widow in that case took an estate in fee. The provisions of the will in that case were similar to those of this case. They provided:

"To my beloved wife, Edith J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seised, the same to remain and be hers, with full power, right and authority to dispose of the same as to her shall seem meet and proper, as long as she shall remain my widow."

In *Giles v. Little* (C. C.) 13 Fed. 100, Judge McCrary, of the United States Circuit Court for the District of Nebraska, held that the statute of Nebraska required that this will should be construed as disposing of the whole estate. In *Giles v. Little*, 104 U. S. 291, 26 L. Ed. 745, the Supreme Court of the United States reversed the decision of Judge McCrary, holding that by the true construction of the will the widow took under it an estate for life in the testator's lands, subject to be devised on her ceasing to be his widow, with power to convey her qualified life estate only. In the subsequent case of *Little v. Giles*, 25 Neb. 313, 41 N. W. 186, the Supreme Court of that state refused to follow the decision of the Supreme Court of the United States, giving the following reasons for such refusal:

"The will in question was construed by the Supreme Court of the United States in *Giles v. Little*, 104 U. S. 291, 26 L. Ed. 745, and it was held that the will merely conferred an estate upon Edith Dawson during her widowhood, and, in case she married again, the remainder in fee passed to her children. The words in the will, 'or whatever may remain,' were construed as apply-

ing alone to the personal estate, and did not affect the realty. The decision is based on the prior one of *Smith v. Bell*, 6 Pet. 68, 8 L. Ed. 322. At common law, in order to devise lands to another in fee, it was necessary to use words of inheritance, or equivalent words, showing an intention to give such estate; and a mere devise of real estate without words of inheritance gave the devisee only a life estate. "The power and technical mode of limiting an estate in fee simple is to give the property to the devisee and his heirs, or to him, his heirs and assigns, forever; but such an estate may, even under a will made before 1838, be created by any expression, however informal, which denotes the intention." Section 3, *Jarm. Wills* (5th Am. Ed.) 30 et seq.; *Dew v. Kuehn*, 64 Wis. 293, 25 N. W. 215. The presumption at common law is that only a life estate was intended to be devised, unless words of inheritance or words of like import were used. The construction of the will in question by the United States Supreme Court, under the common law, had that controlled the case, therefore, no doubt, was correct. The common-law rule, however, has been changed in this state in two important particulars: First, "the term "heirs," or other technical words of inheritance, shall not be necessary to create or convey an estate in fee simple" (Comp. St. c. 73, § 49); and, second, "every devise of land in any will hereafter made shall be construed to convey all the estate of the deviser therein which he could lawfully devise, unless it shall clearly appear by the will that the deviser intended to convey a less estate" (Id. c. 23, § 124). The first of these sections is not referred to in the opinion of the United States Supreme Court, and probably the court's attention was not called to it, and the latter section was by mistake, no doubt, copied incorrectly; the word 'clearly' being omitted. *Giles v. Little*, 104 U. S. 299, 26 L. Ed. 745. Mr. Justice Woods, therefore, in writing the opinion, gave no weight to the section whatever. The section of the statute in question was copied from the statute of Michigan, and its proper construction was before that court in *Weir v. Stove Co.*, 44 Mich. 506, 7 N. W. 78; *Chambers v. Shaw*, 52 Mich. 18, 17 N. W. 223."

The court, after referring to similar bequests in other cases and the construction of such bequests by the courts under statutes of substantially the same character, reached the conclusion that the will in question empowered his widow to convey all of his real and personal estate, if she saw fit to do so, and as she had exercised this right and power after the death of the testator and before her remarriage, the grantees under her deeds acquired all the title of the testator to such lands.

In *Roberts v. Lewis*, 153 U. S. 367, 14 Sup. Ct. 945, 38 L. Ed. 747, the Supreme Court of the United States had before it certain questions certified to it by the Circuit Court of Appeals for the Eighth Circuit, arising out of a question of title held by Lewis, the grantee of Giles, the plaintiff in *Giles v. Little* in the federal courts, and one of the defendants in *Little v. Giles* in the state courts. In this case the Supreme Court overruled its former decision in the case of *Giles v. Little*, 104 U. S. 291, 26 L. Ed. 745, and followed the decree of the Supreme Court of Nebraska in *Little v. Giles*, 25 Neb. 313, 41 N. W. 186. Referring to the latter case the Supreme Court of the United States said:

"The opinion of the Supreme Court of the state appears to have been formed upon full consideration of the difficulties of the case, and is entitled to great weight, especially upon the construction of the statute of the state. *Suydam v. Williamson*, 24 How. 427, 16 L. Ed. 742. And this court, on reconsideration of the whole matter, with the aid of the various judicial opinions upon the subject, and of the learned briefs of counsel, is of opinion that the sound construction of this will, as to the extent of the power conferred on the widow, is in accordance with the conclusion of the state court, and

not with the former decision of this court, which must, therefore, be considered as overruled."

Referring to the will the court said:

"The testator's primary object manifestly was to provide for his widow. He begins by giving her 'all my estate, real and personal,' which of itself would carry a fee, unless restricted by other words. *Lambert v. Paine*, 3 Cranch, 97, 2 L. Ed. 377. He then says, 'to be and remain hers,' which, upon any possible construction, secures to her the full use and enjoyment of the estate, while she holds it. She is also vested, in the most comprehensive terms, 'with full power, right and authority to dispose of the same' (which, as no less title has as yet been mentioned, naturally means the whole estate) 'as to her shall seem most meet and proper, so long as she shall remain my widow.' This last clause, so far as it controls the previous words, has full effect if construed as limiting the time during which the widow may have the use and enjoyment of the estate, and the power to dispose of it, and not restricting the subject to be disposed of. The power thus conferred, therefore, in its own terms, as well as by the general intent of the testator, gives her during widowhood the right to sell and convey an absolute title in any part of the estate; for it would be difficult, if not impossible, to obtain an adequate price for a title liable to be defeated in the hands of the purchaser by the widow's marrying again. That the power was intended to be unlimited in this respect appears, even more distinctly, by the terms of the next clause, by which, if she should marry again, the testator declares it to be his will that 'all of the estate herein bequeathed, or whatever may remain, should go' to his surviving children. By not using the technical word 'remainder,' or making the devise over include the entire estate at all events, but carefully adding, after the words 'all the estate herein bequeathed,' the alternative 'or whatever may remain' (which would otherwise have no meaning), he clearly manifests his intention to restrict the estate given to the children to whatever has not been disposed of by the widow; and there is nothing upon the face of the will, nor are there any intrinsic facts in this record, having any tendency to show that the power of the widow is less absolute over the real estate than over the personal property."

We think this case disposes of the whole question in controversy respecting the character of the estate devised, including the contention of the plaintiff in error that, though this court should hold that the widow was given the power to sell or convey, it does not follow that she could mortgage it. We hold that she was given the entire fee, and the recital of the power to deal with the property in full and absolute terms was simply a method of describing the quantity of a fee-simple title.

[4] It is next contended by the plaintiff in error that the widow could not sell or mortgage the land in controversy at the time and in the manner she did, for the reason that the estate was then pending in the county court, which, under the Constitution of the state of Oregon, is a court of superior and general jurisdiction in probate matters; that no order was ever made by the county court for the sale or mortgage of the property belonging to the estate; and that the defendant Nunan never took any proceedings to obtain an order for the sale of any real or personal property belonging to the estate to satisfy and pay his claim. It appears from the record that the last order made in the estate of Cardwell, while his widow was executrix, was made on April 18, 1892, when a claim in no way connected with this controversy was ordered paid. Mrs. Cardwell died in March, 1896, but no proceedings were taken

in the county court with respect to the Cardwell estate until February 15, 1910, when, upon petition of plaintiff and the other daughters of Cardwell, S. B. Hanly was appointed administrator de bonis non. The complaint in this case was filed in the United States Circuit Court on March 18, 1910. The presumption is that Hanly was at that time the duly qualified and acting administrator of the estate, and that under the statute of the state of Oregon he was entitled to the possession and control of the property. Section 1185, Lord's Oregon Laws (section 1147, B. & C. Codes and Statutes of Oregon), provide as follows:

"The executor or administrator is entitled to the possession and control of the property of the deceased, both real and personal, and to receive the rents and profits thereof until the administration is completed or the same is surrendered to the heirs or devisees by order of the court or judge thereof. \* \* \*

There is testimony in the record that there are debts of the estate unpaid, and that the estate remains unsettled and unclosed. In this situation of the estate, we do not see how the plaintiff can in any view of the proceedings maintain her suit in ejectment for the land in controversy.

The judgment of the court below is affirmed.

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COWDEN et al. (WOOG, Intervener) v. WILD GOOSE MINING &  
TRADING CO. et al.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1912.)

No. 2,096.

1. CORPORATIONS (§ 507\*)—MANAGING AGENT—AUTHORITY—ESTOPPEL TO DENY.

Suits having been brought against a corporation, and service being made on G. who, it was subsequently claimed, had no authority to accept service, he appeared, answered, and nearly a year after stipulated for judgment, whereupon judgments were rendered for plaintiff in each action. An attachment had been levied on the property of the corporation, and after the entry of the judgments a receiver was appointed, and a stipulation entered into that, in consideration of a stay of execution until April 1, 1908, no steps would be taken by the corporation or the receiver to disturb the judgments. This agreement having been carried out, executions were levied, and the property sold. *Held*, that both the receiver and the corporation were estopped in equity to claim that G. was not authorized to accept service or to represent it in the litigation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1971-2000; Dec. Dig. § 507.\*]

2. EXECUTION (§ 242\*)—SALE—CONFIRMATION—EFFECT.

Confirmation of an execution sale of property cures all irregularities in the proceedings leading up to or in the conduct of the sale, which thereafter will only be set aside for fraud, mistake, or surprise.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 669-672; Dec. Dig. § 242.\*]

3. RECEIVERS (§ 77\*)—ATTACHMENT—LIEN—DIVESTMENT.

Carter's Ann. Code Civ. Proc. Alaska, § 141, provides that from the date of an attachment, until it is discharged or the writ executed, the

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 199 F.—36

plaintiff, as against third persons, shall be deemed a purchaser in good faith and for a valuable consideration of the property attached, real and personal. *Held* that, where a receiver was appointed for a corporation after its property had been attached in an action to which the plaintiffs in the attachment were not parties, such appointment did not divest the attachment liens.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 138–144; Dec. Dig. § 77.\*]

**4. RECEIVERS (§ 128\*)—RECEIVERS' CERTIFICATES—LIEN.**

Where property of a private corporation engaged in mining and trading was attached, and thereafter a receiver was appointed, who was authorized to issue receiver's certificates, the lien thereof was not superior to the attachment.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 205, 219–222; Dec. Dig. § 128.\*]

Appeal from the District Court of the United States for the Second Division of the District of Alaska.

Suit by F. R. Cowden and others (Charles Woog, intervener) against the Wild Goose Mining & Trading Company and others. Judgment for defendants, and plaintiffs and intervener appeal. Affirmed.

The court below sustained demurrers interposed to the complaint, cross-complaint, and complaint in intervention, and dismissed the action; the plaintiffs, cross-complainants, and intervener declining to amend. The appeal is from the judgment of dismissal. The plaintiffs and the intervener sued as holders of certain receiver's certificates issued by the receiver of the Campion Mining & Trading Company, which company, and the receiver of its property, Frank L. Blackman, were made defendants to the complaint, along with the Wild Goose Mining & Trading Company, Seward Ditch Company, Albert Fink, as trustee, John L. Beau, Beau Mercantile Company, F. H. Herhold, B. Niggemeyer, C. B. Greeley, C. S. Hannum, and Thomas C. Powell, as United States marshal for the Second division of the district of Alaska.

The complaint alleged, among other things: That Blackman was, in a suit brought in the court below by Charles W. Chase et al. against the Campion Mining & Trading Company, appointed receiver of its property, and since August 13, 1907, has been the duly appointed, qualified, and acting receiver of such property. That the defendant Beau was the president of the Beau Mercantile Company, a corporation, and one of the stockholders of the Seward Ditch Company, also a corporation. That the defendant Hannum was the attorney of Beau and of the Beau Mercantile Company, and that the defendant Fink was the attorney of the defendants Wild Goose Mining & Trading Company and Seward Ditch Company, both of them being corporations. That the Campion Mining & Trading Company was, and still is, the owner of waters and water rights at and near the headwaters of Nome river, in Alaska, of the value of more than \$200,000. That during all of the times mentioned in the complaint one Thomas A. Campion was, and still is, the only authorized agent of the Campion Mining & Trading Company in the district of Alaska upon whom process binding that corporation could legally be served, notice of whose appointment as such was, and still is, of record with the clerk of the court below. That at the times of the alleged fraudulent transactions complained of the defendant Niggemeyer was secretary and treasurer and a director and stockholder of the Beau Mercantile Company, according to the plaintiffs' information and belief. That during the summer of 1903 Niggemeyer, pretending and claiming to be the manager and attorney in fact of the Campion Mining & Trading Company, but in fact having no such authority, executed in the name of that company, as its manager and attorney in fact, a promissory note for the principal sum of \$5,037.83 in favor of the Alaska Banking & Safe Deposit Company, which note Beau indorsed before delivery, and that about the same time Niggemeyer "undertook

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to create a certain indebtedness against the said Campion Mining & Trading Company" in favor of the Beau Mercantile Company by giving a similar note to it in part, and in part for merchandise account, aggregating \$5,022.75. That the indebtedness so attempted to be incurred was without authority, and not binding upon the Campion Mining & Trading Company. That on or about August 18, 1906, the Beau Mercantile Company commenced two actions in the court below, numbered, respectively, 1,570 and 1,573, and that Beau commenced another action in the same court, numbered 1,571, against the Campion Mining & Trading Company, which actions were based upon the said notes and mercantile accounts, in each of which actions summons was duly issued and served upon one William A. Gilmore as the agent of the Campion Mining & Trading Company, but that Gilmore was not then, and at no time was, "a duly appointed agent of the said Campion Mining & Trading Company, upon whom process could be served so as to bind said company, or give the court jurisdiction over the person of said company or its properties." That nevertheless Gilmore entered a general appearance and a pleading for the Campion Mining & Trading Company in each of the said actions. That thereafter the court, "in pursuance of unauthorized stipulations made and entered in said company's name in said causes, and in its behalf, but without any authority vested in the said William A. Gilmore so to do, on or about the 2d day of July, 1907, rendered and entered a purported judgment in each of said actions" in favor of the respective plaintiffs and against the Campion Mining & Trading Company, as follows: In case 1,570, for \$2,562.70, including costs; in case 1,571, for \$5,588.73, including costs; and in case 1,573, for \$3,178.55, including costs—all of which judgments the complaint alleged were void. "That on or about the 12th day of September, 1907, the said John L. Beau, Campion Mining & Trading Company, and Frank L. Blackman, receiver aforesaid, made and entered into a purported stipulation in said cases Nos. 1,570, 1,571, and 1,573 aforesaid, wherein it was agreed by and between the parties to said actions that, in consideration of the said Campion Mining & Trading Company and its said receiver failing to take any action whatever to open up and set aside said void judgments, the said John L. Beau and the said Beau Mercantile Company in said actions would stay execution on said judgments until the 1st day of April, 1908, and the said Campion Mining & Trading Company and its said receiver, in consideration of the staying of said executions on said judgments and refraining from making a sale under said executions until the said 1st day of April, 1908, would not at any time after the making of said stipulation seek in any way to disturb said judgments, or to interpose any defense to the cause of action upon which said judgments were recovered, or to, after said 1st day of April, 1908, resist the issuance of an alias execution, and a levy and sale under said void judgments, and that by virtue of said stipulation in said causes the said John L. Beau, Beau Mercantile Company, Campion Mining & Trading Company, and its said receiver, Blackman, pretended to validate said void judgments and ratify the same under said stipulation; but that plaintiff alleges that the attempted ratification of said void judgments was null and void, and said stipulation was entered into by and between said receiver while still acting as such, without any authority or order of this court first had and obtained to enter into said stipulation attempting to validate said void judgments, and that said stipulation and agreement was, ever since has been, and still is an unconscionable stipulation under its terms so made and entered into by and on behalf of said Campion Mining & Trading Company and its said receiver, without authority and under such circumstances and surroundings as to in truth and in fact constitute coercion on behalf of the said John L. Beau and the Beau Mercantile Company."

The complaint also alleges that the plaintiff Cowden is the holder of a receiver's certificate issued by Blackman under an order of the court in the suit of Chase et al. against the Campion Mining & Trading Company, numbered 1,572, authorizing receiver's certificates to be issued therein; that on July 27, 1908, the respective plaintiffs in the actions numbered 1,570, 1,571, and 1,573 caused alias executions therein to be issued to the United States marshal for the district of Alaska and that the marshal thereafter levied the executions upon certain properties of the Campion Mining & Trading Com-

pany described in the complaint and constituting its principal assets; that subsequently, to wit, August 28, 1908, the marshal, by virtue of the execution in case 1,570, sold the property levied upon to the Beau Mercantile Company for the sum of \$3,408.91, and at the same time and place, under execution issued in case 1,571, the marshal sold the same property to John L. Beau for \$7,536.06, and at the same time and place, under execution issued in case 1,573, the marshal sold that portion of the same property constituting the realty to the Beau Mercantile Company for \$1,078.88, and on the 9th day of September, 1908, sold the personal property levied upon to one Tallason for \$265, which personal property was a part of the property sold under executions issued in actions 1,570 and 1,571; that on the 9th day of September, 1908, each of the said sales in actions numbered 1,570 and 1,571, and on the 9th day of October, 1908, the sale under the execution issued in action 1,573, were confirmed by orders of the court therein entered.

The complaint also alleges that at all the times therein mentioned the Campion Mining & Trading Company was the owner of waters and water rights and real and personal property in Alaska, unincumbered and to the value of more than \$200,000; that on or about April 22, 1905, that company entered into a written agreement with the Seward Ditch Company, containing covenants running with the land of the Seward Ditch Company, under which agreement the latter became indebted to the Campion Mining & Trading Company in the sum of \$75,000, which has never been paid; that on or about October 9, 1906, a purported cancellation and release of that agreement was executed in the name of the Campion Mining & Trading Company, and delivered to the Seward Ditch Company, and that on the same day a purported mortgage covering substantially its entire assets was executed in the name of the Campion Mining & Trading Company, and delivered to the Seward Ditch Company, to secure the payment to the latter of the sum of \$24,000; that on August 2, 1907, the receiver of the Campion Mining & Trading Company, under authority of the court, brought an action to obtain a decree annulling the purported instrument of cancellation and release, and reinstating the agreement, and for a judgment against the Seward Ditch Company for the amount due under the agreement between the two companies, which action is pending and undetermined; that in 1907 the Seward Ditch Company executed to the defendant Albert Fink as trustee a deed of trust covering all of its property as security for the payment of notes aggregating \$200,000 and any other notes that it might make held by the Nome Bank & Trust Company; that after the said trustee had commenced to advertise the properties of the Seward Ditch Company for sale under the provisions of the deed of trust, and before the time set for such sale, the receiver of the Campion Mining & Trading Company, under authority of the court, commenced an action to enjoin such sale and for a money judgment against the Seward Ditch Company; and that in that action the court denied a motion for an injunction pendente lite, but that the action still remains pending and undetermined, and that thereafter, in 1909, Fink sold all of the properties and assets of the Seward Ditch Company, embraced in the deed of trust, to the defendant Wild Goose Mining & Trading Company.

West & De Journal, of San Francisco, Cal., and George D. Schofield, of Nome, Alaska (Joseph T. Curley, of San Francisco, Cal., of counsel), for appellants.

Gordon Hall, Albert Fink, and Thomas R. White, all of San Francisco, Cal., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). The intervener holds a receiver's certificate similar to that held by the plaintiff Cowden, and seeks similar relief, and upon the same grounds. They therefore occupy precisely the same position.

[1] The plaintiffs contend that the judgments in cases numbered



1,570, 1,571, and 1,573 are void, on the ground of fraud in the indebtedness upon which they were founded, and because of lack of service of process therein upon an accredited agent of the Campion Mining & Trading Company. The service, as has been seen, was made upon one William A. Gilmore, who pretended to be the agent and representative of the company, and who filed general appearances and pleadings for it in those cases. The complaint shows that service was made on Gilmore on the 18th of August, 1906, and that he appeared and pleaded in due time, and that it was not until July 2, 1907—nearly one year thereafter—that the judgments were entered. Not only is there no allegation in the complaint that the Campion Mining & Trading Company did not know of the bringing of those actions and of the proceedings therein, but this allegation in the complaint affirmatively shows that that company did have such knowledge:

"Plaintiff further alleges that said properties so levied upon, as hereinafter alleged, had been attached by the marshal at or about the time of the bringing of said actions, by force of writs of attachment issued in said actions respectively to him, and said alias executions were levied upon the same properties so previously attached."

Notwithstanding such knowledge, neither the company nor the receiver of its property made any application to the court in which the actions were pending to set aside the service, or in any way question Gilmore's authority. Moreover, neither the company nor the receiver, in their cross-complaint, questioned the fact or the good faith of the stipulation entered into by them with the plaintiffs in actions 1,570, 1,571, and 1,573, referred to in the above statement of the case, whereby they agreed that no action would be taken to set aside those judgments for defective service of summons or for any other cause, and in effect ratifying and confirming them. On the contrary, in their answer to the complaint they expressly—

"admit that the stipulation therein set forth was made and entered into on their part as therein alleged; but they allege that said stipulation was never intended to bar and did not bar these defendants from contesting the legality of such execution sales as might be made under alias executions to be issued for the satisfaction of said judgments, upon the ground of any irregularity in such sales. And these defendants further allege that at the time when said stipulations were entered into on their part this defendant corporation was without any moneys or other valuable resources whatever wherewith to satisfy or compromise said judgments, or to contest the validity thereof, and this defendant receiver was without any moneys or other resources available for that purpose, and that, being so situated, they entered into said stipulation under compulsion of circumstances, and that the same was the best and only accommodation or arrangement which was offered to them on the part of the judgment creditors in said judgments respectively."

Under such circumstances, neither the company nor its receiver should be heard to say in a court of equity that Gilmore did not have the authority claimed. *Denton v. Baker*, 93 Fed. 46, 35 C. C. A. 187; *Mass. Benefit Life Ass'n v. Lohmiller et al.*, 74 Fed. 23, 20 C. C. A. 274, and cases there cited. Besides, while the complaint alleges that the receiver was not authorized to enter into the

stipulation, it contains no allegation that the Campion Mining & Trading Company was itself unauthorized to enter into it, but, on the contrary, expressly alleges that it did do so.

Both the plaintiffs and cross-complainants by their pleadings concede the fact that under and by virtue of the stipulation the Campion Mining & Trading Company and the receiver of its property received a valuable consideration. Both are therefore estopped to deny the validity of the judgments. There is no allegation that they did not have actual knowledge of the sale of the property of the company under the executions; and that they had at least constructive notice is shown by the fact that by the statutes of Alaska a writ of attachment can only be levied upon real property by posting notice on the ground and recording in the office of the recorder of the district in which the property is situated a certificate to the effect that the property, describing it, has been attached in the action in which the writ issued, which proceedings may be followed by execution sale under prescribed notice.

[2] The irregularities which occurred in the making of the sales in question under the executions which are complained of were cured by the confirmation of the sales by the court. In *Heid v. Ebner*, 133 Fed. 156, 66 C. C. A. 222, this court said:

"It is the general rule in the United States that the confirmation of a judicial sale by a court of competent jurisdiction cures all irregularities in the proceedings leading up to or in the conduct of the sale, and that while such a sale will be set aside where fraud, mistake, or surprise is shown, mere irregularities in the preliminary proceedings do not render the sale invalid, and will not suffice to set it aside after confirmation. *Wills v. Chandler* (C. C.) 2 Fed. 273; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931; *Ludlow v. Ramsey*, 11 Wall. 581, 20 L. Ed. 216; *Stockmeyer v. Tobin*, 139 U. S. 176, 11 Sup. Ct. 504, 35 L. Ed. 123. The laws of Alaska are in accord with this general rule. Section 283 of Carter's Codes of Alaska, pt. 4, provides, in subdivision 4 (Act June 6, 1900, c. 786, 31 Stat. 379) thereof: 'An order confirming a sale shall be a conclusive determination of the regularity of the proceedings concerning such sale, as to all persons, in any other action or proceeding whatever.'"

[3] The laws of Alaska also provide that:

"From the date of the attachment until it be discharged or the writ executed, the plaintiff, as against third persons, shall be deemed a purchaser in good faith and for a valuable consideration of the property, real and personal, attached." Carter's Alaska Codes, p. 174.

As has been stated, the property sold under the executions in question was attached August 18, 1906, and the receiver was not appointed until August 13, 1907, and then in an action to which the plaintiffs in the attachment cases were not parties. The mere appointment of the receiver, therefore, did not divest the liens acquired by the attachments. *High on Receivers*, § 440; *People v. Finch*, 19 Colo. App. 512, 76 Pac. 1120; *Pease, Sheriff, v. Smith, Receiver*, 63 Ill. App. 411.

[4] The contention on the part of the appellants that the holders of the receiver's certificates have a paramount lien upon all of the assets of the Campion Mining & Trading Company is endeavor-

ored to be supported by a citation of the cases of *Wallace v. Loomis*, 97 U. S. 146, 24 L. Ed. 895, *Miltonberger v. Railroad Co.*, 106 U. S. 286, 1 Sup. Ct. 140, 27 L. Ed. 117, *Union Trust Co. v. Illinois M. Railway Co.*, 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963, and *Kneeland v. Luce & Co.*, 141 U. S. 491, 12 Sup. Ct. 32, 35 L. Ed. 830. All of those are cases of certificates issued by receivers of railroads, which, for special reasons many times stated and *covering a limited period only*, the courts sometimes prefer over other liens. The inapplicability of such cases to the present one is made manifest by the Supreme Court in *Union Trust Co. v. Ill. M. R. Co.*, 117 U. S. at pages 455, 456, 6 Sup. Ct. at pages 820, 821 (29 L. Ed. 963), where it is said:

"Property subject to liens and claims and debts, of various characters and ranks, which is brought within the cognizance of a court of equity for administration, and conversion into money, and distribution, is a trust fund. It is to be preserved for those entitled to it. This must be done by the hands of the court, through officers. The character of the property gives character to the particular species of preservation which it requires. Unimproved land may lie idle, with only payment of taxes. Improved property should be rented. Movable property that is not perishable may be locked up and kept; but, if perishable, it must be sold, by way of preservation. A railroad, and its appurtenances, is a peculiar species of property. Not only will its structures deteriorate and decay and perish, if not cared for and kept up, but its business and good will will pass away if it is not run and kept in good order. Moreover, a railroad is a matter of public concern. The franchises and rights of the corporation which constructed it were given, not merely for private gain to the corporators, but to furnish a public highway; and all persons who deal with the corporation as creditors or holders of its obligations must necessarily be held to do so in the view that if it falls into insolvency, and its affairs come into a court of equity for adjustment, involving the transfer of its franchises and property, by a sale, into other hands, to have the purposes of its creation still carried out, the court, while in charge of the property, has the power, and, under some circumstances, it may be its duty, to make such repairs as are necessary to keep the road and its structures in a safe and proper condition to serve the public. Its power to do this does not depend on consent, nor on prior notice. Consent is desirable, but is seldom practicable, where the debts exceed the value of the property. Though prior notice to persons interested, by notifying them as parties, first requiring them to be made parties if they are not, is generally the better way, yet many circumstances may be judicially equivalent to prior notice. A full opportunity, as in this case, to be heard, on evidence, as to the propriety of the expenditures and of making them a first lien, is judicially equivalent. The receiver, and those lending money to him on certificates issued on orders made without prior notice to parties interested, take the risk of the final action of the court, in regard to the loans. The court always retains control of the matter, its records are accessible to lenders and subsequent holders, and the certificates are not negotiable instruments."

We are of the opinion that the demurrers were properly sustained by the court below, and its judgment is affirmed.

## SCHRAUBSTADTER et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1912.)

No. 2,014.

## 1. FOOD (§ 20\*)—MISBRANDING—INDICTMENT—REQUISITES—PRIOR INVESTIGATION—NOTICE.

An indictment for misbranding champagne in violation of the Pure Food and Drugs Act (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1911, p. 1354]) was not invalid for failure to allege a preliminary investigation by an officer of the Department of Agriculture, a notice to defendants of their violation of the act, or that defendants were afforded an offer to present evidence and be heard.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 21; Dec. Dig. § 20.\*]

What constitutes a violation of pure food regulations, see note to *Brina v. United States*, 105 C. C. A. 559.]

## 2. FOOD (§ 14\*)—MISBRANDING—CHAMPAGNE WATER—EVIDENCE.

Where defendants sold in interstate commerce a domestic wine, artificially carbonated, under a label "Extra Dry Champagne," with a design and other words in French calculated to induce a purchaser to believe he was buying a foreign and not a domestic product, defendants were guilty of misbranding, in violation of the Pure Food and Drugs Act.

[Ed. Note.—For other cases, see Food, Cent. Dig. §§ 10-13; Dec. Dig. § 14.\*]

## 3. INDICTMENT AND INFORMATION (§ 81\*)—DESIGNATION OF DEFENDANTS.

An indictment described defendants as S. and G., "doing business in the city and county of San Francisco under the firm name and style of A. Finke's Widow, hereinafter called the defendants." *Held*, that the quotation was merely descriptive of the persons indicted, and that the indictment would be regarded as of the individual members of the firm, and not of the firm under its firm name.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 216-224; Dec. Dig. § 81.\*]

## 4. CRIMINAL LAW (§ 878\*)—TRIAL—VERDICT—CONSTRUCTION.

An indictment charged defendants in three counts with misbranding, in violation of the Pure Food and Drugs Act (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1911, p. 1354]), and the verdict was "guilty as charged in the indictment." *Held*, that the verdict was tantamount to a conviction on each of the three counts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2093-2101; Dec. Dig. § 878.\*]

## 5. CRIMINAL LAW (§§ 995, 1214\*)—CONVICTION—SENTENCE.

Defendants, members of a firm, were indicted individually in separate counts for three separate violations of the Pure Food and Drugs Act (Act Cong. June 30, 1906, c. 3915, § 2, 34 Stat. 768 [U. S. Comp. St. Supp. 1911, p. 1354]), which provides \$200 as the maximum fine for the first offense. The jury returned a verdict of "guilty as charged in the indictment," whereupon the court rendered judgment that "each of the defendants pay a fine of \$100 on each count of the indictment, consisting of three counts, to wit, the sum of \$300 each." *Held*, that the fine was not excessive, and that the statement of the aggregate thereof did not invalidate the judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2518, 2521, 2523-2526, 2528½, 2536-2543, 3304-3309; Dec. Dig. §§ 995, 1214.\*]

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the District Court of the United States for the Northern District of California.

Ernest Schraubstadter and Emile A. Groezinger were convicted of violating the Pure Food and Drugs Act, and they bring error. Affirmed.

Plaintiffs in error were indicted under the Pure Food and Drugs Act, convicted, and fined each \$300, from which judgment this writ of error is prosecuted. The indictment contains three counts. In each of the counts the defendants are described as "Ernest Schraubstadter and Emile A. Groezinger, doing business in the city and county of San Francisco, under the firm name and style of A. Finke's Widow, hereinafter called the defendants." By the first count it is charged that on the 28th day of December, 1909, they did willfully, unlawfully, and knowingly ship and cause to be shipped from the city and county of San Francisco, state and Northern district of California, to D. Holzman, at Spokane, in the state of Washington, "five cases of half bottles of so-called champagne, each bottle of which so-called champagne in each of the cases aforesaid was misbranded in the following particulars, to wit: The label on the neck of each of the bottles aforesaid contained the words 'Extra Dry Champagne' (with a design of a crown), and the main label on each of the bottles aforesaid contained the words: 'Champagne Brand Defleur Fils & Cie. Grand Vin Royal. Guaranteed under the Pure Food and Drugs Act, June 30th, 1906, Serial No. 7016' (with a design of a fancy coat of arms)." It is then charged that the said labels were designed to mislead the purchaser into the belief that the product was a champagne manufactured in a foreign country, when in truth and in fact it is not a champagne at all, but a white wine artificially carbonated, and said labels do not give any information as to the real place of production or manufacture, and the real fact is that the product in said bottles is a domestic wine artificially carbonated.

The second count charges a shipment of a like number of cases of "so-called champagne" on the same day from San Francisco to Spokane, each bottle of which was misbranded in the following particulars, to wit: "The label on the neck of each of the bottles aforesaid contained the words 'Extra Dry' (with a design of a crown), and the main label on each of the bottles aforesaid contained the words 'Crown Brand Champagne' (with the design of a crown and crossed scepters), and underneath the words: 'Guaranteed under the National Pure Food and Drugs Act, June 30th, 1906.'" And it is further charged that the product in said bottles contained was not in fact champagne, but a domestic wine artificially carbonated, and the said product was and is calculated to deceive the purchaser thereof.

The third count pertains to a sale and delivery to McDonald & Cohn, importers and wholesale liquor dealers of San Francisco, of two cases of half bottles of so-called champagne, misbranded in the following particulars, to wit: "The label on the neck of each of the bottles aforesaid containing the words 'Extra Dry Champagne' (with a design of a shield and the monogram A. F. W.), and the main label on each of the bottles aforesaid contained the words: 'Cuvée Special E. L. Mercier & Cie. Brand. Extra Dry. Guaranteed under the Pure Food and Drugs Act, June 30th, 1906. Serial No. 7016'"—which the said McDonald & Cohn caused to be shipped from San Francisco to Benson, Ariz. It is then charged with like effect as in the first count, and, further, that defendants gave to the purchaser a written guaranty that the goods so purchased complied with the provisions of the Pure Food and Drugs Act, and that in so selling said wine defendants did so with the knowledge that the same might be entered into the commerce of the country as a champagne.

Trial was entered upon before a jury, but before the same was completed the jury was discharged under an agreement that the trial should be had before the court, waiving a jury. On conclusion of the testimony, and after hearing the argument of counsel, it was "by the court ordered that a judgment of guilty be, and the same is hereby, entered as charged in the indictment herein." Thereafter judgment was rendered as follows: "It is there-

fore ordered and adjudged that each of said defendants pay a fine of one hundred (100) dollars, on each count of the indictment herein, consisting of three counts, to wit, the sum of three hundred (300) dollars each." Previous to the entry thereof a motion was filed in arrest of judgment, based upon the insufficiency of the indictment.

Bert Schlesinger and S. C. Wright, both of San Francisco, Cal., for plaintiffs in error.

John L. McNab, U. S. Atty., and Earl H. Pier, Asst. U. S. Atty., both of San Francisco, Cal., for the United States.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge (after stating the facts as above). [1] The first objection interposed by defendants challenges the sufficiency of the indictment. The alleged misbranding was preliminarily investigated by the proper officer of the Department of Agriculture, but it will be seen that the fact of such investigation is not set forth in the indictment, nor does it show that any notice was given by the Secretary of Agriculture to the defendants, notifying them of the violation of said act, nor that defendants were thereby afforded an opportunity to present evidence or to be heard. For these and other grounds of like nature it is contended that the indictment is insufficient. In other words, it is argued that the indictment should set forth the doing of the things required to be done under sections 4 and 5 of the act in question. The very contention has been set at rest to the contrary in the case of *United States v. Morgan*, 222 U. S. 274, 32 Sup. Ct. 81, 56 L. Ed. 198. The defendants in that case added mineral salts to water drawn from the water supply in New York City, and, charging it with carbonic acid, bottled and sold it as "Imperial Spring Water." An invoice of this they sold and shipped into New Jersey, and were indicted for shipping misbranded goods in interstate commerce. The indictment there, as here, did not set forth the facts the want of which it is claimed renders the present one objectionable. The court held the indictment sufficient, however, reversing the judgment of the court below to the contrary. The court says:

"The provision as to the hearing is administrative, creating a condition where the district attorney is compelled to prosecute without delay. When he receives the Secretary's report, he is not to make another and independent examination, but is bound to accept the finding of the department that the goods are adulterated or misbranded, and that the party from whom they had been obtained held no guaranty. But the fact that the statute compels him to act in one case does not deprive him of the power voluntarily to proceed in that and every other case under his general powers. If, for any reason, the Executive Department failed to report violations of this law, its neglect would leave untouched the duty of the district attorney to prosecute 'all delinquents for crimes and offenses cognizable under the authority of the United States.' Rev. Stats. §§ 771, 1022 (U. S. Comp. St. 1901, pp. 601, 720). So an improper finding by the department would no more stay the grand jury than an order of discharge by a committing magistrate after an ordinary preliminary trial; for the statute contains no expression indicating an intention to withdraw offenses under this act from the general powers of the grand jury, who are diligently to inquire and true presentment make of all matters called to their attention by the court, or that may come to their knowledge during the then present service."

The indictment in the case at bar must be held sufficient.

[2] It is suggested that the evidence indisputably shows (and the entire evidence is in the record) that the defendants used the labels in good faith, believing that they had a perfect right to call their wine "California Champagne"; that it was sold as such without objection, and had been known to the trade for many years under that designation. The labels, however, which are evidentiary of the misbranding, contain no such designation or legend as "California Champagne," and the trial court found that they were misleading, and that the dress on each of the packages indicated a design to create in the minds of the consumers the impression that they were "purchasing a foreign and not a domestic product." Unquestionably there is evidence in the record tending to support this conclusion, and, being a question of fact, this court will take no note as respects the weight of the evidence.

Three other contentions are made: First, that the judgment is void, because it is single, and not upon each count, and for \$300, an amount in excess of the maximum fine for the first offense; second, that the indictment was against the defendants as an association, and hence a single fine should have been imposed; and, third, that there was no separate conviction upon each count of the indictment, hence a single judgment should have been imposed, which should not have exceeded by fine \$200. We will answer the second first, and then the third.

[3] The indictment is against "Ernest Schraubstadter and Emile A. Groezinger, doing business in the city and county of San Francisco under the firm name and style of A. Finke's Widow, hereinafter called the defendants." The very statement shows an intendment to indict the defendants personally, and not the firm as a firm. The recitation "doing business" in San Francisco, etc., is but descriptive of the persons composing the firm, and it would be exceedingly technical to hold that such an indictment was an indictment of the firm, and not of the persons composing it. An indictment so drawn will be treated as an indictment of the individual members of the firm, and not of the firm under its firm name. *State v. Powell*, 3 Lea (Tenn.) 164. The indictment here should be treated likewise.

[4] The form of conviction is: "Guilty as charged in the indictment." This was a conviction of the three offenses charged by the three counts of the indictment. In *Ballew v. United States*, 160 U. S. 187, 16 Sup. Ct. 263, 40 L. Ed. 388, the defendant was indicted by two counts; one charging him with wrongfully withholding from a pensioner part of the pension allowed and due her, and the other with demanding and receiving as agent a greater compensation for services in prosecuting the claim for pension than is provided by law, and the jury returned a general verdict of guilty. Speaking of the verdict, the court says:

"That in a case such as this a general verdict is proper, and imports of necessity a conviction as to both crimes, is settled"—citing *Claassen v. United States*, 142 U. S. 140, 146, 12 Sup. Ct. 169, 35 L. Ed. 966.

The verdict in the case at bar was therefore tantamount to a conviction upon each of the three counts contained in the indictment.

It is beyond controversy that each of said counts charges a separate and distinct offense, based upon altogether different acts of the defendants, but of such character as were properly included in one indictment. The offenses charged are shipping or causing to be shipped misbranded goods in interstate commerce.

[5] This brings us back to the first of the three contentions stated. The form of the judgment is that: "Each of said defendants pay a fine of one hundred (100) dollars, on each count of the indictment, consisting of three counts, to wit, the sum of three hundred (300) dollars each." The judgment could not be more specific, declarative of a purpose of imposing a fine of \$100 on each defendant under each count of the indictment; the maximum fine for the first offense being \$200. Act June 30, 1906, c. 3915, § 2, 34 Stat. 768 (U. S. Comp. St. Supp. 1911, p. 1354). So that the fine imposed was not excessive. The stating of the aggregate of the fines to be \$300 did not invalidate the judgment. The case of *United States v. Peeke*, 153 Fed. 166, 82 C. C. A. 340, 12 L. R. A. (N. S.) 314, does not help the defendants' contention. It relates to cumulative sentences of imprisonment. In this case it is a sentence by fine, and, when properly analyzed, it is not even cumulative, as a fine of \$100 is imposed upon each count.

Affirmed.

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#### JOURNAL PUB. CO. v. DRAKE et al.

(Circuit Court of Appeals, Ninth Circuit. October 14, 1912.)

No. 2,042.

#### 1. COPYRIGHTS (§ 70\*)—INFRINGEMENT—ACTION FOR PENALTY—DIRECTION OF VERDICT.

Rev. St. § 4965 (U. S. Comp. St. 1901, p. 3414), provides that if any person, after the copyrighting of a photograph, without consent of the proprietor of the copyright shall copy, print, or publish the same in whole or in part, or, knowing the same to be printed or published, shall sell or expose for sale any copy thereof, he shall forfeit \$1 for every sheet of the same found in his possession or exposed for sale, one half to go to the proprietor of the copyright and the other half to the United States. *Held*, that where defendant printed 2 copyrighted photographs belonging to plaintiffs without their consent, and 400 sheets of the journal in which they were printed were found in defendant's possession, the court properly directed a verdict for plaintiffs for the penalty prescribed.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 65-84; Dec. Dig. § 70.\*]

#### 2. COPYRIGHTS (§ 70\*)—NATURE AND FORM—PENALTIES.

An action to recover penalties for violating Rev. St. § 4965 (U. S. Comp. St. 1901, p. 3414), relating to the infringement of copyrights, is a civil action founded on an implied contract, which every person enters into with the state to observe the laws.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 65-84; Dec. Dig. § 70.\*]

#### 3. TRIAL (§ 170\*)—QUESTIONS FOR COURT AND JURY—DIRECTION OF VERDICT.

Where plaintiff has clearly made out his case, and there is no evidence to the contrary, it is proper for the court to direct a verdict in his favor.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 390-395; Dec. Dig. § 170.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes



#### 4. APPEAL AND ERROR (§ 907\*)—INCOMPLETE RECORD—PRESUMPTIONS.

In the absence of a complete record of the evidence, there being no objection to a statement by the court as to what the evidence was with respect to a fact, it will be presumed on appeal that the statement was correct.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911-2915, 2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.\*]

#### 5. COPYRIGHTS (§ 52\*)—INFRINGEMENT—INTENT.

Rev. St. § 4965 (U. S. Comp. St. 1901, p. 3414), provides that in case any person publishes a copyrighted photograph, without consent of the owner of the copyright and with intent to evade the law, he shall forfeit certain prescribed penalties. *Held*, that the penalty was for the act of copying, printing, and publishing a copyrighted article, or for selling or exposing for sale such a copy, and, the printing or selling being proved, an unlawful intent would be presumed.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 50; Dec. Dig. § 52.\*]

#### 6. COPYRIGHTS (§ 70\*)—INFRINGEMENT—SHEETS.

Rev. St. § 4965 (U. S. Comp. St. 1901, p. 3414), prohibiting the infringement of a copyright, declares that the infringer shall forfeit \$1 for every sheet of the same found in his possession, either printed, copied, published, or exposed for sale. *Held*, that the penalty imposed is for every sheet on which an infringement is printed; and hence, where 400 sheets, each containing 2 separate and distinct infringements, were found in defendant's possession, there were 800 infringements printed, and the court properly rendered judgment for \$800.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 65-84; Dec. Dig. § 70.\*]

In Error to the District Court of the United States for the District of Oregon.

Action by J. D. Drake and E. R. Drake, doing business under the name and style of Drake Bros., against the Journal Publishing Company, to recover the penalty provided by law for the infringement of a copyright. Judgment for plaintiffs, and defendant brings error. Affirmed.

In 1903 the plaintiffs were photographers in the city of Silverton, Marion county, Or., under the firm name and style of Drake Bros. In July, 1903, plaintiffs became the sole owners and proprietors of two certain photographic productions, entitled and known as "Lower South Silver Creek Falls," and "South Silver Creek Falls." In September, 1903, plaintiffs secured copyrights from the Librarian of Congress for these two photographs, and thereafter gave notice of such copyrights by printing on each print of said photographs and upon some visible portion of each of said photographs the following notice: "Copyright, 1903, Drake Brothers." Prior to September 8, 1907, the plaintiffs had given permission to one Phillip S. Bates, a publisher in the city of Portland, Or., to use said photographs in an illustrated edition of the "Pacific Northwest," a newspaper of general circulation published by the said Phillip S. Bates at Portland, Or., for the purpose of exploiting the resources of Oregon. Thereafter an agent of the defendant, in search of material for a proposed illustrated edition of the Oregon Daily Journal, a paper published by the defendant in Portland, Or., called at the office of said Phillip S. Bates and secured copies of the photographs in question. These photographs were taken by the agent of the defendant to the office of the Oregon Daily Journal, and by a mechanical process defendant made reduced copies of the same in size, and used said copies by printing and publishing the same in defendant's paper, the Oregon Daily Journal, on September 8, 1907.

It is recited in the record that J. D. Drake, one of the partners in plain-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tiffs' business, testified that since the complaint was filed he had succeeded to the partnership as the owner of said copyrights, and that prior to the filing of the complaint he did not give the defendant, its officers, agents, or servants, leave or permission to use said copyrighted photographs.

In March, 1908, plaintiffs visited the office of the Oregon Daily Journal and purchased 400 copies of the issue of the defendant's paper of September 8, 1907, which contained copies of plaintiffs' copyrighted photographs. Thereafter plaintiffs brought this suit in the United States District Court for the District of Oregon to recover the penalty of \$1 each, provided by the statute.

Upon the trial of the case, the facts having been proved as stated, the court instructed the jury to return a verdict for the plaintiffs. It is recited in the record that the court, in granting plaintiffs' motion, stated that the photographs were reproduced and used by the defendant without the knowledge or consent of plaintiffs. In accordance with the court's instructions, the jury returned a verdict for the plaintiffs for the sum of \$800 and costs. Thereafter judgment was entered upon the verdict in favor of the plaintiffs for the sum of \$400, and for the use and benefit of the United States \$400, together with costs and disbursements in the action. The defendant brings the case here by writ of error.

John F. Logan and John H. Stevenson, both of Portland, Or., for plaintiff in error.

Seitz & Seitz and Conley & De Neffe, all of Portland, Or., for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). [1] The only question in this case is whether the court was in error when it instructed the jury to return a verdict for the plaintiffs. The action is based upon section 4965 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3414), which, so far as this case is concerned, provides:

"If any person, after the recording of the title of any map \* \* \* photograph \* \* \* shall \* \* \* contrary to the provisions of this act, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses \* \* \* copy, print, publish \* \* \* in whole or in part, or by varying the main design, with intent to evade the law, or, knowing the same to be so printed, published \* \* \* shall sell or expose to sale any copy of such map or other article, as aforesaid, he shall forfeit \* \* \* one dollar for every sheet of the same found in his possession, either printing, printed, copied, published \* \* \* or exposed for sale. \* \* \* One-half of all the foregoing penalties shall go to the proprietors of the copyright and the other half to the use of the United States."

There is no substantial controversy about the facts in this case. The plaintiffs had secured copyrights for these photographs. They were owned by the plaintiffs, and were copied, printed, and published by the defendant, and the evidence was that such copying, printing, and publishing by the defendant was without the consent of the plaintiffs. This evidence was uncontradicted, and 400 sheets of the Oregon Daily Journal were found in the possession of the defendant, in which these two photographs were copied, printed, and published. It was the duty of the court to instruct the jury that these undisputed facts constituted a violation of the statute and that their verdict should be for the plaintiffs.

[2, 3] The action is a civil action for penalties. "Actions for penalties are civil actions, both in form and in substance, according to Blackstone. 3 Com. 158. The action is founded upon that implied contract which every person enters into with the state to observe its laws." *Stearns v. United States*, 2 Paine, 300, Fed. Cas. No. 13,341; 30 Cyc. 1344. Where plaintiff has clearly made out his case, and there is no evidence to the contrary, it is proper for the court to direct a verdict in favor of the plaintiff. 38 Cyc. 1574.

[4] It is objected that the evidence of one of the members of the plaintiffs' partnership that consent had not been given by him to the defendant to use the copyrighted photographs was not sufficient; that there was nothing to show that written consent had not been given by the other partner. In granting plaintiffs' motion to instruct the jury to find for the plaintiffs, the court stated that the photographs were reproduced and used by the defendant "without the knowledge or consent of plaintiffs." Passing the question whether the written consent of plaintiffs was not a fact to be established by the defendant, it does not appear that all the evidence introduced upon the trial is in the record. In the absence of such a complete record of the evidence, and the fact that there was no objection made to the statement made by the court as to what the evidence was with respect to that fact, it will be presumed that the statement made by the court was correct, and that the evidence was uncontradicted that the copying, printing, and publishing of these two photographs by the defendant was without the consent of the plaintiffs.

[5] It is further objected that there was no evidence of any intent on the part of the defendant to evade the law. The penalty provided by the statute is for the act of copying, printing, and publishing a copyrighted article, or for selling or exposing for sale such a copy, and the forfeiture or penalty is fixed for every sheet of such copy found in the possession of the person who has committed any one of the acts prohibited. The general rule in such a case is that, where the defendant has been shown to have committed an unlawful act, an unlawful intent is presumed. "If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent." *Ellis v. United States*, 206 U. S. 246, 257, 27 Sup. Ct. 600, 602 (51 L. Ed. 1047, 11 Ann. Cas. 589). But there is a prohibition in this statute against the copying, printing, and publishing of a copyrighted article "by varying the main design with intent to evade the law." That is not this case, and it is obvious that the intent to evade the law is only required to appear or be inferred where the copyrighted article has not been reproduced in the substantial form and character of the original, but where in the reproduction there has been a varying of the main design. In such a case it should appear as a fact, or be inferable from facts proven, that the reproduction was with an intent to evade the law, and this would be a question of fact for the jury. There is no such question in this case.

[6] It is further objected that the verdict and judgment is in ex-

cess of that provided by the statute; that the penalty of \$1 is for every sheet of the infringed copyright found, without regard to the number of infringements printed on each sheet. We do not so understand the law. The penalty imposed is for every sheet upon which an infringement is printed. In this case, as there were two separate and distinct infringements printed upon 400 sheets, there were 800 infringements printed in all.

The judgment of the District Court is affirmed.

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PHYSICIANS' DEFENSE CO. v. COOPER, State Ins. Com'r.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1912.)

No. 2,068.

1. INSURANCE (§ 124\*) — WHAT CONSTITUTES — "CONSIDERATION" — "RISK" — "INDEMNITY."

"Insurance" is a contract by which one party, in consideration of a price paid adequate to the risk, becomes security to the other that he may not suffer loss, prejudice, or damage by the happening of the perils specified to certain things which may be exposed to them. The ingredients of the contract are the consideration, the risk, and the indemnity. The "consideration" is the premium for the insurer's undertaking; the "risk," the perils or contingencies against which the assured is protected; and the "indemnity," the stipulated desideratum to be paid to the assured in case he has suffered loss or damage through the perils or contingencies specified.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 172, 176, 178; Dec. Dig. § 124.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3674-3677; vol. 2, pp. 1444-1447; vol. 8, p. 7612; vol. 4, pp. 3539, 3540.]

2. INSURANCE (§ 2\*)—NATURE OF BUSINESS—DEFENSE OF LITIGATION.

Complainant, in consideration of a specified yearly consideration, issued a contract to physicians, guaranteeing that, in case they were sued for damages for civil malpractice, complainant agreed to employ a local attorney, in whose selection the contract holder should have a voice, who, with the defendant's attorney, would defend the case without expense to the contract holder to the extent of the exhaustion of the sum named in the policy, which for the defense of one suit was \$5,000, or not to exceed \$10,000 in any one year in case more than one suit was brought against such holder, relieving the latter from liability for costs and attorney's fees to that extent. Held, that complainant was engaged in the insurance business, within Civ. Code Cal. §§ 2527, 2531, 2532, 2534, regulating insurance, and that complainant was not entitled to do business within the state without complying with the insurance laws.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1½; Dec. Dig. § 2.\*]

Appeal from the Circuit Court of the United States for the Northern District of California.

Suit by the Physicians' Defense Company against E. C. Cooper, Insurance Commissioner of the State of California. Judgment for defendant (188 Fed. 832), and complainant appeals. Affirmed.

The Physicians' Defense Company is a corporation of Indiana. It is engaged in a business whereby it issues to its patrons and customers a form

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of contract in purport as follows: In consideration of the printed application and the sum of \$15, being the consideration of one year's defense, and the further payment of \$15 annually during the life of the contract, the Physicians' Defense Company agrees to defend the legally qualified physician "against all suits for damages for civil malpractice, based on professional services rendered by himself or his agent during the term of this contract, at its own expense, not exceeding \$5,000 in defense of any one suit, nor exceeding in the aggregate \$10,000 in defense of suits based on services rendered by the holder hereof, or his agent, within one year from the date of this contract, or within any one year for which this contract shall be renewed, all in the manner and upon the conditions hereinbelow stated." After providing for notice to the company of suit brought against the physician for malpractice, the agreement further provides: "Upon receipt of notice from the holder hereof that a suit has been commenced against him for damages for civil malpractice, the company will employ a local attorney, in whose selection the holder hereof shall have a voice, who, together with the company's attorney, will defend the case without expense to the holder hereof. Such defense will be maintained until final judgment shall have been obtained in favor of the holder hereof, or until all remedies by appeal, writ of error, or other legal proceedings shall have been exhausted, or until the above mentioned sums shall have been expended in said defense, providing that this contract does not cover suits based upon criminal acts or suits involving the collection of fees for services. Said company does not obligate itself to pay or to assume or to secure the payment of any judgment rendered against the holder hereof, in any suit defended by it. \* \* \* Each consecutive full year's renewal of this contract shall add five per cent. (5%) of the principal sum to the amount for the defense of any one suit, and to the amount for the defense of any number of suits within one year, conformably with the table of accumulations indorsed hereon, but such addition shall never exceed fifty per cent. (50%) of the aforesaid principal sums. This contract shall not lapse at the end of the time as stated above, if the holder hereof shall pay the annual consideration in advance at the home office in Ft. Wayne, Indiana, or to an authorized agent of the company, in exchange for the company's receipt, signed by the president and secretary, and countersigned by the agent, but shall continue in force for the term or terms for which such annual consideration shall be paid."

The plaintiff, the appellant here, by its bill of complaint shows that it commenced operations in California in September, 1902, and has since so continued, building up a large and remunerative business, but that it has not filed the bond provided by section 623 of the Political Code of the state, nor has it procured the certificate of authority required by section 596 of such Code to be obtained by companies transacting an insurance business within the state, nor any certificate or certificates of authority to do business within the state, other than the annual certificates issued by the Secretary of State to foreign corporations upon payment of the license tax imposed thereon by the laws of the state. It is further shown that the defendant, being the Insurance Commissioner of the state, claiming that plaintiff is engaged in insurance business, asserts that plaintiff has no right nor authority to transact such business within the state without first filing a bond as required by said section 623 of the Political Code, and having issued to it a certificate of authority under section 596 of such Code, and threatens to prevent plaintiff from further transacting business within the state unless it complies with the provisions of said sections. An injunction is prayed against the threatened acts of the Insurance Commissioner. The sufficiency of the bill was tested by a demurrer thereto, which was sustained, and, a decree having been given and entered dismissing the bill, the plaintiff appeals.

Stanley Moore and Goodfellow, Eells & Orrick, all of San Francisco, Cal., for appellant.

U. S. Webb, Atty. Gen., and E. B. Power, Asst. Atty. Gen., both of San Francisco, Cal., for appellee.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge (after stating the facts as above). But one question is presented on this appeal, which is whether the plaintiff is transacting an insurance business within the meaning of the statutes of California relating to the subject. If it is, it is admitted that the Insurance Commissioner's position is the correct one. If not, then the Commissioner should be restrained from interference with plaintiff's continuing to transact business with the state.

All persons and companies are prohibited from transacting insurance business within the state of California without first obtaining a certificate of authority from the Insurance Commissioner, and filing a bond as may be required by such Commissioner. Sections 596 and 623, Political Code. The Civil Code of the state, under chapter 1 of title 11, "Insurance in General," defines insurance to be:

"A contract whereby one undertakes to indemnify another against loss, damage or liability arising from an unknown or contingent event." Section 2527, Pomeroy's Civil Code of California.

Section 2531 declares what events may be insured against, namely:

"Any contingent or unknown event, whether past or future, which may damnify a person having an insurable interest, or create a liability against him."

But the provisions of the chapter (section 2532) do not authorize insurance pertaining to a lottery or lottery drawing a prize. It is further declared (section 2534) that:

"All kinds of insurance are subject to the provisions of this chapter."

A person or company engaging in such business as is here attempted to be defined may be said to be transacting insurance business.

[1] The statutory definition of insurance does not differ greatly from that usually given by lexicographers, text-writers and judges, and yet it is practically as comprehensive as any. Webster defines it as:

"The act of insuring against loss or damage by a contingent event; a contract whereby one party undertakes to indemnify or guarantee the other against loss by certain specified risks." Webst. Dict. "Insurance."

The Standard Dictionary defines it as:

"An act or system of insuring or assuring against loss; specifically, the system by or under which indemnity or pecuniary payment is guaranteed by one party or several parties to another party, in certain contingencies, upon specified terms."

And the Century Dictionary:

"In law, a contract by which one party, for an agreed consideration, which is proportioned to the risk involved, undertakes to compensate the other for loss on a specified thing from specified causes."

As to the text-writers, May defines insurance as:

"A contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss."

Such, says the author, is the definition of the term in its most general terms, and, speaking further, he says:

"It had its origin in the necessities of commerce. It has kept pace with its progress, expanded to meet its rising wants and to cover its ever-widening fields, and, under the guidance of the spirit of modern enterprise, tempered by a prudent forecast, it has, from time to time, with wonderful facility, adapted itself to the new interests of an advancing civilization. It is applicable to every form of possible loss. Wherever danger is apprehended, or protection required, it holds out its fostering hand and promises indemnity." May on Insurance, §§ 1, 2.

Phillips defines it as:

"A contract whereby, for a stipulated consideration, one party undertakes to indemnify the other against certain risks." 1 Phil. Ins. § 1.

Smith, in his work on Commercial Law, defines it as:

"A contract by which a person, in consideration of a gross sum, or a periodical payment, undertakes to pay a larger sum on the happening of a particular event." Smith, Com. Laws, 299.

This collation of definitions is taken, with some rearrangement, from *People v. Rose*, 174 Ill. 310, 314, 51 N. E. 246, 247 (44 L. R. A. 124).

"An insurance contract," says the court, in *Shakman v. Credit-System Co.*, 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. Rep. 920, "is a contract whereby one party agrees to wholly or partially indemnify another for loss or damage which he may suffer from a specified peril."

Again the court, in *Commonwealth v. Equitable Beneficial Ass'n*, 137 Pa. 412, 419, 18 Atl. 1112, 1113, says of insurance that:

"It is a merely business adventure, in which one, for a stipulated consideration or premium per cent., engages to make up, wholly or in part, or in a certain agreed amount, any specific loss which another may sustain; and it may apply to loss of property, to personal injury, or to the loss of life. To grant indemnity or security against loss for a consideration is not only the design and purpose of an insurance company, but is also the dominant and characteristic feature of the contract of insurance."

We will refer to but one more definition of the term, which is that given by 22 Cyc. p. 1384, as follows:

"Insurance is a contract by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other that he shall not suffer loss, prejudice, or damage by the happening of the perils specified to certain things which may be exposed to them."

The principal ingredients of such a contract are the consideration, the risk, and the indemnity. The consideration is the premium for the insurer's undertaking; the risk may be said to be the perils or contingencies against which the assured is protected; and the indemnity is the stipulated desideratum to be paid to the assured in case he has suffered loss or damage through the perils and contingencies specified. Insurance, under the statute, is a contract to indemnify, "against loss, damage or liability." We

think the addition of the word "liability" to the usual definition of the term does not operate to enlarge its significance. The kinds of insurance which have grown up and are denominated insurance under the usual definition have become very numerous. 22 Cyc. 1386. And now the business of insuring against the liability of employers for the personal injuries of their employes and others is one well recognized and established. 15 Cyc. 1035.

[2] Now we may look to the contract in question, and determine whether it falls within the category of insurance, and whether a continuance of the issuance of such contracts does or does not constitute insurance business. In case the holder of the contract is sued for damages for civil malpractice, the Defense Company engages to employ a local attorney, in whose selection the holder of the contract shall have a voice, who, together with the company's attorney, will defend the case without expense to the holder, and this to the extent of the exhaustion of the sum named in the policy, which for the defense of one suit is \$5,000; if others in one year, \$10,000. It seems plain that when the holder is sued for civil malpractice, which he deems is wrongful, and the necessity of making defense is thrust upon him, he must suffer loss, damage, or liability within the meaning of the contract to the extent that he is obliged to employ attorneys and meet the expenses of the trial in regular course. He must pay his attorneys for their services in his behalf, and he must pay his costs on the trial. These are the contingencies which the Defense Company agrees to meet. True, the company does not agree to pay to the holder of the contract the amount of such expenses incurred up to the sum of \$5,000; but it does agree to lift them from the burden or liability of the holder, so that he will not be required to use his own money to meet them. The contingency of paying the expenses of attorneys and cost of defense in case of suit for civil malpractice is the risk or peril which the company agrees that it will meet, and it can make no difference whether it pays the amount of the expenses and costs incurred to the parties doing the service or to the holder of the contract, so that he may himself meet such expenses and costs. The indemnity is the amount of such expenses and costs to be paid. Or, to put it another way, the Defense Company agrees to hold the holder of the contract harmless in that respect to the extent of \$5,000 in the event of the happening of the contingency specified.

Such a contract, in our opinion, cannot be classed as a contract for personal services. The company is not itself an attorney, and does not undertake the defense as such. What it does undertake is, in case of suit, to employ a local attorney, in whose selection the holder shall have a voice, who, with the company's attorney, will defend the case, and to relieve the holder from the expense thereof, an expense which must follow the happening of the very contingency provided against. Not only this, but the company must relieve the holder of paying the costs of suit. Suppose the contract had been to repay to the holder whatever sums, not exceeding \$5,000, he should be required to pay out for attorneys and costs in case of such litigation. Could there be any question that there would be a contract of insurance?



We think not. Can it change the character of the contract in this respect that it purports to hold the holder harmless against the payment of such expenses and costs? The contract, reduced to its simplest idea, is but an agreement to pay the expenses and costs that the holder would have to pay in the contingency specified. This is indemnity pure and simple, and with whatever verbiage the contract may be clothed it does not serve to cover its real purpose, which is one to indemnify the holder against damage and liability for attorney's expenses and costs of defense, in the event he is sued for malpractice.

It is faulty logic to say that this is not a loss, damage, or liability of the contract holder, premising that he does not incur it, and concluding that it is the liability of the Defense Company. The loss, damage, or liability follows the suit for malpractice; and, were it not for the contract of the Defense Company, the holder must bear it. Whose loss, damage, or liability would it then be? That of the person sued, of course. It is this very burden which the Defense Company agrees to bear in case the contingency of the holder being sued happens, and this is insuring the holder against the risk dependent upon the contingency. Looking on the other side, if this be a contract for personal services, why limit the amount of the services to be rendered in dollars and cents? Attorneys do not take contracts for defending parties sued in that way. How peculiar it would be for an attorney to say: "I will engage in your defense \$5,000 worth." It would follow that when the fund was exhausted the attorney would quit, whether the case was brought to a close or not. The very uncertainty of the amount to be paid by the Defense Company to meet the exigency contracted against is persuasive that the contract is not one of hiring, but one rather of indemnity. And such is our conclusion. See *Physicians' Defense Co. v. O'Brien*, 100 Minn. 490, 111 N. W. 396. The reasoning of the court in this case is both cogent and persuasive.

The plaintiff cites with confidence *Vredenburg v. Physicians' Defense Co.*, 126 Ill. App. 509, and *State v. Laylin*, 73 Ohio St. 90, 76 N. E. 567. While these cases are squarely opposed to our position, we are unable to adopt their reasoning.

It follows that the decree of the court below should be affirmed; and it is so ordered.

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STONE-WEBSTER ENGINEERING CORPORATION v. COLLINS.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1912.)

No. 2,059.

1. MASTER AND SERVANT (§ 170\*)—INJURIES TO SERVANT—COMPETENT FELLOW SERVANTS—DUTY TO EMPLOY.

A master's duty to employ reasonably prudent and competent fellow servants is discharged when the master has exercised ordinary care, prudence, and circumspection to that end, such as a person of ordinary judgment and discernment, inured to that kind of business, would ordi-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

narly exercise, having in mind the safety and security of the coemployees from harm and accident while engaged in their work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 336; Dec. Dig. § 170.\*]

**2. MASTER AND SERVANT (§ 286\*)—INJURIES TO SERVANT—SELECTION OF FELLOW SERVANTS.**

In an action for injuries to a servant by the negligence of a coemployee, whether defendant was negligent in selecting the latter *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

**3. MASTER AND SERVANT (§ 88\*)—INJURIES TO SERVANT—TERMINATION OF EMPLOYMENT—RETURNING FROM WORK.**

Where an employé was permitted to ride on defendant's engine from the place of his work to camp after the termination of the work for the day, and was injured while so doing, the master was not freed from liability because the servant at the time of his injury was not acting within the scope of his employment, because the relation of master and servant had temporarily ceased to exist; defendant being still under obligation to observe reasonable care for plaintiff's protection while on his way to camp.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 144-151; Dec. Dig. § 88.\*]

Injuries to servant while not on duty, see note to *Ellsworth v. Metheney*, 44 C. C. A. 489.]

**4. MASTER AND SERVANT (§§ 288, 289\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—ASSUMED RISK.**

In an action for injuries to a servant while riding on defendant's engine from his place of employment to camp, whether plaintiff was negligent, and whether he assumed the risk of injury, *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088, 1089, 1090, 1092-1132; Dec. Dig. §§ 288, 289.\*]

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

In Error to the Circuit Court of the United States for the Western Division of the Western District of Washington.

Action by Edward Collins against the Stone-Webster Engineering Corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

F. S. Blattner, Frank C. Neal, and Robert M. Davis, all of Tacoma, Wash., for plaintiff in error.

Govnor Teats, Hugo Metzler, and Leo Teats, all of Tacoma, Wash., for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge. This is an action by Edward Collins, being the plaintiff below, against the plaintiff in error, to recover damages on account of certain personal injuries sustained while in the employ of the plaintiff in error, hereinafter to be called defendant. The defendant was constructing a power plant near Buckley, in Washington. It was engaged, at the time of the accident complained of, in excavating and removing earth; and, as a

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

convenience for dumping or depositing the same, it constructed trestle work, and on top of that a railroad track, by drift-bolting joists on the piling, then laying ties on these, and upon the ties the iron rails for the track of the engine and cars. The manner of proceeding with the work was to build a section of trestle, equip it with joists, ties, and rails, and then haul and dump or deposit dirt and earth about it through means of engines and dump cars until the space underneath was filled to the track. When this was done, the track was laid out onto the fill, and another section of trestle and track constructed, using the joists taken from the section where the fill had been completed. Thus the fill and track were extended, as the company proceeded with its excavation and deposit of earth. Engines of a type called "dinkey engines" were used for hauling the dump cars, usually four or five being carried in a train. These are equipped with a footboard at the front end for use by the brakemen in switching the engine and cars from one track to another.

The workmen were provided with board and lodging at camp designated "Camp 8—A." At the time, the defendant was using a steam shovel for excavating. The dump cars were filled by means of the steam shovel, and then the dirt was hauled to the end of the track and deposited. The plaintiff was employed in the capacity of a carpenter's helper, and immediately before the accident was at work in constructing trestle for extending the dump. His foreman of construction and other men were at work with him. In going to camp the men proceeded along the railroad track from the dump to a switch, a distance of 300 feet, more or less, thence along the main track, from 300 to 400 feet, to near where the steam shovel was located, then on beyond some 600 feet to camp. The railroad track at the dump and approaching it was constructed at a grade of about 3 per cent., so that the cars were pushed upgrade as the earth was brought to the dump.

At 6 o'clock on the evening of the 7th of August, 1910, the engineer had pushed four cars out upon the trestle, which, being unloaded, were drawn back again upon the solid track near the switch. The purpose was to leave the cars on the track for the night, as was usual, and cut the engine loose and run it down to a place near the steam shovel, to be left there under the care of a watchman. The cars left on the track were secured by placing blocks of wood on the rails in front of the wheels, and when secured the engine was uncoupled from them. Just after the engine had been uncoupled, and before it was put under way for moving down the track, the plaintiff attempted to get upon the footboard in front of the engine for the purpose of riding down to the steam shovel, on his way to camp, and in doing so his right leg and foot were caught by the cars bumping against the engine, by reason whereof he received the injuries complained of.

The cause of complaint is that the defendant was negligent in employing and having in its employ, and assigned to the duty of brakeman on the train, including the engine and cars then in use,

a young boy, who was inexperienced, and physically and mentally incompetent to attend to the work of switching and managing the cars, and properly blocking them when left upon the track unattended with the engine. The boy's name was Lester Hayden, and at the time of the accident he was in his eighteenth year. And it is further alleged that he, through want of proper attention, so carelessly and negligently blocked the cars upon the track that they were not made secure and safe, and that after the engine had been uncoupled and run ahead a few feet they ran down and collided with the engine, causing the injury to plaintiff's leg and foot.

The plaintiff's account of the accident in brief is that he, with Charles Comstock, his foreman, and some six or eight other men were at work on the trestle; that the men were all released, except himself and another employé, before the hour to quit, so that they might go to camp on the company's time, they having to carry some tools. The cars were pushed out on the trestle and unloaded, and then run down to the place where they were stopped. It then being 5 o'clock, the hour of quitting work, Comstock, the plaintiff, and the other employé, being desirous of riding in on the engine, hurried forward. The plaintiff, carrying a spike maul and an auger, passed the cars on the right-hand side and came up to the engine. The cars were stationary when they passed them, and the engine had been cut loose and was standing from 10 to 18 feet in advance of them. Comstock was ahead, and had stepped upon the footboard, and was sitting on the corner of the engine. The plaintiff stepped in front of Comstock on the board. The other man then came up and asked for room, whereupon plaintiff attempted to pass to the other end of the footboard, to the other side of the engine. In doing so he first laid his spike maul and auger over on that end of the board, and stepped over the bumper with his left foot, holding onto the hand rail and facing the engine. In the meanwhile, and while carrying his right foot and leg around the bumper and in front of it, the cars came down and collided with his leg. The engine was then stationary, and he was not aware that the cars were moving down upon it while he was getting upon the footboard.

Comstock's testimony does not materially differ from the plaintiff's, except that he thinks the engine was standing some 6 or 8 feet from the cars at the time they boarded the engine, and he saw Hayden put a block under the wheel of the car. Harrington, another witness, relates that he passed down ahead of the plaintiff; that when he passed Comstock he was sitting on the engine, and the engine was attached to the cars.

On the other hand, the testimony of Hayden and the engineer would seem to indicate that, when the plaintiff boarded the engine, the engine was backing up at the signal of Hayden; that it was the custom in blocking the cars to cut the engine loose, running it ahead slowly for a short distance, and stopping, to test whether the cars were securely blocked before going on finally; that on this occasion the cars had been blocked, and the engine

had been cut loose and run ahead a few feet at the signal of Hayden, the brakeman; that Hayden, finding the cars had not been securely blocked, had signaled the engineer to back up, and the engine was moving back towards the cars again at the time of the collision. It must be understood that the engine was fronting the cars, but pushing them ahead of it, and was running backwards in going towards the steam shovel. When we speak of backing up to meet the cars, the engine was itself running forward.

There was also testimony tending to show that Hayden had had only slight experience as a brakeman, that he had been at work but a week in that kind of service, and that he was rather careless in the way he handled his cars, was inattentive to his work, and did not seem to realize what should be done at all times, and that his inexperience and inattention to his work had become a topic of remark among the men. There being a dispute as to the manner in which the accident happened, the question touching it was solely for the jury's determination; that is to say, was it because of the carelessness, want of experience, and want of attention of Hayden? The jury must have found that it was, for they could not have found for the plaintiff otherwise.

[1] In this connection, there was also another question of vital consequence, which was whether the defendant company had used ordinary care in the selection of its servants, for it was charged with the duty to its servants to employ reasonably prudent and competent fellow servants to work with them. This duty is discharged, however, when the master has exercised ordinary care, prudence, and circumspection, such as a person of ordinary judgment and discernment, inured to that kind of business, would ordinarily exercise, having in mind the safety and security of his employes from harm and accident while engaged in their work. The like duty applies as respects keeping an incompetent servant in the master's employ after he has discovered, or might have discovered by reasonable care and prudence, such incompetence. 26 Cyc. 1293-1299.

[2] On the subject of the selection of brakemen for the service, Mr. F. N. Thebo, the superintendent of construction, testified that prior to and about the time of the accident he was experiencing difficulty in keeping a full crew of workmen, and, being asked if it was customary in the employment of brakemen to make inquiries of the applicants as to their experience, he answered:

"Yes, sir, it is at certain times, when men are plentiful, to get experienced men; but when men are not plentiful there are times when we have to depend upon the men themselves and their judgment as to whether they can do the work or not."

There is here some evidence that the usual care and precaution in the selection of brakemen was not exercised, and, taken in connection with the evidence as to Hayden's inexperience and inattention to his work, the question was properly left to the jury for their consideration; no exceptions being urged to the instructions of the court submitting it.

[3] Another question presented is whether the plaintiff at the time of the accident was acting within the scope of his employment, so as to render the defendant liable for his injury. It is urged that the relation of master and servant had ceased to exist, plaintiff having quit work for the night, and that the risk of injury attending his further movements was his own, and not that of the company. Perhaps ordinarily such would be the case. There is evidence here, however, tending to show that the men were permitted to ride in on the engine and cars from their work in going to their camp. The plaintiff testified that, being the carpenter's helper, he was sent on errands from time to time to get tools and materials, and that he was always permitted to ride on the cars or the engine in order to expedite his work, and that on occasions before this he had ridden in after work on the engine. There is other testimony in corroboration, besides evidence tending to show that the men were not forbidden to ride on the engine. If at this juncture the relation of master and servant had ceased to exist, though there is authority to the contrary (*Helmke v. Thilmany*, 107 Wis. 216, 83 N. W. 360, 362), the defendant was still under obligation to observe reasonable care for the protection of the plaintiff while on his way to camp.

[4] It is next insisted that plaintiff was guilty of contributory negligence, citing the cases *Baltimore & P. R. R. Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506, and *Kresanowski v. N. P. Ry. Co.* (C. C.) 18 Fed. 229, as conclusive authority for the position. These cases, while somewhat analogous to the one at bar, are yet clearly distinguishable. In the first case, the party injured rode on the pilot of the engine, when a car was specially provided for his transportation. In the other case, the party injured was sent to his work with others on an engine. He, with one or two others, sat on the front of the engine, with their feet over the pilot; the tender being full of wood. The engine, moving to the front, collided with another engine on the track, causing the injury complained of.

Here, the purpose of the plaintiff was to ride on the front end of the engine, it is true; but the engine was expected to move the other way, it being supposed, according to the theory of the plaintiff, that the cars had been safely blocked and that the engine was ready to move off. Under the testimony, the question of contributory negligence was properly left to the jury. So, also, was the question of assumption of risk. There was matter pertinent for the consideration of the jury in that relation.

Affirmed.

## THE GOV. AMES.

(District Court, D. Massachusetts. April 3, 1912.)

No. 562.

**ADMIRALTY (§ 124\*)—ACTION—COSTS—PREMIUM PAID FOR BOND FOR RELEASE OF VESSEL.**

The amount paid by the owners of a vessel libeled for collision to a surety company for furnishing stipulation for discharge of the vessel, the giving of which is optional with him, is not taxable as costs against the other party on his failure to recover, in the absence of any general order, rule, or usage for such taxation in force or existing when the stipulation was given.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 836-857; Dec. Dig. § 124.\*]

In Admiralty. Suit for collision by Charles L. Smith, as owner of the schooner Lejok, against the schooner Gov. Ames; Cornelius A. Davis and others, claimants. On appeal from clerk's taxation of costs. Affirmed in part, and reversed in part.

Blodgett, Jones & Burnham, for libellant.

Benjamin Thompson, of Portland, Me., for claimants.

DODGE, District Judge. Smith's suit against the Gov. Ames, of which vessel Davis appeared as claimant, was dismissed by this court, and on appeal the dismissal was sustained by the Court of Appeals. 187 Fed. 40, 109 C. C. A. 94. But the Court of Appeals modified the final decree here, by directing an item of \$393.75, paid by Davis to the surety on the stipulation given by him as claimant to release his vessel from arrest, taxed in his favor here, and objected to by Smith both here and on appeal, to be deducted from the costs which Davis was to recover, as the prevailing party, in the final decree on mandate. See 187 Fed. 48, 49, 109 C. C. A. 94. The direction that this deduction be made from the costs taxed in a cross-suit heard with this, instead of in this suit, was an inadvertence subsequently corrected. See 187 Fed. 50, 51, 109 C. C. A. 94.

The mandate having been filed here, upon taxation of costs for final decree under it, the clerk has deducted the \$393.75 in accordance with the above direction. He has, however, allowed \$236.25, paid by Davis to the surety on the same stipulation for keeping it in force here pending the appeal.

1. On Davis' behalf it is contended that the Court of Appeals' direction regarding the item of \$393.75 was founded upon a misunderstanding of the actual situation of the question in this court, that this is obvious from the record, and that he is entitled to have the item taxed, notwithstanding the direction of the appellate court. But it is not for this court to say that the appellate court misunderstood the record. See *In re Lennox* (D. C.) 181 Fed. 428. Nor, in any event, could I find from the record that any misunderstanding appears.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

The item referred to was taxed here by the clerk in making up the final decree entered before the appeal, on January 11, 1910, as part of Davis' costs. There was an appeal from the clerk's taxation, and it was affirmed by this court in accordance with its opinion in *Coastwise, etc., Co. v. The Edda*, 173 Fed. 436, 97 C. C. A. 638. All this distinctly appeared in the appeal record submitted to the Court of Appeals in the case now before me.

The opinion in *The Edda* relating to the taxation of costs in that case was dated October 20, 1908, and is not reported in 173 Fed. 436, 97 C. C. A. 638, where the opinion on the merits, dated August 8, 1908, is reported. The prevailing party in *The Edda* sought to tax the premiums paid by him upon his stipulation, and they were disallowed, under the special circumstances of that particular case. But it was said in the opinion, after discussion of the question whether such premiums were or not properly taxable:

"The fact that the practice of allowing the taxation of premiums such as these has become established in three District Courts, and the reasons of justice or expediency which have led to its adoption and establishment in those courts, seem to me sufficient grounds for the future adoption of the same practice in this court. The stipulation for which these premiums were paid, however, was given many months ago, at a time when no such practice was recognized here, and while it has been on file and in force in this case the court has expressly declined to allow such premiums to be taxed under similar circumstances, in another case. I am unable to believe that it would be fair to the losing party in this case to apply a changed practice for the first time against it. The clerk's refusal to tax the amount in question is therefore sustained in the present case."

The entire opinion of October 20, 1908, from which the above is quoted, formed part of the record in *The Edda*, upon which the Court of Appeals decided that case October 21, 1909, although the above disallowance made by this court was not a point then in controversy. The allowance of the item of \$393.75 as part of the costs in this case, however, was directly in controversy on appeal, and, as the files of the Court of Appeals show, both parties referred that court in their briefs to the opinion of this court in *The Edda* above quoted. In that opinion *Lee Co. v. Penberthy Co.*, 109 Fed. 964, 48 C. C. A. 760, and *Jacobsen v. Expedition Co.*, 112 Fed. 73, 50 C. C. A. 121, which the Court of Appeals discusses (187 Fed. 48, 49), were both cited and discussed. Other decisions were also cited and discussed, but none, except these two, were Court of Appeals decisions, and they fall into the class which the Court of Appeals has referred to in this case as not authoritative with it. 187 Fed. 48, 109 C. C. A. 94. Its reversal of the allowance made here it based upon its findings that the allowance was "not supported by any order of court, or by any statute," that no usage was available in support of them, and that the stipulation for which the premiums had been paid was not required by any rule in the first instance. Its conclusion was thus stated (187 Fed. 49, 109 C. C. A. 103):

"As, therefore, in this case there is neither usage nor any court order, the objection \* \* \* to the allowance of this item of costs is sustained; and



this without determining what would be the effect of an order, if there had been one."

Taking the Court of Appeals opinion in connection with the above circumstances, I see no reason to doubt that what was decided is in substance as follows:

(1) There being no statute allowing it, a general order or rule of court, or a prevailing established usage, must appear to have been in force at the time in order to justify the taxation, as part of his costs, of premiums paid by the prevailing party for stipulations not required of him by any order or rule, but given by him in order to release his vessel from arrest in preference to leaving her in custody or letting her be sold.

(2) Nothing said by this court in *The Edda* was equivalent to the making of such a general order or rule, or had the effect of establishing such a usage as would justify the taxation.

(3) Neither the taxation made by the court by final decree in this case, nor the express order of January 11, 1910, affirming the clerk's taxation, supplies the place of a general order, rule, or usage, such as the Court of Appeals considers necessary.

If I am right as to the effect of the decision, so that neither what was said in *The Edda*, nor the order of January 11, 1910, in this case, warranted the taxation because of the absence of a general order, rule, or usage, it would seem also to follow that the general order, rule, or usage considered necessary must have existed when the stipulation was given. The stipulation here in question was given April 13, 1906, long before the opinion above referred to in *The Edda* of October 20, 1908. I think that due compliance with the mandate requires me to sustain the clerk in his refusal to tax the \$393.75.

2. On Smith's behalf it is contended that nothing can be taxed for the cost of keeping the stipulation in force pending the appeal. If I have rightly understood the Court of Appeals, I do not see how I can sustain the clerk on this point, and his taxation of \$236.25 must therefore be disallowed.

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IN re I. S. VICKERMAN & CO. et al.

(District Court, D. South Dakota, C. D. October 12, 1912.)

1. BANKRUPTCY (§ 397\*)—PARTNERSHIP.

In South Dakota, in case of the bankruptcy of a partnership, no member of the firm can claim any portion of the firm property as an individual exemption, nor has the partnership a right to exemptions as a separate entity.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 678; Dec. Dig. § 397.\*]

2. BANKRUPTCY (§ 189\*)—LIEN CREDITOR—INVALID LIEN—EXEMPTIONS.

Where a creditor of a bankrupt firm had a lien, which was invalid as to the firm's general creditors, but was valid as between the creditor

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

and the firm and its individual partners, such creditor was not entitled to enforce the same against exemptions; neither the partners nor the firm being entitled to exemptions under the South Dakota law.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 286-289, 291-295; Dec. Dig. § 189.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of I. S. Vickerman & Co., a copartnership, and Charles H. Vickerman and Irma S. Vickerman as individuals. On review of a decision of a referee allowing exemptions to the firm out of the partnership property, and directing a sale and proceeds applied to the satisfaction of the debt of an alleged lien creditor. Order affirmed so far as it provides for a sale of the property, and reversed so far as it provides for application to the debt of the lien creditor.

Philip & Waggoner, of Pierre, S. D., for bankrupt.  
Gaffy, Stephens & Fuller, of Pierre, S. D., for creditor.

ELLIOTT, District Judge. The trustee herein set apart to the said bankrupts, copartners, items aggregating \$750 and \$250, respectively, as selected from the stock of merchandise of the firm, and thereupon H. E. Dorothy, one of the creditors, filed exceptions thereto in writing, and subsequently such exceptions, as amended, were heard by the referee and submitted to him for his decision.

The record discloses, beyond controversy, that the bankrupts above named were partners, doing business as I. S. Vickerman & Co.; that on the 11th day of May, 1912, the trustee filed his report, setting aside exemptions to Charles H. Vickerman, a member of said firm, items aggregating \$750 and \$250, respectively, "as selected from the stock of merchandise described in the schedules." It further appears that the stock of merchandise described in the schedules was the property of the insolvent copartnership; and the referee also found, as a matter of law, in effect, that the said bankrupt was entitled to claim said exemptions, but that a certain contract had been executed by the bankrupts, with one of their creditors, H. E. Dorothy, constituting a purchase-money lien upon the stock (which had theretofore been held void as to creditors of the bankrupt by this court), and that by reason of said contract and lien, the referee holding the contract and lien valid as between the original parties to the contract, the said bankrupts lost their right as against said creditor to claim from the said stock of merchandise the said exemptions, and hold same, or any part thereof, and that the claim for exemption inured to the benefit of said creditor holding such lien, and thereupon it was ordered by the referee that the report of the trustee, setting apart exemptions of the bankrupts, be and the same was set aside, and the trustee was by said order directed to sell the articles so selected from the said stock of merchandise, and set apart by the trustee as exempt, and, after paying the costs of sale, to apply the balance left to the payment of the claim of H. E. Dorothy, said lien creditor. Exceptions to said order were filed by the petitioners herein.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[1] Upon the face of this record the first question that is presented for determination is: Has a partnership a right to exemptions under the statutes of South Dakota? This question was answered in the negative, in *Re Lentz et al.* (D. C.) 97 Fed. 486. The question was there settled for this jurisdiction, considering only the statutes of this state as they existed in A. D. 1899. The court said:

"In case of the bankruptcy of a partnership, neither member of the firm can claim any portion of the firm property to be set apart to him as his individual exemptions."

Counsel refer to section 363 of the Code of Civil Procedure of this state, as it is found in the Revised Code of 1903. This court, Hon. John E. Carland, then Judge thereof, in *Re Novak et al.*, 150 Fed. 602, considered this question, and it was there determined that:

"Subdivision 5, § 363, of the Code of Civil Procedure of 1903, does not give a partnership exemptions, nor did the language of said subdivision give such exemptions when used as a part of section 333 of the old Code of Civil Procedure. Comp. Laws 1887, § 5138. And when the Legislature re-enacted the language found in subdivision 5, and made it subdivision 5 of section 363 of the Code of Civil Procedure of 1903, simply changing the amount of exemptions, no partnership exemption was given."

Under this interpretation of the statutes of the state of South Dakota, this subdivision 5 of section 363 of the Code of Civil Procedure of 1903 is inoperative, for the reason *that it does not grant an exemption* to a partnership, and it has no law granting the partnership exemption upon which it can operate, for the reasons fully set forth in *Re Novak et al.*, *supra*. The question of the right of a partnership, or either member of a partnership, to exemptions under subdivision 5 of section 363 of the Code of Civil Procedure, Revised Code of 1903, was denied by this court in *Re Abrams*, 193 Fed. 271.

[2] This view of this statute eliminated entirely the rights of this lien creditor, H. E. Dorothy, because his right to the proceeds of the sale of said exemptions was dependent upon the claim upon his part that the bankrupt was entitled to exemptions, thus depriving general creditors of the benefit of sharing therein, and further insisting that the lien of said creditor upon said goods was, as between the parties to said contract, superior to the right of possession by the bankrupts as exempt property.

The contract under which said creditor, Dorothy, is claiming has heretofore in this action been held void as to the creditors of said bankrupts, and it follows that the trustee should have administered this estate, including the property set aside as exempt, and which is in controversy herein, for the benefit of all of the creditors of said bankrupts. The action of the trustee herein, setting aside exemptions to this partnership, or a member of this partnership, selected by one of the partners out of the partnership property, was erroneous.

The order of the referee, dated June 15, 1912, so far as it directed the trustee herein to sell the personal property claimed by the bankrupts, and theretofore set aside to them by said trustee, as their ex-

emptions, was correct, for the reason that said bankrupt, and *neither of them, was entitled to exemption out of the partnership property*, and to that extent, and for that reason, should be affirmed.

That portion of the order, however, that directed the application of the proceeds from said sale to the payment of the claim of said H. E. Dorothy, is erroneous. The referee should have directed that the proceeds of the sale of such property be applied to the payment of the claims against the said estate, as other assets of said estate.

Let an order be entered affirming the action of the referee in directing the trustee to sell the property claimed as exempt by said bankrupts.

Let said order further specifically direct that the net proceeds thereof be applied pro rata to the payment of the claims of all creditors.

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SATTLER v. SLONIMSKY et al.

(District Court, E. D. Pennsylvania. October 14, 1912.)

No. 1,850.

**BANKRUPTCY (§ 279\*)—ACTION BY TRUSTEE—CONSPIRACY TO HINDER AND DELAY CREDITORS.**

Under Bankr. Act July 1, 1898, c. 541, § 47a, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3439), as amended by Act Cong. June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500), giving to a bankrupt's trustee, as to all property not in the custody of the bankruptcy court, the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied, a creditor being entitled to sue in trespass on the case for conspiracy, prior to bankruptcy, to fraudulently secrete and transfer the debtor's property, such action may be maintained by the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 419-424; Dec. Dig. § 279.\*]

At Law. Action by one Sattler, as trustee in bankruptcy, against S. Slonimsky and others. On motion to dismiss. Denied.

Wessel & Aarons, of Philadelphia, Pa., for the motion.

Fox & Rothschild, of Philadelphia, Pa., opposed.

THOMPSON, District Judge. This action in trespass is brought to recover damages arising from an alleged unlawful conspiracy entered into by the defendants prior to the adjudication in bankruptcy to fraudulently and collusively transfer and conceal moneys of Harry Ruderman and Jacob Ruderman, the bankrupts, for the purpose of hindering and delaying their creditors.

Prior to the amendment of June 25, 1910, to section 47a of the Bankruptcy Act, such a suit could not have been maintained upon a cause of action arising prior to the adjudication in bankruptcy, because the rights of action which vested in the trustee upon his appoint-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ment were only such as were vested in the bankrupts prior to the adjudication. The amendment to section 47a provides, however, that the trustee "as to all property not in the custody of the bankruptcy court shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

That a creditor may bring an action of trespass on the case, based upon a conspiracy to fraudulently secrete and transfer the property of a defendant in an execution from the reach of the plaintiff, is well settled. *Tams v. Lewis*, Trustee, 42 Pa. 402; *Collins v. Cronin*, 117 Pa. 35, 11 Atl. 869. I think the present action is maintainable against all the parties to the alleged conspiracy.

The motion is therefore denied.

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TRUST CO. OF AMERICA v. CHICAGO, P. & ST. L. RY. CO. OF ILLINOIS.

RAMSEY et al. v. STEAD, Atty. Gen., et al.

(District Court, S. D. Illinois, S. D. September 27, 1912.)

1. COURTS (§ 264\*)—JURISDICTION OF FEDERAL COURTS—ANCILLARY PROCEEDINGS.

A petition, by railroad receivers appointed by a federal court in a foreclosure suit, for an injunction to restrain the enforcement of a state statute fixing fares or rates which affect the earnings of the road, on the ground that it is confiscatory and unconstitutional, is ancillary to the main suit and within the jurisdiction of the court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 801; Dec. Dig. § 264.\*]

2. CARRIERS (§ 12\*)—STATE REGULATION OF RATES—APPORTIONMENT OF EXPENSES.

The revenue train mileage basis, used by railroads in apportioning common operating expenses between their freight and passenger business, while concededly only an approximation, *held*, on the evidence, the most satisfactory for making such apportionment, for the purpose of determining the reasonableness of a state statute fixing passenger fares, and the revenue or gross earnings basis the most equitable for apportioning the expense of a road's interstate and intrastate passenger service, making a proper allowance for the greater cost of the intrastate business.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 11, 12; Dec. Dig. § 12.\*]

3. CARRIERS (§ 12\*)—STATE REGULATION OF RATES—REASONABLENESS.

The Illinois passenger rate act of May 27, 1907 (Laws VII. 1907, p. 746), fixing maximum fares of two cents per mile, *held* confiscatory and unconstitutional as applied to the Chicago, Peoria & St. Louis Railway Company of Illinois, on evidence that during its enforcement of such rates its net earnings on its intrastate passenger business were only about 1 per cent. on the value of the property employed therein, whereas it was entitled to earn 6 per cent.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 11, 12; Dec. Dig. § 12.\*]

In Equity. Suit by the Trust Company of America against the Chicago, Peoria & St. Louis Railway Company of Illinois. On intervening petition of John P. Ramsey and H. M. Merriam, receivers of defendant, against W. H. Stead, Attorney General of Illinois, and others. On final hearing on exceptions to master's report. Exceptions overruled, and decree for petitioners.

Prior to the 1st of July, 1909, the Trust Company of America filed a bill against the Chicago, Peoria & St. Louis Railway Company of Illinois, to foreclose a mortgage upon a railroad. John P. Ramsey and H. M. Merriam were appointed receivers of the railway by order of July 1, 1909. They operated the road until October 13, 1909, when they filed their intervening petition against W. H. Stead, Attorney General of Illinois, and the various state's attorneys for the counties through which the road runs, for the purpose of testing the validity of the maximum railway rate act approved May 27, 1907, fixing the maximum passenger rate at two cents per mile. On January 3, 1910, the Attorney General and the other respondents demurred to the intervening petition of the receivers upon several grounds, among others, that it appeared by the petition and the bill that the subject-matter of the petition was wholly unrelated to the bill, and that an answer to the intervening petition would raise a new and independent issue in the foreclosure suit, wholly foreign to the purpose and subject-matter of the bill, and wholly unrelated to the issue raised by the bill and answer. The court overruled the demurrer.

On October 13, 1909, the receivers moved for a preliminary injunction according to the prayer of the intervening petition, and on the same day the court issued a preliminary injunction, restraining the respondents from enforcing or attempting to enforce the rates provided for in the Illinois maximum rate act referred to, and from enforcing or attempting to enforce, through any agency provided in the statutes of Illinois, or otherwise, any of the penalties prescribed by the statutes of the state for failure on the part of the petitioners to observe any of the provisions of the maximum rate act, and from commencing or prosecuting any suit or action for the failure of the petitioners to observe the rates provided for in said act. It was further provided in the order that the receivers, at the time of the sale of each passenger ticket, should deliver to each passenger a coupon, stating upon its face the amount of the fare received from the passenger in excess of two cents per mile, and that the holders of coupons have a first lien upon all the property of the railway company to secure the payment of all costs and damages sustained by them by the reason of the issuing of the preliminary injunction, if it should be finally adjudged that the injunction was wrongfully issued.

On January 25, 1910, the Attorney General and his co-respondents answered the intervening petition, again raising the question of jurisdiction and putting the merits of the petition in issue. Issue was joined March 9, 1910, by the filing of the general replication by the receivers. Thereupon the case was referred to Walter McClelland Allen, as master in chancery, to hear the testimony produced by the parties and report his conclusions of fact and law thereon. The evidence was taken before the master, who filed his report July 19, 1911, as follows:

"Pursuant to an order of reference heretofore entered in the above-entitled cause, whereby said intervening petition was referred to me, as one of the masters in chancery of this court, to hear the testimony produced by the parties thereto, and report conclusions of fact and law thereon, I respectfully submit the following report, and herewith return a typewritten transcript of the testimony as a part thereof.

#### "The Issues.

"The petitioners, who were appointed receivers on the 1st day of July, 1909, of the property of the Chicago, Peoria & St. Louis Railway Company of Illinois, an Illinois corporation, in this cause, on a bill to foreclose a mort-

gage upon the railway property, attack the validity of the act of the General Assembly of the state of Illinois passed in the year 1907 (Laws 1907, p. 476), commonly known as the 'Two Cent Rate Act,' as a deprivation of due process of law, contrary to the provisions of section 1 of the fourteenth amendment to the Constitution of the United States, as impairing the obligation of the contract implied in the charter of the company granted it by the state, in violation of section 10 of article 1 of the Constitution of the United States, and aver that the rate of charges prescribed by said act is unreasonable, unjust, oppressive, discriminative, confiscatory, and void.

"Petitioners claim that from the 1st day of July, 1907, until the 1st day of July, 1909, the railway was operated in compliance with the provisions of said act and with as great economy as was compatible with efficient service to the public and proper maintenance and preservation of its property, and that such operation resulted for the first year in an actual deficit of \$8,032.41 in the earnings derived from the intrastate passenger business within the state of Illinois, and for the second year in a surplus of only \$794.80; the total intrastate passenger earnings for said period amounting to \$510,230.27, while the operating expenses solely incident to said business, including no fixed charges, except taxes, amounted to \$517,467.88.

"Upon the presentation of their petition an order for a preliminary injunction was granted, restraining the respondents, the Attorney General and the state's attorneys of the various counties through which the railroad's right of way extends, from enforcing the rates prescribed by said act and penalties provided for violation thereof, and directing the petitioners, upon the sale of passenger tickets, to issue to each purchaser a coupon, secured by first lien upon the railway property, for the amount paid in excess of two cents a mile, the coupons to be payable in the event that the injunction was wrongfully issued.

"Demurrer to the petition was overruled, and on March 9, 1910, answer was filed, in substance denying the allegations of the bill and challenging the methods used in the division of common expenses between the freight and passenger business and of the earnings and expenses between interstate and intrastate passenger traffic.

#### "Controverted Questions of Fact.

"The ultimate questions of fact in controversy, upon which the right of petitioners to a permanent injunction depends, are:

"(1) The proper and equitable division of expenses common to both freight and passenger traffic, which cannot be directly allocated to either, so that each branch of the service shall bear its just share of the common expenses.

"(2) A proper and equitable division of earnings and expenses between intrastate and interstate passenger business necessary to the ascertainment of earnings and expenses of the intrastate business.

"(3) Proper apportionment of the value of the property as a whole to each branch of the service, in order to ascertain the value of the investment in the intrastate passenger service upon which a fair return should be computed.

"(4) The value of the use to the public of the intrastate passenger service rendered by petitioners.

#### "Division of Common Expenses.

"The basis of division of most of the common operating expenses adopted by petitioners in order to arrive at a just apportionment between the freight and passenger service is that known as 'revenue train mileage.' It is not contended that this basis is mathematically accurate, but that it more nearly approximates a division of expenses just to both branches of the service than any other basis yet devised, that the existence of so many indeterminate factors renders such accuracy impossible, and that in the present state of the development of railroad accounting this basis represents the substantially unanimous judgment of the railroad world. It is a rule, also, which was prescribed by the Interstate Commerce Commission at a time when it

required a division of these expenses, and as promulgated in its form of report for the year 1893 is thus stated: 'Expenses which are not naturally chargeable to either traffic should be apportioned on a mileage basis, making the division between the passenger and freight traffic in the proportion which the passenger and freight train mileage bears to the total mileage of trains earning revenue.'

"Mr. Robert I. Farrington, vice president of the Great Northern Railroad, who has spent 27 years in railroad service, and was a member of the committee appointed by the Association of American Railway Accounting Officers to confer with the Interstate Commerce Commission with reference to a uniform system of railway accounting, which the Commission was authorized by the Hepburn bill, passed in 1906 (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1911, p. 1288]), to make, in explanation of the train mileage basis, likens the railroad business to that of a manufacturing institution, whose product is trains and train miles. Its entire business is devoted to running trains, getting the business to handle in trains, and taking care of it after it has been handled in trains. The train, he says, is the only unit that applies equally to the expense and the revenue. Other witnesses of large railroad experience, who have given much thought to the question, support this basis of division. These witnesses include W. D. Taylor, chief engineer of four railroads, who has also occupied the chair of Civil Engineering in the University of Louisiana for seven years, of Railroad Engineering in the University of Wisconsin for four years, and has devoted half his life since maturity to practical work; Chester J. McPherson, assistant to the general manager of the Missouri Pacific Railroad; W. B. Storey, vice president of the Santa Fe Railroad; W. B. Doddridge, who has been general superintendent of the Union Pacific Railroad; John Hurst, general accountant of the Pennsylvania Line; F. P. Johnson, statistician of the Missouri Pacific; R. M. Huddleston, chief auditor of the New York Central; John P. Ramsey, one of the petitioners; H. W. Berger, auditor of the Chicago, Peoria & St. Louis Railway; and M. P. Blauvelt, controller of the Illinois Central Railway.

"On behalf of the respondents, Conway W. Hillman has testified against this basis of division of common expenses. Mr. Hillman entered railroad service in 1876 as a telegraph operator for the Cumberland Valley Railroad, and served that road in the capacities of agent, operator, scales clerk, yard clerk, assistant dispatcher, and finally as dispatcher, until 1881, when he took a position with the Northern Pacific Railroad in the treasurer's office, and became assistant treasurer in the year 1888. In 1896 he organized the accounting department of the Metropolitan West Side Elevated Railway Company of Chicago. In 1903 he left the service of the company and took employment with the Chicago, Rock Island & Pacific Railroad in the controller's office for a short time, and afterwards as chief clerk in its insurance department. This is the extent of his experience in practical railroad operation. He has since followed the business of a public accountant. For the past three years or more he has devoted almost his entire time to railroad rate cases, and has been employed as an expert on behalf of various states and their Railroad Commissions, where such litigation has been pending. The division of common expenses did not become a practical question with him until after he was employed as an expert in rate litigation. In all, he has been employed in 10 or 12 of such cases. In the present case he has had access to the railway company's books and records, and his assistants were engaged for three months or thereabouts in the work of compiling from these records the data from which he testifies. While petitioners have presented the results of operations for two years, respondents have taken only the year ending June 30, 1909, in which the earnings were considerably larger than in previous years. Mr. Hillman regards revenue train mileage as only an indicative factor, and presents his own formulæ in Respondents' Exhibit 7 as a more accurate method of division. By the application of these formulæ, he arrives at the figures shown in Respondents' Corrected Exhibit 2, which shows a total of operating expenses incurred for the year ending June 30, 1909, of \$205,476.29 in the intrastate passenger



business, while the application of the formulæ used by petitioners, introduced in evidence as Exhibit 2, results in a total of operating expenses chargeable to intrastate passenger business amounting to \$233,943.65, exclusive of taxes, rental, and hire of equipment—a difference in results of over \$28,000, arising from the difference in method of apportioning common expenses.

"The Hillman method is set forth and explained in detail in his testimony, and lengthy cross-examination was had. The subject-matter is one of expert railroad accounting, upon which the master must form his conclusions according to the weight of evidence drawn from expert sources. The petitioners have produced the testimony of men of high standing and large experience in railroad operation and accounting in support of their basis of division. Mr. Hillman stands alone in opposition to their views. The revenue train mile basis was adopted and came into general use by railroads without reference to rate litigation, but for the purpose of determining the cost and profit of operation for the railroads' own corporate purposes, and the testimony of the witnesses for petitioners is free from the common criticism applied to expert testimony. Railroads have both the freight and passenger rate questions to meet. Unless, therefore, the Hillman method, as explained by its author, is of itself so persuasive of its merits as to overcome this general judgment of men specially equipped in this particular field, there can be no doubt that the weight of the testimony is on the side of the petitioners.

"The Interstate Commerce Classification of accounts has been followed in this case, and is set forth in the exhibits. There are in all five blocks in these Accounts; (1) Maintenance of Way and Structure; (2) Maintenance of Equipment; (3) Traffic Expenses; (4) Transportation Expenses; (5) General Expenses—and a total of 108 different accounts.

"The criticism made of the revenue train mileage basis is that it is arbitrary, involves many assumptions, does not reflect the use of the facilities, the upkeep of which causes the expense, and is at best a rough approximation. This criticism involves the claim, for the Hillman method, of elimination of these objections, or at least of such a substantial reduction of them as to entitle it to be substituted as producing a more reliable result. Mr. Hillman himself claims for his methods of division practical accuracy.

"Reference to some only of the items of common expense will be sufficient for the purposes of this report.

"Account No. 2 in the first block of accounts (Maintenance of Way and Structure—Ballast):

"Petitioners for the year ending June 30, 1909, charge to passenger expense \$852.09 (Exhibit 8) upon the revenue train mileage basis. Mr. Hillman charges only \$424.68 out of a total freight and passenger expense of \$1,860.76. He first divides the expense into two parts—that caused by wear, which he estimates at 10 per cent., following a holding of the Wisconsin Railroad Commission in *Buell v. Chicago, Milwaukee & St. Paul Railway Company*; and that caused by weather, which he estimates at 90 per cent. He then divides the 10 per cent. assumed to be due to wear between freight and passenger upon the basis of train weights passing over the track, and the remaining 90 per cent. upon the basis and in the proportions of earnings freight and passenger. In arriving at this result he assumes:

"(1) That the percentage attributed to wear and weather are correct, or substantially so; there being no available statistics upon the question.

"(2) That the extra speed of a passenger train equalizes the lower adjustment of the freight train in destructive effect upon the ballast.

"(3) That the kind of ballast used makes no difference in the percentage.

"(4) That the freight train weights upon the Chicago, Peoria & St. Louis Railroad are obtained with substantial correctness by multiplying the number of freight car miles by the average weight of a freight car in use generally on railroads, to this adding the ton miles of the live freight, and to this the weight of the engine and tender, multiplied by the engine miles, the weight of the engine being figured upon a general average basis; that the passenger train weights are obtained with substantial accuracy in a similar

manner, allowing 150 pounds per passenger and the same weight of express, mail, and baggage, making a total of 300 pounds as the weight of a passenger, express, mail, and baggage.

"All these assumptions are controverted, and, obviously, in the absence of statistics upon the general questions and data relating to the particular railway, the conclusion drawn and computations made based upon them are unreliable, and represent merely an individual opinion.

"The only reason assigned for dividing 90 per cent. of this expense in proportion to freight and passenger earnings is that it is an expense the unit of which does not exist in the operation of the road, and that the earnings are the source from which the expense must be paid.

"There has been much discussion in the briefs of counsel as to the proper factor to be used in dividing the common expense due to wear of ballast, ties, rails, roadway, and tracks, and some other accounts. It is conceded, as it obviously must be, that the weight of trains has an effect, and that this effect cannot be ignored. Respondents say that the train mileage basis ignores train weights entirely, while petitioners deny that this is so. The true situation is that while no particular percentage of the expense is assigned to weight, nor is it used as a component factor of any formula, yet its consideration is involved as one of the elements entering into the train mileage basis. Mr. Taylor's opinion is that weight alone is not a fair factor, because a minor one. Mr. Blauvelt says, in testifying in support of the train mile basis, that it takes into consideration all the factors.

"Mr. Storey did say that the train mile basis, without an assumption that every train was of a certain weight, would be 'a poor measure of relative deterioration'; but it is clear, from his testimony as a whole, that what he meant was that it was fair to assume that each train had the same destructive influence upon the track—weight, speed, and other elements considered. 'You have got,' he says, 'to take all kinds of elements, and then in the end form a judgment alone. There is no absolute measure.'

"The train weight basis, as applied by Hillman, ignores some important factors. One of these is the number of points of contact where the weight rests; another, the fact that the locomotive does as much or more damage to the track than the following train; another, that it is necessary to keep the track in a much better condition, because of the higher speed of passenger trains, than would be necessary if the track were used for freight trains only, a fact which is illustrated, in actual operation, where two tracks are maintained, one for passenger and the other for freight service.

"Account No. 6, Roadway and Track, for the year ending June 30, 1909, amounts as computed on the train mileage basis used by petitioners to \$30,363.86 (Exhibit 8), while the Hillman method produces only \$15,494.75 (Respondents' Corrected Exhibit 2).

"In the division of this account between wear and weather, Hillman takes the various wear percentages he has already used for the prior accounts: Nos. (2) Ballast, 10 per cent. wear, 90 per cent. weather; (3) Ties, 17.5 per cent. wear, 82.5 per cent. weather; (4) Rails, 90 per cent. wear, 10 per cent. weather; (5) Other Track Material, 90 per cent. wear, 10 per cent. weather—together those afterwards used for the following accounts: Nos. (8) Bridges, Trestles, and Culverts, 15 per cent. wear, 85 per cent. weather; (10) Grade Crossings, Fences, Cattle Guards, and Signs, 25 per cent. wear, 75 per cent. weather—and applies each of these percentages, respectively, to the amount in dollars and cents of the particular account, adds together into one total sum the various sums thus obtained, representing wear, and then applies the percentage which the amount produced is of the total amount representing both wear and weather, to the sum total of common expenses in this account. Having thus obtained his percentages for division between wear and weather, he then divides the weather proportion on the basis of earnings and the wear proportion on the basis of train weights.

"All of the assumptions involved in the accounts 2, 3, 4, 5, 8, and 10 are necessarily involved in this division, and in addition the process is by the use of averages. This division further illustrates the constantly recurring

effect of assumptions indulged with respect to one account entering into the others and the intermingling in the result produced of unrelated items of expense.

"Account No. 13, Telegraph and Telephone Lines:

"Hillman's division of this account is one half on the revenue train mile basis and the other half upon the car mile basis. This division is admitted to be without data to support it, and is purely arbitrary.

"Account No. 22 on Petitioners' Exhibit 8 (No. 18 on Respondents' Corrected Exhibit 2)—Maintaining Joint Track Yards and Other Facilities:

"Petitioners' computation for the year ending June 30, 1909, shows total expense chargeable to passenger traffic \$12,731.35, while Hillman shows only \$8,335.17, which according to the formulæ shown in Respondents' Corrected Exhibit 7 he professes to have allocated. Of course, it is manifest and agreed by the parties that allocation—meaning thereby the direct charging of an expense caused by one branch of the service to that branch—should always, where possible, be adopted, and, if Mr. Hillman had done this, there could be no question of the propriety of his treatment of this account. He says that he gave particular attention to this account, that his analysis is especially his own work, and that he personally examined all the vouchers. The terminals are at six places: (1) Springfield; (2) between Peoria and Pekin, including the terminals at both cities; (3) St. Louis; (4) Ridgely and the tower at Alton; (5) Jacksonville; (6) Madison. Common expenses at Springfield he professes to divide partly upon the basis of other maintenance accounts and partly upon the basis of train miles including switching. Peoria and Pekin common terminal expenses he professes to divide upon a wheelage basis. St. Louis and Madison expenses are allocated to each branch. Ridgely and Jacksonville common expenses he divides upon the revenue train mile basis.

"Cross-examination developed many errors in the analysis of the various amounts used by Hillman, and it is conceded by respondents' counsel that he was in error in basing his division of Peoria and Pekin Union bills on the switching bills, instead of the joint mileage statement of engines and cars of the Chicago, Peoria & St. Louis Railway passing over the Peoria & Pekin Union tracks from Pekin to Peoria. It is said, however, that this error only makes a difference of \$894.61. He divided \$3,295.34, part of this account accruing at Springfield, on the train mile basis, upon the assumption that the expense was mainly for the upkeep of crossings and crossing towers, when in fact it included \$1,399.45 paid for the maintenance of the Madison street track and \$598.63 paid for the upkeep of the passenger station. It is clear that the results arrived at are unreliable, and that neither in process nor results does the division made represent an 'allocation,' in the sense in which that term has been used in this proceeding.

"Passing for further illustration to the second block of accounts—Maintenance of Equipment:

"Account 24, Superintendence, is divided by Hillman, as is the same account under Maintenance of Way and Structures, No. 1, and under Transportation Expenses, No. 61, upon the basis of all other accounts in the block, and therefore is affected by every valid criticism of these other accounts. This is true of a number of accounts, and of the entire fifth block of Accounts, General Expenses, 106 to 116, which are divided upon the basis of all the preceding division of accounts. The process of separate analysis of each item of common expense, instead of using one basis for many, appears upon the surface to have merit; but when the process is set forth in detail, and applied to the various items, the claim of superiority turns out to be more specious than real. Arbitraries, presumptions, opinions, averages, and approximations have not been eliminated, and certainty substituted in their place; but, instead of one yardstick, admittedly inaccurate, but in general use as practically satisfactory, there are many yardsticks, also inaccurate, and without other sanction than an individual opinion.

"Sufficient reference has been made to particular items for the purpose of showing the general effect of the application of the Hillman methods to the entire list of common expenses, and the final question is whether his un-

supported individual opinion is to be accepted, or the judgment of many men of larger experience.

"The same sort of testimony was given in the Minnesota case (Shepard v. Northern Pacific Railway [C. C.] 184 Fed. 765), where the master, and later, upon exceptions, the court, rejected the methods advocated by Hillman, and adopted the train mileage basis, which was also the basis used in the Missouri and Oklahoma rate cases. The weight of the testimony upon this question I find to be with the petitioners.

#### "Division of Cost Between State and Interstate Passenger Traffic.

"Petitioners' division of cost between state and interstate passenger traffic is upon the revenue basis, and is set forth for the years ending June 30, 1908, and June 30, 1909, in Exhibits 11 and 12. The computation includes also an extra cost of 15 per cent. applied to operating expenses, only, of state traffic over interstate.

"Respondents' method of division is set forth in Exhibit 7, and is not expressed in a single formula, but proceeds according to Mr. Hillman's individual view throughout the list of accounts.

"As in the case of the division of common expenses between freight and passenger traffic, many witnesses of experience have testified in support of the method applied by petitioners. That there is an excess cost of carrying state passengers over interstate is clear. The evidence would justify a larger percentage than that used by petitioners to represent it. The cause of this excess cost arises from the shorter haul of state passenger, the more frequent starting and stopping of trains, and consequent wear upon track, roadway, and equipment, greater consumption of fuel, greater use of terminal facilities, more frequent exposure of person and baggage to injury, the sale of more tickets, and the checking of baggage, the printing of more tickets, and greater accounting expense.

"The Chicago, Peoria & St. Louis has 244 miles of track, and the average length of haul of a state passenger for the year ending June 30, 1909, was 18.72 miles; of an interstate passenger, 50.26 miles.

"Because the apportionment of expense contended for by respondents is supported only by the individual judgment of Mr. Hillman, while the apportionment made by petitioners is supported by the judgment of many witnesses, who have had large experience in practical railroad operation, and because, further, the Hillman method is not of itself, to the mind of the master, persuasive of its superiority, and because cases thus far adjudicated have sanctioned the method used by petitioners, it is adopted, for the purposes of this report, as being supported by the weight of the evidence—not as being mathematically accurate, but as producing a more equitable result than the more detailed and complicated method employed by Hillman.

#### "Division of Property Valuation Between Freight and Passenger Business.

"After considerable testimony had been taken on behalf of petitioners as to the value of the railway property, it was stipulated that for the purposes of this case the value of the property used by it during the two years ending July 1, 1909, and thereafter by the receivers, for the conduct of its business as a common carrier of freight and passengers within the state of Illinois, was and still is \$5,500,000. Petitioners divide this valuation upon the basis of gross revenue, using the operations for the two years ending June 30, 1909. This results in a valuation of \$927,904.98 for the property used in state passenger business. For respondents, Mr. Hillman professes to divide the total property upon the expense basis, whereby he arrives at a valuation of \$814,011.71 for the same property, assigning as his reason for using this basis that, in computing the expenses between freight and passenger, he had employed the factors which show the use of the property. The evidence does not warrant the statement that the factor which expresses the use has been applied in all cases. None of the expenses caused by weather have been so computed. In the division of Maintenance and Way and Structures Account much more of the expenses is assigned to weather than to wear, and such expense is extraneous to use. Nor does the expense basis appear, even though based on use, to be a more equitable one than the gross earnings basis. There

is, of course, no accurate basis for making this division, and the earnings basis is open to objection. Nevertheless, for the reasons given in the Minnesota case, where the court says: 'Because these bases (referring to the ton mile, passenger mile, car mile, engine mile, passenger car mile, and passenger engine mile) ignore the difference in the classes of freight carried and in the distances they are hauled, because the apportionment of the value of railroad property on the basis of the gross earnings of the classes of business which disclose approximately the values of their uses of it gives effect to these material differences, appeals more persuasively to the reason and produces results more equitable than any other basis suggested, and because this basis has commended itself to the judgment of and has been adopted by the courts in like cases, the master was justified in following their decisions'—the earnings basis and valuation made thereon are adopted.

#### "Value of Use to Public.

"Counsel for respondents contend that there is no proof that a higher rate than two cents a mile will be fair to the public. The rule is as stated in *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, and quoted in the brief of counsel: 'What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth.'

"Ordinarily cost of production with a reasonable profit added determines the value of the product to the purchaser. This test of value assumes normal conditions attending the production. In the absence of proof of special circumstances, such as those suggested in *Reagan v. Trust Co.*, 154 U. S. 413, 14 Sup. Ct. 1060, 38 L. Ed. 1028, waste in the management of the road, enormous salaries, unjust discrimination as between individual shippers, construction at a time when material and labor were at the highest price, or in localities where there is not sufficient business to sustain a road, proof of the cost of production makes at least a prima facie case.

"Counsel for respondents upon this branch of the case argue that the Chicago, Peoria & St. Louis Railway was unwisely built, and invoke, further, the doctrine laid down in *Covington v. Sanford*, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560: 'If the establishment of new lines of transportation would cause a diminution of the number of those who need to use the road, \* \* \* that is not in itself a sufficient reason why the corporation operating the road should be allowed to maintain rates that would be unjust to those who must and do use the property.'

"The argument of counsel is based upon the present existence of the competitive lines of the Chicago & Alton and Illinois Traction systems, the latter an electric interurban of recent construction. Counsel use five important terminal stations for comparison with the Chicago & Alton Railroad, showing a considerably shorter mileage than by the Chicago, Peoria & St. Louis Railway. On the other hand, counsel for petitioners point to other important stations, where the comparison is inapplicable, and where their road is the direct line; and, besides, counsel say that there is no evidence in this case that two cents a mile is compensatory to the Chicago & Alton Railroad. A finding, upon evidence of this character, that a rate in excess of two cents a mile is unjust to the public would lack substantial support and would be merely speculative. Density of population is one of the greatest factors in determining the reasonableness of a rate. Comparisons between rates are of little value, unless all the elements that enter into the problem are presented. *Smyth v. Ames*, supra. For a like reason, the comparative table presented in Respondents' Exhibit 6 is not regarded as of value.

"From the evidence in this case it appears that, to be compensatory, a maximum rate of three cents a mile is necessary. It seems to the master that the rights of the public at noncompetitive points upon this railroad would be adequately protected by conditioning the grant of relief, so that a rate of three cents should be the maximum chargeable between any stations on its line within the state.

#### "Revenues.

"The amount of intrastate passenger revenue, as computed by the accountant for the petitioners for the year ending June 30, 1909, is \$261,339.36, while the computation made by the accountant for respondents is \$261,145.62. The difference is trifling, and does not affect the final result sufficiently to merit discussion.

#### "Findings.

"From the evidence, therefore, and in accordance with the views herein expressed, I find:

"(I) That the total value of the Chicago, Peoria & St. Louis Railway property used during the two years ending July 1, 1909, and thereafter by the receivers, for the conduct of its business as a common carrier of freight and passengers within the state of Illinois, is the sum of \$5,500,000.

"(II) That the most equitable basis of division of this total valuation between the freight and passenger traffic is that of gross earnings, and that upon this basis the value of said property used during the same period for the transportation of passengers within the state of Illinois is the sum of \$927,994.98.

"(III) That the most equitable bases of division of expenses common to the freight and passenger traffic which cannot be allocated directly to either are those set forth in Exhibit 2, whereby most of these expenses (reference being had to the exhibit) are divided upon the basis of revenue train mileage.

"(IV) That 6 per cent. per annum is a reasonable net return upon the value of the railway property used in the transportation of passengers within the state of Illinois. The net annual income upon this basis would be the sum of \$55,679.69.

"(V) That the expenses of the intrastate passenger business for the year ending June 30, 1908, amounted to \$256,923.32, while revenue from the same source amounted to \$248,890.91, leaving a deficit of \$8,032.31 in the net earnings; that the expenses of the intrastate passenger business for the year ending June 30, 1909, amounted to the sum of \$260,544.56, while the revenue from the same source amounted to \$261,339.36, resulting in a surplus of net earnings amounting to \$794.80. (Exhibits 3 and 4.)

"(VI) That the effect of the operation of the maximum rate law passed by the Legislature of the state of Illinois in the year 1907 is to deprive petitioners of a reasonable return upon the value of the Chicago, Peoria & St. Louis Railway property devoted to passenger traffic within the state of Illinois, and that a maximum rate of three cents a mile, chargeable to passengers using its line within the state, would not be unjust to the public.

#### "Conclusion.

"From the foregoing findings I conclude:

"That the act of the Legislature of the state of Illinois passed in the year 1907 entitled 'An act to establish and regulate the maximum rate of charges for the transportation of passengers by corporations or companies operating or controlling railroads in part or in whole in this state and to provide penalties for the violation of the provisions thereof and repealing all acts or parts of acts in conflict therewith' is confiscatory and operates to deprive petitioners of the power to earn reasonable compensation for the services rendered in the carriage of passengers, without due process of law and to deny them the equal protection of the laws, in violation of the Constitution of the United States, and that said act, so far as petitioners are concerned, is void and of no effect, and petitioners are entitled to a decree as prayed in their intervening petition.

"It is recommended, however, that such decree be so conditioned that a rate of three cents a mile shall be the maximum chargeable to intrastate passengers on the line of said railway.

"Respectfully submitted,

Walter McClellan Allen,  
"Master in Chancery."

On August 17, 1911, the Attorney General and his co-respondents filed exceptions to the report and findings of the master, substantially covering the merits of the report. On November 27, 1911, the cause came on for final hearing.

Under section 17 of act of Congress of June 18, 1910, 36 Stat. 557, c. 309, Judicial Code, § 266 (U. S. Comp. St. Supp. 1911, p. 236) providing that an interlocutory injunction, suspending or restraining the enforcement, operation, or execution of any state statute, by restraining the acts of any state officers in the enforcement or execution of such statute, shall be granted only by three federal judges, the two additional judges were called in the final hearing; the preliminary injunction having been granted by a single judge prior to the passage of the act of 1910.

Wilson, Warren & Child, of Springfield, Ill., for receivers.

W. H. Stead, Atty. Gen., and Thomas E. Dempcy, Asst. Atty. Gen. (June C. Smith, of Centralia, Ill., of counsel), for defendants.

Before BAKER, Circuit Judge, and HUMPHREY and SANBORN, District Judges.

SANBORN, District Judge (after stating the facts as above). [1] A technical question of jurisdiction was raised in the former Circuit Court by demurrer, and later by answer to the effect that the receivers' injunction petition was not ancillary to the foreclosure suit, because the subject-matter of the petition is wholly unrelated to the subject-matter of the bill. The demurrer was overruled by the Circuit Court, upon the authority of *Ex parte Young*, 209 U. S. 123, 144, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764, holding that a federal question is raised in suits like this, and *Compton v. Jessup*, 68 Fed. 263, 15 C. C. A. 397, *Blake v. Pine Mountain Coal Co.*, 76 Fed. 624, 22 C. C. A. 430, and like cases, holding that petitions similar to this are ancillary to the main suit, and hence within the jurisdiction. We are entirely satisfied that the jurisdiction was properly sustained.

The Chicago, Peoria & St. Louis Railroad was operated at a loss during the fiscal years of 1908 and 1909, and on June 30, 1909, the total deficit was \$202,071.60. A foreclosure suit was at once begun, and this intervening petition was filed in that suit. Compliance with the two-cent maximum passenger rate act of Illinois by the road was in part responsible for the deficit. Receivers were appointed, who operated the road under the same conditions up to October 13, 1909, when they filed this petition, alleging that the maximum passenger rate act, as applied to this railroad, was confiscatory, and constituted a taking of its property without due process of law. A temporary injunction was issued, prohibiting the enforcement of the statute as to this road, and the receivers thereupon put in force a three-cent rate, with one-cent coupons, as provided in the injunctive order.

The question now before us is whether the evidence shows the Illinois rate to be confiscatory, as applied to this particular railroad, in respect to passenger returns.

[2] Earnings from the state passenger business, including mail, express, and similar returns from the running of passenger trains, are readily found. Expenses directly chargeable to such business may also be figured with reasonable certainty. But the "common expenses," so called, like maintenance of the line, the equipment,

traffic, and general expenses, and their proper distribution, between freight and passenger business, present much difficulty. The master, following the great weight of the expert testimony, as well as the decisions of the courts, has adopted and applied what is known as the "revenue train mile" basis in the distribution of these common expenses between the freight business, state and interstate, and the passenger. On such basis the road was not earning a fair return from its state passenger business up to the time of the receivership, and the master concludes that the injunction should be made permanent, and the receivers allowed to charge three cents a mile for passenger service.

The revenue train mile basis of apportionment, as between freight business and passenger business, is applied to expenses not directly apportionable (called "common expenses") by the following method: The ninth annual report of the company shows the train mileage for 1909 of passenger trains, 446,540; freight trains, 532,962; mixed trains, 790; and special trains, 338. All but the last were revenue producing trains. Excluding the special trains, whose character is not shown, the total train mileage was 980,292. Of the mixed trains, one-fourth of the mileage was allowed to passenger service; the balance, to freight. The total passenger miles would therefore be 446,737.5; and the freight, 533,554.5—total, 980,292; and the passenger percentage 45.57. The year 1909 is taken, instead of the year 1908 (June 30 to June 30), because showing a nearer recovery from the panic of 1907, and thus being closer to normal conditions. Thus, taking the common expense of superintendence for the year, which was \$7,891.59, the passenger proportion would be \$3,596.19. The master's figures for this item are \$3,610.50, a difference of \$4.31. This method of apportionment was applied to all the common expenses, in order to ascertain what part were passenger expenses, with the modifications referred to in Exhibit 2, shown on another page.

Next it was necessary to find the proportion of state and interstate passenger expense. This was done by finding the state and interstate revenues. It was found that the state passenger returns for 1909 were \$261,339.26; interstate, \$48,217.58; mail, express, and miscellaneous income earned by passenger trains, undivided as between state and interstate, \$54,974.46—being a total of \$364,531.40. By applying the revenue train mile basis to all common expenses for 1909, and allocating all direct passenger expenses, it was found that both these kinds of expense, including the proper share of taxes and hire of equipment, amounted to \$350,914.45, which was the expense of producing the \$364,531.40; also that the state passenger expense was \$326,326.75. It was then found that the state passenger revenue represented 71.69 per cent. of the total passenger revenue; the interstate, 13.23 per cent.; and express, mail, and miscellaneous, 15.08 per cent. It was also shown by testimony for the receivers that it costs about 15 per cent. more to handle the state passenger business than it does the interstate, because of the shorter haul of state passengers and other reasons. By applying the additional 15 per centum to the operating expense, it was found that 2.75 per cent. of such



expense, or \$8,973.99, should be added to the state passenger expense; the final result being that the state passenger business for 1909 earned a net return of \$794.80, or less than 1 per centum. This method is approved in *Chicago, etc., Co. v. Tompkins*, 176 U. S. 179, 20 Sup. Ct. 336, 44 L. Ed. 417, *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, and *Louisville & N. R. Co. v. Railroad Commission* (D C.) 196 Fed. 800, 824.

[3] In order to find what the road was fairly entitled to earn on its passenger business in 1909, the total value of the railroad in that year was found to be \$5,510,961. These figures were agreed to by both sides, and are supported by the testimony. To obtain the proportion of the passenger value, state, interstate, and mail and express, the total revenue of \$1,554,600.37 was taken, and the total passenger revenue found to be 23.45 per cent. of this, making the valuation of the passenger proportion \$1,292,329.35. 71.69 per cent. of this, or \$926,464.46, represents the state passenger valuation. This should fairly earn 6 per cent., or \$55,587.87. On this basis, the earnings for 1909 were about \$55,000 too small. That this is the proper rule, see *Smyth v. Ames*, supra, and *Missouri, K. & T. R. Co. v. Love* (C. C.) 177 Fed. 493 (the Oklahoma case).

The plan or formula of division or allocation of expense for each fiscal year adopted by the master, and recommended by the testimony of substantially all the witnesses except Mr. Hillman, is as follows:

A. To the revenue freight train mileage 75 per cent. of the mixed train mileage is added, and to the revenue passenger train mileage 25 per cent. of the mixed train mileage is added, and the common expenses are apportioned on the percentage thus obtained. The mixed train mileage is treated in this manner, wherever revenue train mileage is used in apportioning common expenses.

B. Expenses incurred solely in the passenger business were charged to passenger, and expenses which could not be separated between freight and passenger, but were common to both, were divided in the ratio which the passenger revenue train mileage bore to the total revenue train mileage.

C. When the expense was upon a locomotive engaged in straight passenger service, the expense was charged to passenger. When the expense was upon a locomotive which had made both freight and passenger miles during the month, there was charged for each passenger mile made by that locomotive the average cost per mile of like expense on locomotives in straight passenger service.

D. These are expenses which were incurred solely in the passenger service.

E. Expenses incurred solely in the passenger business were charged to passenger, and expenses which could not be separated between freight and passenger, but were common to both, were divided in the ratio which the total passenger revenues bore to the total freight and passenger revenues.

F. Expenses incurred for a particular yard were charged to passenger in the ratio which the number of passenger cars bore to the total freight and passenger cars there handled. Expenses of a gen-

eral character incurred in all yards were charged to passenger in the ratio which the total number of passenger cars bore to the total number of freight and passenger cars handled in all yards.

G. Where the information obtainable showed wrecks to be passenger, the expense was charged to passenger; in months in which passenger wrecks occurred, all expense which could not be located directly was charged to passenger in the ratio which the passenger revenue train mileage bore to the total revenue train mileage.

Applying this formula to the classification of expense accounts in use on most railroads, recommended by the Interstate Commerce Commission, we obtain the following for the fiscal year 1909 (wherever the passenger percentage is 45 and a fraction, the figures in the passenger column represent the revenue train mile basis; when less than 45, a direct allocation to the freight business is indicated, and when greater than 45, a like allocation to the passenger):

#### DIRECT AND COMMON EXPENSE TABLE.

##### *I. Maintenance of Way and Structures.*

	Total Expense,	Freight.	Passenger.	Passen- ger Per Cent.
1. Superintendence .....A	\$ 7,891.59	\$ 7,891.59	\$ 3,610.50	45.76
2. Ballast .....A	1,860.76	1,008.67	852.09	45.79
3. Ties .....A	37,242.08	21,582.61	15,659.47	42.05
4. Rails .....A	2,843.83	1,952.03	891.80	31.36
5. Other track material.....A	11,702.55	7,594.04	4,108.51	35.11
6. Roadway and track.....A	74,891.98	44,528.12	30,363.86	40.54
7. Removal of snow, sand, and ice .....A	1,191.26	713.10	478.16	40.14
8. Tunnels. (None.)				
9. Bridges, trestles and culverts .....A	23,714.98	12,801.68	10,913.30	46.02
10. Crossings (over and under) A	24.97	11.88	13.09	52.42
11. Grade crossings, cattle guards, and signs.....A	6,033.20	3,205.56	2,827.64	46.87
12. Snow and sand, fences and snow sheds. (None.)				
13. Signal and interlocking plants .....A	586.39	320.71	265.68	45.32
14. Telegraph and telephone lines .....A	5,106.25	2,805.76	2,300.49	45.85
15. Electric power transmission. (None.)				
16. Buildings, fixtures, and grounds .....A	8,465.75	4,596.50	3,869.25	45.71
17. Docks and wharves. (None.)				
18. Roadway, tools, and supplies. ....A	2,521.26	1,394.55	1,126.71	44.69
19. Injuries to persons.....A	1,080.66	575.23	505.43	46.77
20. Stationery and printing...A	100.67	54.91	45.76	45.46
21. Other expenses.....A	1,011.90	541.72	470.18	46.77
22. Maintaining joint tracks and other facilities, Dr. ....B	28,964.66	16,233.31	12,731.35	43.95
23. Do. Cr. ....B	9,392.17	7,553.35	1,838.82*	19.58
Totals .....	\$205,752.57	\$116,558.12	\$89,194.45	43.35

\*This is a deduction, not an addition.

*II. Maintenance of Equipment.*

	Total Expense.	Freight.	Passenger.	Passen- ger Per Cent.
24. Superintendence .....A	\$ 15,990.90	\$ 8,754.64	\$ 7,236.26	45.26
25. Steam locomotives, repairs C	98,164.44	79,961.26	18,203.18	18.54
26. Steam locomotives, renewals. (None.)				
27. Steam locomotives, deprecia- tion .....C	13,207.44	11,218.80	1,988.64	15.06
Electric Locomotives.				
28. Repairs. (None.)				
29. Renewals. (None.)				
30. Depreciation. (None.)				
Passenger Train Cars.				
31. Repairs .....B	18,771.81	100.00	18,671.81	99.50
32. Renewals. (None.)				
33. Depreciation .....B	3,067.96		3,067.96	100.00
34. Freight cars, repairs....B	179,254.68	179,254.68		
35. Freight cars, renewals....B	2,573.08	2,573.08		
36. Freight cars, depreciation B	31,081.03	31,081.03		
Electric equipment of cars.				
37. Repairs. (None.)				
38. Renewals. (None.)				
39. Depreciation. (None.)				
Floating equipment.				
40. Repairs. (None.)				
41. Renewals. (None.)				
42. Depreciation. (None.)				
Work Equipment. (43-45.)				
43. Repairs .....A	2,473.99	1,343.41	1,130.58	45.70
44. Renewals .....A	130.11	70.71	59.90	46.04
45. Depreciation .....A	1,602.42	870.91	731.51	45.65
46. Shop, machinery, and tools A	6,097.37	3,271.15	2,826.22	46.35
47. Power plant equipment. (None.)				
48. Injuries to persons.....A	941.76	593.59	348.17	36.97
49. Stationery and printing...A	327.63	183.00	144.63	44.15
50. Other expenses.....A	1,016.04	555.82	460.22	45.30
51. Maintaining joint equipment at terminals, Dr. ....D	231.54	210.54	21.00	.09
52. Do. Cr. ....D	17.91			
Totals .....	\$374,914.28	\$316,039.19	\$54,875.09	14.63

*III. Traffic Expenses.*

53. Superintendence .....D	\$ 27,184.78	\$ 20,637.03	\$ 6,547.75	24.09
54. Outside agencies .....D	36,817.38	33,437.79	3,379.59	9.18
55. Advertising .....D	1,587.88		1,587.88	100.00
56. Traffic associations .....D	1,228.54	1,179.48	49.06	3.99
57. Fast freight lines .....	1,087.72	1,087.72		
58. Industrial and immigration bureaus. (None.)				
59. Stationery and printing...B	5,802.07	5,078.14	723.93	12.48
60. Other expenses. (None.)				
Totals .....	\$ 73,699.37	\$ 61,411.16	\$12,288.21	16.67

IV. *Transportation Other Than Train Expenses.*

	Total Expense.	Freight.	Passenger.	Passen- ger Per Cent.
61. Superintendence .....A	\$ 13,851.07	\$ 7,573.83	\$ 6,277.24	45.32
62. Dispatching trains.....A	15,438.54	8,840.81	6,597.73	45.06
63. Station employes .....A	81,444.29	72,703.22	8,741.07	10.73
64. Weighing and car service as- sociation .....	3,022.22	3,022.22		
65. Coal and ore docks. (None.)				
66. Station supplies and ex- penses .....A	6,190.25	3,392.46	2,797.79	45.20
67. Yardmasters and clerks...F	12,149.72	11,992.28	159.41	1.31
68. Yard conductors and brake- men .....	27,036.86	26,397.21	639.65	2.37
69. Yard switch and signal ten- ders .....F	608.40	597.07	11.33	1.86
70. Yard supplies and ex- penses .....F	560.22	550.83	9.39	1.68
71-76. (See next head.)				
77. Operating joint yards and terminals, Dr.....B	97,996.33	84,477.42	13,518.91	13.80
78. Do. Cr. ....B	1,786.82	1,735.16	51.66	2.89
79-89. (See next head.)				
90. Interlockers, block and other signals .....B	3,017.32	1,804.87	1,212.45	40.19
91. Crossing flagmen and gate- men .....	3,980.62	2,293.38	1,687.24	42.39
92. Drawbridge operation. (None.)				
93. Clearing wrecks.....G	3,154.43	2,169.30	985.13	31.22
94. Telegraph and telephone op- eration .....B	1,784.13	1,470.90	313.23	17.56
95. Operating floating equip- ment. (None.)				
96. Express service. (None.)				
97. Stationery and printing...B	7,360.76	4,476.91	2,883.85	39.18
98. Other expenses .....B	1,515.94	1,164.42	351.52	23.19
99. Loss and damage, freight...	16,789.59	16,789.59		
100. Loss and damage, baggage D	1.24		1.24	100.00
101. Damage to property.....B	5,522.39	2,400.31	3,122.08	56.54
102. Damage to stock on right of way .....B	2,159.84	1,426.36	733.48	33.96
103. Injuries to persons.....B	32,541.63	26,728.94	5,812.69	17.86
104. Operating joint tracks and other facilities, Dr. ....B	11,527.19	6,611.17	4,916.02	42.65
105. Do. Cr. ....B	3,003.92	1,997.43	1,006.49	33.50
Totals .....	\$342,862.64	\$282,789.31	\$60,073.33	17.52

*V. Train Transportation.*

	Total Expense.	Freight.	Passenger.	Passen- ger Per Cent.
71. Yard enginemen .....F	\$ 15,836.12	\$ 15,472.65	\$ 363.47	2.29
72. Engine house expenses, yard engines .....F	4,652.47	4,564.80	87.67	1.88
73. Fuel, yard engines.....F	12,523.97	12,230.21	293.66	2.34
74. Water, yard engines.....F	1,550.26	1,506.38	43.88	2.83
75. Lubricants, yard engines..F	850.58	831.55	43.88	2.83
76. Other supplies, yard en- gines .....F	495.20	485.10	10.10	2.24
79. Motormen. (None.)				
80. Road enginemen .....D	77,972.24	51,110.98	26,861.26	34.45
81. Engine house expense, road engines .....B	21,144.60	11,661.81	9,482.79	44.86
82. Fuel, road engines .....C	103,804.15	82,654.74	21,149.41	20.38
83. Water, road engines.....B	8,199.25	4,765.63	3,433.62	41.88
84. Lubricants, road engines..C	4,506.75	3,290.09	1,216.66	27.00
85. Other supplies, road en- gines .....C	3,060.61	2,653.84	406.77	13.29
86. Operating power plants. (None.)				
87. Purchased power. (None.)				
88. Road trainmen .....D	71,322.92	56,366.48	14,956.44	20.97
89. Train supplies and ex- penses .....B	20,969.65	13,614.41	7,355.24	35.08
Totals .....	\$346,889.47	\$261,209.17	\$85,680.30	24.70

*VI. General Expenses.*

106. Salaries and expenses of general officers .....A	\$ 14,178.44	\$ 7,760.28	\$ 6,418.16	45.27
107. Salaries, clerks and attend- ants .....A	21,788.98	11,928.63	9,860.35	45.25
108. General office supplies and expense .....A	4,150.28	2,337.27	1,813.01	43.68
109. Law expense .....A	8,075.22	4,442.81	3,632.41	44.98
110. Insurance .....B	4,703.63	4,035.76	667.87	14.20
113. Stationery and printing...A	2,073.74	1,154.23	919.51	44.35
114. Other expense .....A	1,675.03	944.82	730.21	43.60
115. General administration of joint tracks, yards, and other facilities, Dr. ....D	477.88	303.73	174.15	36.44
116. Do. Cr. ....A	310.44			
Totals .....	\$ 56,812.76	\$ 32,597.09	\$24,215.67	42.62

*VII. Other Expenses Directly Allocated.*

Taxes .....	\$ 51,401.14	\$ 39,294.33	\$ 12,106.81	23.55
Hire of equipment, Dr.....	9,762.11	9,762.11		
Hire of equipment, Cr.....			517.44	
Rentals, St. Louis Union De- pot .....	5,252.24			
Other rentals, St. Louis....	9,097.20			
Rentals, Illinois .....	21,594.27			
Total rentals .....	35,943.71	22,945.38	12,998.33	36.16
Total expenses .....	1,498,038.05	1,147,123.30	350,914.75	23.42
Total revenue .....	1,564,833.10	1,200,301.70	364,531.40	23.23
Net revenue for 1909.....	66,795.05	53,178.40	13,616.65	20.39
Value of road.....	5,500,000.00	4,207,679.65	1,292,320.35	23.45
Net revenue percentage.....	1.21%	1.26%		1.05

It appears from the foregoing that the whole earnings of the road for 1909 were only 1.21 per centum upon the fair and conceded valuation. This small return resulted in part from the fact that the road is a comparatively small one, and partly because it meets with sharp competition by stronger lines and a well-developed trolley system. It appears inferentially from the testimony that its freight rates cannot be increased. The only practicable escape open to the road, therefore, is to enlarge its passenger returns by obtaining authority to put in a three-cent fare for state passengers. This is not to help out its loss on freight business, but to earn a fair return on the state passenger traffic. Hence the filing of this petition, and the well-prepared case of the receivers, presenting a strong inference that the line was in 1909 obtaining a very inadequate return upon its passenger business. Much expert testimony was taken to the effect that by applying common railroad book-keeping the freight business in 1909 paid  $1\frac{1}{4}$  per centum, and the passenger 1 per centum.

The important question before the master, and now before us, is whether the best possible rules for dividing the expense between freight and passenger, and between state and interstate passenger business, have been applied. A more difficult question is rarely presented. For want of a better rule, railway experts have adopted the revenue train mile as a fair (or as the least unfair) basis; that is, as the total passenger miles for a year are to the whole number of train miles (freight, passenger, and mixed, excluding switching, repair, and special trains not bringing in revenue), so is the common passenger expense, which cannot be directly applied (unknown), to the whole common expense (a known quantity). Other bases for the division of common expenses, especially between intrastate and interstate freight and passenger business, are the straight revenue basis (or gross earnings basis), train weights, ton miles, passenger miles, engine miles, etc. To apportion common expenses between intrastate freight and passenger business, on the one hand, and interstate business, on the other, the straight revenue basis is sometimes used for certain expenses, as in the *Arkansas Rate Cases* (C. C.) 187 Fed. 290, 335, 339, 341. To find the value assignable to the freight and passenger business, respectively, freight gross earnings (state and interstate) are taken to represent the freight value, and passenger gross earnings the passenger value, as in *Shepard v. Northern P. R. Co.* (C. C.) 184 Fed. 765, 811, 812. But for the apportionment of common expenses between freight business, state and interstate, and passenger business, state and interstate, no rule so satisfactory as the revenue train mile basis has been discovered. This method of division at one time received the approval of the Interstate Commerce Commission, has been used by many railway companies for their own information in advance of any controversy on the subject, was adopted by the Wisconsin Railroad Commission in the *Buell Case*, 1 Wis. R. R. Com'n Rep. 324, and is approved in several decided

cases, particularly the Minnesota case, 184 Fed. 765, *supra*. Judge Sanborn's discussion of this basis is on 184 Fed. 813, as the one used by the railway companies and adopted by the master. The revenue train mile basis was also used in the Missouri Rate Cases, St. Louis, etc., Co. v. Hadley (C. C.) 168 Fed. 317, 348, as appears from the language of Judge McPherson on page 348 and by the testimony of Mr. Johnson in this case. He says this basis was applied by the expert state accountants, and approved by the court, as, indeed, appears in the report. Care must be taken, in reading these cited opinions, as well as others, to distinguish between the division of common expenses between freight business (state and interstate) and passenger business, on one hand, and the division of earnings for valuation purposes, or the separation of common expenses between intrastate freight and passenger business, and interstate, on the other. None of the opinions are as clearly or carefully stated as they might have been in these respects, but a careful reading leaves no doubt whatever.

To illustrate the difficulty of treating accounts on bases other than the revenue train mile, take account No. 2, Ballast, the total cost of which for 1909 was \$1,860.76. Of this 90 per cent. is supposed to be due to weather and 10 per cent. to wear. The 10 per cent. or \$186, may therefore be distributed between freight and passenger on the revenue train mile basis, 45.79 per cent., or \$85.16, for passenger, and \$100.84, freight. How shall the weather proportion be divided? Weather bears no closer relation to gross earnings, or train weights, than it does to revenue train miles. Any application of a weather expense between passenger and freight is unsatisfactory, and for want of a better plan it is divided on the revenue train mile basis. Ties, bridges, and culverts, grade crossings, and fences, cattle guards, and signs (all under the general head "Maintenance of Way and Structures"), rest substantially on the same ground as ballast, while the others of the 19 primary accounts in this head are naturally divisible on the revenue train mile basis.

Under the second general head, "Maintenance of Equipment," many of the primary accounts are directly allocated. The rest are fairly divisible between freight and passenger business upon the revenue train mile basis.

The third general account, "Traffic Expenses," does not bear as close a relation to the revenue train mile as the equipment group; but the amount of common expense distributed to passenger is relatively small. Most of the items have been directly allocated between freight and passenger.

The other two general accounts, 5 and 6, "Transportation Expenses" and "General Expenses," bear a closer relation to revenue train miles than to any other principle of division. Many of the items in these heads are divided by Mr. Hillman on the revenue basis.

On the whole, therefore, we are satisfied that the master has adopted the best method obtainable, one less unsatisfactory than

any other which can be fairly applied. Whether we follow the great weight of evidence, or the decisions cited, we may feel that justice has been done, and that the master's findings and conclusions should be sustained, except one provision. He recommends that the decree provide that a maximum rate of three cents per mile be made chargeable for state passengers. This would probably be the exercise of the legislative power of making rates, and not a judicial power. See cases cited in *Peoria Waterworks Co. v. Peoria Ry. Co.* (C. C.) 181 Fed. 990, 1004. In this respect the decree should provide that the District Court may, in exercising its function of managing the road in its possession, institute any rate, not exceeding three cents, as in its judgment may be fair and proper.

A decree should be entered in accordance with this opinion.

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In re F. M. & S. Q. CARLILE.

(District Court, D. North Carolina. September 30, 1912.)

1. BANKRUPTCY (§ 224\*)—PREFERENCES—ACTION TO RECOVER PROPERTY—NATURE OF SUIT.

Bankr. Act July 1, 1898, c. 541, § 23b, 30 Stat. 552 (U. S. Comp. St. 1901, p. 3431), as amended by Act Feb. 5, 1903, c. 487, § 8, 32 Stat. 798 (U. S. Comp. St. Supp. 1911, p. 1499), conferring on federal and state courts jurisdiction of suits by the trustee to recover property fraudulently or preferentially transferred or incumbered within four months before bankruptcy, does not confer jurisdiction on the referee of a proceeding by the trustee to recover choses in action pledged by the bankrupts to the receiver of a bank to secure an overdraft within four months of the bankruptcy proceedings, on the ground that such transfer constituted a voidable preference; the receiver of the bank claiming adversely to the bankrupts and to their trustee, and such action not being a proceeding in bankruptcy, but an action to recover property from an adverse claimant.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 383; Dec. Dig. § 224.\*]

2. BANKRUPTCY (§ 311\*)—PREFERENCES—AVOIDANCE.

Bankr. Act July 1, 1898, c. 541, § 57g, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443), as amended by Act Feb. 5, 1903, c. 487, § 12, 32 Stat. 799 (U. S. Comp. St. Supp. 1911, p. 1504), declares that the claims of creditors who have received preferences voidable under section 60b, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section 67e, have been made or given, shall not be allowed, unless such creditors surrender their preferences, etc. Section 60a declares that a person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing thereof and before adjudication, procured or suffered judgment against him, or made a transfer of any of his property, the effect of which will be to enable any one of his creditors to obtain a greater percentage than any other of the same class, etc. *Held*, that a preference under section 60a is not voidable, nor does it prevent the preferred creditor from proving his claim for any balance remaining due after exhausting the property transferred.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 497-500; Dec. Dig. § 311.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



**3. BANKRUPTCY (§ 166\*)—PROPERTY TRANSFERRED—RECOVERY BY TRUSTEE—PREFERENCES.**

Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), does not confer on the trustee the right to recover property transferred by the bankrupt within four months prior to bankruptcy proceedings, unless the elements prescribed by section 60b are shown to exist.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-253, 255-258; Dec. Dig. § 166.\*]

**4. BANKRUPTCY (§ 166\*)—PROPERTY TRANSFERRED—"PREFERENCE"—RECOVERY BY TRUSTEE.**

Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), declares a recoverable "preference" to consist of a transfer of property within four months of the filing of the petition by a person who is insolvent, when the person to whom the transfer is made shall then have reasonable cause to believe that the enforcement of the transfer will effect a preference. *Held*, that where, at the time the bankrupts transferred certain choses in action to the receiver of a bank to secure an overdraft, the receiver did not have reasonable cause to believe that the bankrupts were insolvent, as distinguished from mere ground for suspicion that they might be, and their financial condition was such at the time of the transfer that the bankrupts themselves might reasonably have thought that they were not insolvent, the transfer was not voidable.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-258; Dec. Dig. § 166.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5489-5499; vol. 8, p. 7759.]

**5. BANKRUPTCY (§ 303\*)—PREFERENCES—VACATION—BURDEN OF PROOF.**

In a suit by a bankrupt's trustee to recover a preference alleged to be voidable under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), the burden of proof is on the trustee to show that the bankrupts were insolvent when the transfer was made, and that the creditor had reasonable ground to believe that the enforcement of the transfer would effect a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. § 303.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of F. M. & S. Q. Carlile. On petition to review a referee's order setting aside a transfer of certain choses in action made by the bankrupts to the receiver of the Bank of Tarboro. Reversed.

James Pender, of Tarboro, N. C., for estate.

H. A. Gilliam and W. Stamps Howard, of Tarboro, N. C., for receiver.

CONNOR, District Judge. The controversy presented by the record relates to the validity of the transfer of certain choses in action made to the receiver of the Bank of Tarboro by the bankrupts within four months prior to the institution of proceedings in bankruptcy, to secure an overdraft due the bank.

[1] Before proceeding to discuss the merits of the case, I deem it proper to call attention to the irregularity in the proceedings had before the referee and the method adopted for bringing the question, raised by his ruling and exceptions thereto, before the court. The trustee seeks to have the receiver deliver certain choses in action or

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the proceeds thereof, transferred to him by the bankrupts within four months prior to the institution of proceedings in bankruptcy, alleging that such transfer constituted a voidable preference. It will be observed, by reference to the language of section 60b, that in such cases the trustee is empowered to institute an action in the court designated by the act.

"The Bankrupt Act, as amended, confers jurisdiction of suits for the recovery of property under sections 60b, 67e, and 70e upon the courts of bankruptcy, without the defendant's consent." 2 Loveland, Bankruptcy, § 536.

"An action to recover property from an adverse claimant, for the estate of a bankrupt, is not a proceeding in bankruptcy. It presents a controversy arising in bankruptcy. The referee has no jurisdiction in such cases. The general rule is that the trustee must bring an independent suit at law, or in equity, to recover money or property in the possession of a person who claims a right, title, or interest in it as against the trustee. Summary proceedings on a motion, or notice, or rule, to show cause, cannot be substituted for plenary suits in such cases." Loveland on Bankruptcy, § 540.

In *Jaquith v. Rowley*, 188 U. S. 620, 23 Sup. Ct. 369, 47 L. Ed. 620, it appeared that the bankrupt had deposited certain notes with his surety on a bail bond given in an action pending in the state court. Upon his adjudication in bankruptcy, the trustee, by a proceeding in the bankrupt court, sought to enjoin the surety from collecting the notes and to have them delivered to him for the benefit of the bankrupt's estate. Referring to the procedure, Mr. Justice Peckham said:

"It was a summary application to the court in bankruptcy to grant an order in a matter, the result of the granting of which would be to immediately take from the surety moneys which had been deposited with him before the commencement of the proceedings, and thus compel him to come into the bankruptcy court for the litigation of questions as to his right to retain the money claimed by him. It would also enjoin the plaintiffs in the state suits from proceeding to collect their judgments from the surety in the bail bonds. To extend such a jurisdiction over an adverse claimant would be within the prohibition of sections 23a and 23b, whether such jurisdiction were exerted by an action, strictly so called, or by a summary application to the court in bankruptcy. \* \* \* If the trustee desired to test the question of the right of the surety to retain the money, he must do so in accordance with the provisions of the sections of the Bankrupt Act, above referred to."

The learned justice points out clearly the distinction between the facts in the case before the court and those in *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, in which the summary jurisdiction of the bankrupt court to order the delivery of property to the trustee was sustained.

In *First National Bank v. Title & Trust Co.*, 198 U. S. 280, 288, 289, 25 Sup. Ct. 693, 695 (49 L. Ed. 1051), Mr. Chief Justice Fuller, referring to the similarity of the language, in this respect, used in Act March 2, 1867, c. 176, § 14 Stat. 517, and that of 1898, says that the decisions construing that act are applicable, and that—

"it was settled that the bankruptcy court was without jurisdiction to determine adverse claims to property, not in possession of the assignee in bankruptcy, by summary proceedings, whether absolute title or only a lien was asserted."

Reference to the language of section 23 of the Bankrupt Act of 1898, in the light of the decisions of the Supreme Court, demonstrates that Congress—

"manifested its intention that controversies, not strictly or properly part of the proceedings in bankruptcy, but independent suits, brought by the trustee in bankruptcy to assert a title to money or property against strangers to those proceedings, should not come within the jurisdiction of the District Court of the United States, 'unless by consent of the proposed defendant.' One object in inserting this clause in the act may well have been to leave such controversies to be tried and determined, for the most part, in the local courts of the state, to the greater economy and convenience of litigants and witnesses." *Bardes v. Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175; *Wall v. Cox*, 181 U. S. 244, 21 Sup. Ct. 642, 45 L. Ed. 845.

Subsequent to these decisions, section 23b, was amended by adding the words:

"Except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e and section seventy, subdivision e." Amendment of 1903.

A standard writer on bankruptcy, discussing the subject, says:

"The amendatory act of 1903 has, however, re-enacted the doctrine [of the act of 1867] of concurrent jurisdiction [in the federal and state courts] at least as to suits by the trustee to recover property fraudulently or preferentially transferred or incumbered within the four months period." *Collier, Bankruptcy* (8th Ed.) 394.

The amendments to the bankrupt law, as interpreted by the court, would seem to clarify the subject of jurisdiction in plenary suits. When the trustee deems it his duty to demand, and seek to recover, the possession of property, or the proceeds thereof, held by an adverse claimant, or one to whom a transfer, assignment, or other conveyance has been made, which under the provisions of section 60b is a voidable preference, or under section 67e is a fraud upon creditors, under the Bankruptcy Act, or under section 70e under the state laws, he must bring a plenary action in the District Court of the United States, or in the state court, having jurisdiction of the subject-matter and parties. *Collier, Bankruptcy*, 407, 408. The question of jurisdiction of the referee to proceed summarily to order the surrender of property held by an adverse claimant is discussed, and the authorities reviewed, in *Re Peacock* (C. C.) 178 Fed. 851. The reason upon which Congress proceeded is stated by Mr. Loveland in his work on *Bankruptcy* (4th Ed.) § 37. He says:

"In such cases the court is not exercising jurisdiction in bankruptcy, but the jurisdiction of an ordinary court of law or equity, and the parties would be deprived of the usual process of law in defense of their rights in summary proceeding. The defendant, in such cases, may be entitled to trial by jury, or to put in evidence upon an issue regularly made by pleadings, or to have the decree or judgment reviewed upon appeal or writ of error."

It is a mistake to suppose that all persons having transactions with one who is adjudged a bankrupt, acquiring rights of property adverse to the bankrupt, and therefore to his trustee, who succeeds to the bankrupt's rights, may be drawn, without their consent, into the bankrupt court before the referee, and such rights summarily dealt with, depriving them of trial by jury and other rights which, but for the intervening bankruptcy, are secured to them. Such a person is not required to go into the bankrupt court to assert his rights, nor can he, without his consent, be drawn into it by summary process. It

is equally clear that if one be in possession of property as the bailee or agent of the bankrupt, or if he takes from the possession of the trustee property belonging to the bankrupt, he may, upon notice, be summarily ordered to surrender such property to the trustee. *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405. The referee may, upon petition of the trustee, and upon notice to such person, proceed to ascertain whether the person in possession is a bailee or agent, or otherwise holds such possession for the bankrupt, or whether he is an adverse claimant. If, upon such examination, he finds that such person is an adverse claimant, he must dismiss the petition and remit the trustee to his plenary action; otherwise, he may order the delivery of the property to the trustee. His ruling in this proceeding may, upon the petition of either party, be reviewed by the judge of the District Court. General Orders in Bankruptcy 27;<sup>1</sup> *Collier on Bankruptcy* (8th Ed.) 883. When the ruling complained of pertains to questions arising in the course of the administration of the estate, of which the referee has jurisdiction, it is subject to review as prescribed by the General Order. This can be done only upon petition. The Circuit Court of Appeals has jurisdiction to review the orders and judgments of the District Court upon matters of law. Section 24. See *Collier on Bankruptcy*, 433.

The record in this case does not, in many respects, conform to the statute or provisions of the order, and, but for the fact that the parties have submitted themselves and their rights to the jurisdiction of the court, waiving all questions of procedure, consenting that the referee should hear the matter, it would be my duty to remand the record to the referee and direct him to dismiss the proceeding. This would result in delay, and entail expense to the parties and the estate of the bankrupt. The testimony is undisputed and the question of law free from difficulty. I therefore deem it my duty, in the interest of substantial justice, and to prevent further delay, to dispose of the case as presented upon the record. This, however, is not to be regarded as a precedent for future action in this district. It is one of the evils, against which an intelligent sentiment, both professional and lay, is making protest, that substantial justice is too frequently either delayed or denied by a nonobservance of rules of procedure, or by their rigid, technical enforcement.

[2] Proceeding, therefore, to a disposition of the case as disclosed by the transcript, I note that the referee bases his conclusion upon the language of section 60a, quoting it in his opinion. The solution of the question presented by the contention made by the trustee is dependent upon the construction of section 60b. A preference under section 60a is not voidable, nor does it, under section 57g, as amended by the act of 1903, prevent the preferred creditor from proving his claim for any balance remaining due after exhausting the property transferred. It will be noted that section 57g, as originally enacted, precluded a creditor, who had received a preference as defined by section 60a, from proving his debt until he had surrendered the property transferred. Subsequent to, and by reason of, the decision in *Pirie v. Chicago Title & Trust Co.*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, Congress amended section 57g, so that only a preference

<sup>1</sup> 89 Fed. xl, 32 C. C. A. xxvii.

as defined by section 60b prevented the creditor from proving the balance of his debt without surrendering his preference.

[3] At no time did the Bankrupt Act of 1898 give to the trustee the right to recover property transferred within four months prior to proceedings in bankruptcy, unless the elements prescribed by section 60b were shown to exist. A preference, as defined by section 60a, is without any effect upon the right of the creditor, since the amendment of 1903 to section 57g. It would be a strange conclusion that a simple preference under section 60a entitled the trustee to recover the property transferred, when, under section 57g, as amended, he can prove his debt without surrendering the preference.

[4] We are thus brought to inquire whether, under the provisions of section 60b, the testimony before the referee entitles the trustee to recover the property transferred by the bankrupt on August 11, 1911; that is, does the testimony establish the allegation that the transfer constituted a voidable preference? Section 60b defines such a preference, so far as applicable to this case, as (1) a transfer of property, (2) within four months before the filing of the petition in bankruptcy, (3) by a person who is insolvent, (4) when the person to whom the transfer is made shall then have reasonable cause to believe that the enforcement of such transfer will effect a preference. When these essential elements are found in a transaction between a bankrupt and his creditor, it is provided that—

"it shall be voidable by the trustee and he may recover the property or its value."

For the definition of the word "preference," as used in section 60b, recourse must be had to section 60a. We there find that, in order that a transfer, etc., shall operate as a preference, within the meaning of the act, it must—

"enable the creditor, to whom the transfer is made, to obtain a greater percentage of his debt than any other such creditors of the same class."

Thus it is seen that section 60a defines a "preference," section 60b a "voidable preference," section 67e a "fraudulent preference," under the Bankrupt Act, and section 70e a "transfer of property," fraudulent under the state law. For the definition of a preference, which is declared to be an act of bankruptcy, see section 3. Without question, the evidence before the referee establishes a preference within the terms of section 60a, leaving in controversy the sole question whether it brings such preference within the terms of section 60b.

[5] The burden of proof is upon the trustee. Loveland on Bankruptcy (4th Ed.) § 544; *Barbour v. Priest*, 103 U. S. 293, 26 L. Ed. 478. Judge Sanford in *Kimmerle v. Farr*, 189 Fed. 295, 111 C. C. A. 27 (Sixth Circuit), says that the burden of proof is on the trustee in bankruptcy, seeking to avoid as a preference a transfer of property made by a bankrupt, to prove by sufficient evidence all of the essential elements of a voidable preference. The question discussed in that case, whether it is essential to show that the

creditor knew of the debtor's intention to create a preference, is eliminated by the amendment of 1910; the words inserted in section 60b by the amendment of 1903, "had reasonable cause to believe that it was intended thereby to give a preference," being stricken out. *Loveland on Bankruptcy* (4th Ed.) § 492.

Did Pennington, or his attorney, who drew and took the transfer, have reasonable cause to believe that the effect of the transfer would be to give a preference, as defined by section 60a? F. M. Carlile was the only witness examined before the referee. He says that, when Pennington was appointed receiver of the Bank of Tarboro, in June, 1911, the firm of F. M. & S. Q. Carlile was overdrawn \$1,263.78; that they owed the bank \$700 by note, and another note of \$1,000 secured by mortgage on real estate; that they executed the transfer to Pennington in the office of Mr. Gilliam, one of his attorneys, for notes and accounts amounting to about \$1,050, and a promise to deliver in ten days thereafter \$300 more; that at the time he executed the transfer he thought his firm was entirely solvent, and so represented to Mr. Gilliam; that he stated to Mr. Gilliam that they had \$1,000 solvent accounts, \$570 notes secured by mortgages, \$1,700 cash account (about), \$5,000 stock (about), \$800 hearse and wagon (about), and at the same time represented that the liabilities of said firm, other than its indebtedness to the Bank of Tarboro, did not exceed \$3,000; that at that time he had no idea that the firm would go into bankruptcy within four months from said date; that he assured Mr. Gilliam that, by giving them the extension, they would be able to liquidate all of the firm's obligations; that Mr. Pennington asked him about securing the overdraft—said he would grant the extension if the collaterals were put up. This is all that was said about it. He did not say that if they were not put up he would "push them for it." Their purpose in making the transfer was not to give the bank a preference, but to secure the overdraft. There is no evidence that Pennington had any information in regard to the financial condition of Carlile.

The only other evidence introduced was the schedule, filed by the bankrupts, October 14, 1911, from which it appears that they owed debts, secured, \$5,305 (it appears that the property mortgaged was of sufficient value to pay these debts), and \$5,627.04 unsecured debts. The schedules show stock valued at \$4,000, notes secured by title retained to furniture purchased \$1,300, notes for pianos, title retained, \$670, hearse and wagon \$515, and debts due on open accounts \$1,500. It does not appear that either Mr. Pennington or Mr. Gilliam had any knowledge of, or information in regard to, the indebtedness of the firm, other than that due the bank, or any other knowledge or information in regard to the character, etc., of the property other than that given by bankrupts. Certainly, if they were justified in accepting that information—that is, if they had no good and sufficient reason to doubt the truth of it—there was nothing in the statement calculated to create a reasonable belief that the firm was insolvent; that is, that the bankrupts were

making false statements, and that, in accepting the transfer, they were receiving a preference.

The referee finds, I presume, from the account of the trustee, that he has not, after diligent effort, been able to realize more than \$3,624 cash from the property. This finding, however, is of little probative value in ascertaining what information Mr. Pennington or his attorney had on the subject on August 11, 1911. There is no evidence in the record in respect to the moral character of the bankrupts, the manner in which they had been conducting business, or their commercial credit. Nor is there any evidence in regard to the extent or character of their dealings with the bank—whether their account was frequently overdrawn, or how long the overdraft had existed. There is nothing to indicate that the receiver had been, prior to his appointment, connected with the bank, or was acquainted with the relations existing between the bank and the bankrupts. It does not appear that the receiver did anything more than a prudent and faithful discharge of his duty demanded. While the overdraft was large for men of their worth, we may take notice of the fact that, for some reason, the bank went into the hands of the receiver in midsummer, at a season when, in this section, cash business is dull and money scarce. While prudent banking would suggest that customers be called upon to either cover the overdraft or give security, yet the mere fact that a customer of a bank, carrying a stock of \$4,000, etc., has overdrawn for \$1,263, would not, of itself, be calculated to create a reasonable apprehension of insolvency.

The correct rule is well stated by Mr. Justice Bradley in *Grant v. National Bank*, 97 U. S. 80, 24 L. Ed. 971, in which he says:

"Some confusion exists in the cases as to the meaning of the phrase 'having reasonable cause to believe such a person is insolvent.' Dicta are not wanting which assumes that it has the same meaning as if it had read 'having reasonable cause to suspect such person is insolvent.' But the two phrases are distinct in meaning and effect. It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debts. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further, he may feel anxious about his claim, and have a strong desire to secure it, and yet such belief as the act requires may be wanting. Obtaining additional security, or receiving payment of a debt, under such circumstances, is not prohibited by the law. \* \* \* The debtor is often buoyed up by the hope of being able to get through with his difficulties long after his case is, in fact, desperate, and his creditors, if they knew anything of his embarrassments, either participate in the same feeling, or at least are willing to think that there is a possibility of his succeeding. To overhaul and set aside all his transactions with his creditors, under such circumstances, because there may exist some grounds of suspicion of his inability to carry himself through, would make the bankrupt law an engine of oppression and injustice."

In the language of Mr. Justice Bradley in the opinion cited, the evidence before the referee falls far short of establishing that the receiver had reasonable cause to believe that Carlile was insolvent at the time the transfer was executed. Mr. Collier, in his excellent work on Bankruptcy, at page 669, says:

"It has been held that it is not necessary for a creditor to know, or have reasonable cause to believe, that the debtor is insolvent when a mortgage or pledge is made within the four months period to secure an antecedent debt."

In support of this guarded statement the author cites *In re Mills* (D. C.) 162 Fed. 42, 20 Am. Bankr. Rep. 501. An examination of the "headnote" (No. 4) sustains the statement of Mr. Collier and the referee's conclusion in this case. An examination of the case, as reported, explains how the error found its way into the "headnote." The referee, in an elaborate report, finds as a fact that the creditor had, not only reasonable cause to believe that the debtor was insolvent, but that the officers of the trust company well knew that he was insolvent. On page 48 of 162 Fed. the referee says:

"The referee further holds that, when a mortgage or pledge is made to secure an antecedent debt, within four months of the filing of petition in bankruptcy against him, it is not necessary that the creditor should have reasonable cause to believe that the debtor was then insolvent; a different rule applying to such a case from that which governs when there is an absolute payment of a pre-existing debt"—saying that the law is "directly so held by the Circuit Court of Appeals in this (the Fourth) circuit, in *Farmers' Bank v. Carr*, 127 Fed. 690 [62 C. C. A. 446]."

An examination of the case does not sustain the construction put upon it. It does not very clearly appear from the report how the question arose, but it is manifest, from Judge Simonton's opinion, that the conclusion reached by the court was based upon the fact that the preferred creditor had notice of such facts as should have created a reasonable belief of the debtor's insolvency. It will be found that the cases cited by the referee (*McNair v. McIntyre*, 113 Fed. 113, 51 C. C. A. 89; *In re Hill* [D. C.] 140 Fed. 984; *In re Pease* [D. C.] 129 Fed. 446) do not sustain his conclusion. So much of the report (page 48) as discusses this question is entirely unnecessary and surplusage, because he had found the fact of actual notice of insolvency upon which the ultimate conclusion was based. It will be noted that, when the report came before Judge Purnell, District Judge, he wrote no opinion, simply stating that "the findings of fact are supported by ample proof" and "are in all respects confirmed." It is true that he also says that the conclusions of law are also confirmed; but a reasonable construction of the last words used by the judge restricts the conclusion of law to such as are applicable to the findings of fact. The case, as thus explained, is in harmony with the uniform current of authority and the manifest meaning of the statute.

I have deemed it proper to make this reference to the error into which one, following the "headnote" and the language of the referee in that case, may be led because of the fact that the case is



from this district. In view of the fact that the parties have submitted to the jurisdiction, and by their actions waived all questions of regularity of procedure, I have discussed and decided the questions presented, thus saving time and expense in the final settlement of the estate. The error into which the referee fell is the result of supposing that the case was governed by section 60a, instead of section 60b. He does not find, because in his view of the law it was not material to inquire, whether the receiver or his attorney had a reasonable ground to believe that Carlile was insolvent. I am of the opinion that he was correct in finding that the transfer operated as a preference as defined by section 60a, but was in error in holding that this entitled the trustee to recover the property. I am further of the opinion that the evidence does not establish a voidable preference within the definition of section 60b. There is no suggestion that the transfer was void under section 67e. The trustee, therefore, is not entitled to recover the property in controversy.

The order of the referee is reversed.

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NORTHERN PAC. RY. CO. v. LEE et al.

GREAT NORTHERN RY. CO. v. SAME.

(District Court, W. D. Washington, S. D. September 9, 1912.)

Nos. 1,093, 1,094.

**1. CARRIERS (§ 18\*)—SUIT TO ENJOIN ENFORCEMENT OF RATES ESTABLISHED BY STATE—PROPER PARTIES.**

In a suit by a railroad company against a state commission to enjoin the enforcement of freight rates established by it under a state statute, shippers of articles affected by such rates may properly be joined as defendants as representatives of their class on an allegation that, unless enjoined, they will attempt to enforce such rates.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16-18, 20, 24; Dec. Dig. § 18.\*]

**2. PARTIES (§ 91\*)—MISJOINDER OF DEFENDANTS—PARTIES ENTITLED TO OBJECT.**

The objection that defendants are not necessary or proper parties, and are improperly joined, cannot be raised by other defendants who are proper parties.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 149; Dec. Dig. § 91.\*]

**3. COMMERCE (§ 61\*)—STATE REGULATION OF RATES—VALIDITY—AFFECTING INTERSTATE COMMERCE.**

That the enforcement of intrastate freight rates established by a state commission between points within the state will make it necessary for a carrier for the protection of its business to voluntarily reduce certain of its interstate rates does not render the order of the commission invalid as affecting interstate commerce; its effect therein being indirect and merely incidental.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 81-84; Dec. Dig. § 61.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**4. CARRIERS (§ 12\*)—CONSTITUTIONAL LAW (§ 298\*)—STATE REGULATION OF FREIGHT RATES—VALIDITY—REASONABLENESS OF RATES.**

Freight rates established by state authority are invalid as unreasonable and confiscatory, if so low that a carrier cannot earn a fair and reasonable return on the value of the property devoted to the service, and what constitutes a fair return is a mixed question of law and fact.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 11, 15-20; Dec. Dig. § 12;\* Constitutional Law, Cent. Dig. § 847; Dec. Dig. § 298.\*]

**5. CARRIERS (§ 18\*)—SUIT TO ENJOIN ENFORCEMENT OF RATES ESTABLISHED BY STATE—PLEADING.**

In a suit by a railroad company to enjoin enforcement of an order of a state commission establishing intrastate rates on certain classes of freight only, it is not sufficient for the bill to allege that, under such order, complainant cannot earn a fair return on its entire intrastate freight business, but it must allege facts from which it can be determined whether the particular rates affected by the order are fair and reasonable in themselves.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16-18, 20, 24; Dec. Dig. § 18.\*]

In Equity. Suit by the Northern Pacific Railway Company against George A. Lee, Jesse S. Jones, and Harry E. Wilson, members constituting the Public Service Commission of Washington, W. V. Tanner, Attorney General of Washington, and J. L. Carman and C. H. Hyde; also suit by the Great Northern Railway Company against said Commission and Attorney General and Fred Sylvester and George E. Sylvester. On demurrers to bills. Demurrers sustained.

Geo. T. Reid, J. W. Quick, and L. B. da Ponte, all of Tacoma, Wash., for complainant Northern Pac. Ry. Co.

W. V. Tanner and Stephen V. Carey, both of Seattle, Wash., for defendants Lee, Jones, Wilson, and Tanner.

F. V. Brown, of Seattle, Wash., for complainant Great Northern Ry. Co.

S. J. Wettrick, of Seattle, Wash., for defendants Sylvester.

CUSHMAN, District Judge. These cases are now before the court upon demurrers to the complaints. They were heard together, and will be considered and disposed of in the same way.

The bill in case No. 1,094 alleges: That complainant is operating as one system lines of railroad in the state of Washington and other states, and is engaged in state and interstate commerce. That the greater part of its business in said state is interstate; the same cars being used for both interstate and intrastate commerce. That defendants Lee, Jones, and Wilson constitute the Public Service Commission of the state of Washington. That the defendant Tanner is its Attorney General. That the defendants Hyde and Carman are intrastate shippers of the state of Washington, sued as representatives of that class of shippers.

That in February, 1912, said Commission made an order requiring complainant to cease making charges under its freight tariffs throughout the state, and thereafter to charge only lower rates

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fixed in the Commission's order. That complainant has complied with the order to avoid numerous suits and the risk of large penalties, which penalties might have aggregated more than \$100,000 a day.

That the rates lowered by the Commission were on freight in classes 1, 2, 3, 4, 5, A, B, C, D, and E, according to complainant's classification of freight products, and excluded "lower class, or commodity rates \* \* \* specifically established."

That the Commission found complainant's property used as a common carrier in the state of the value of \$127,250,000. This was conceded by the bill to be approximately true. The value of the property is alleged to be:

For state business.....	\$70,648,971 00
For interstate business.....	\$56,601,029 00
For state freight business.....	\$43,480,949 00
For state passenger business.....	\$27,168,022 00
For interstate freight business.....	\$39,833,444 00
For interstate passenger business.....	\$16,767,585 00

That for the fiscal year ending June 30, 1911, its revenues in the state of Washington, under the old tariff, were:

From state freight business.....	\$6,415,416 35
From interstate freight business.....	\$5,877,130 10
Miscellaneous freight earnings.....	\$ 561,050 41
Intrastate proportion miscellaneous freight earnings.....	\$ 292,806 60
Interstate proportion miscellaneous freight earnings.....	\$ 268,243 81
Revenues received on account of hire of freight equipment....	\$ 638,379 65
Intrastate proportion of same.....	\$ 333,163 96
Interstate proportion of same.....	\$ 305,215 69
Revenues from intrastate passenger business.....	\$3,654,988 04
From interstate passenger business.....	\$2,255,824 06
Miscellaneous passenger earnings.....	\$ 867,420 50
Intrastate proportion of same.....	\$ 536,378 14
Interstate proportion of the same.....	\$ 331,042 36
Rental passenger equipment.....	\$ 336,647 69
Intrastate proportion of same.....	\$ 208,169 47
Interstate proportion of same.....	\$ 128,478 22
Received from operations connected with passenger service....	\$ 124,500 04
Intrastate proportion of same.....	\$ 76,985 84
Interstate proportion of same.....	\$ 47,514 20

That for the same year the operating expenses for the state of Washington were \$13,280,609.31, segregated as follows:

For carrying freight.....	\$8,502,079 84
For carrying passengers.....	\$4,778,529 47
The ton miles carried intrastate freight were.....	420,662,143
The ton miles interstate freight carried were.....	738,963,823

That one ton mile, intrastate freight, costs  $2\frac{1}{2}$  times as much as one ton mile interstate freight. That, therefore, of the total freight expense—

The proportion intrastate would be.....	\$4,993,356 51
The proportion interstate would be.....	\$3,508,723 33

For the same period—

The intrastate passenger miles were.....	128,783,847
The interstate passenger miles were.....	105,843,492

That the intrastate passenger miles cost 15 per cent. more than the interstate passenger miles. That, therefore, of the total expense for carrying passengers—

The proportion for intrastate service was.....	\$2,786,838 39
The proportion for interstate service was.....	\$1,991,691 08

That for said year the taxes paid were chargeable as follows, segregated on the basis of revenue:

Against intrastate freight earnings.....	\$ 442,881 65
Against interstate freight earnings.....	\$ 405,729 45
Against intrastate passenger earnings.....	\$ 276,723 92
Against interstate passenger earnings.....	\$ 170,788 72
The total earnings, as shown for intrastate freight and freight equipment, was.....	\$7,041,386 91
The total expense and taxes chargeable against the same was..	\$5,436,238 16
Leaving an income of.....	\$1,605,148 75

That this income only amounts to 3.692 per cent. on the part of the property assignable to intrastate freight business.

The total intrastate passenger earnings, including rental and hire of passenger equipment, were.....	\$4,476,521 49
The total taxes and expenses chargeable against the same were .....	\$3,063,562 31
Leaving an income for intrastate passenger business.....	\$1,412,959 18

—or a percentage on the property assignable to intrastate passenger business of 5.201 per cent.

That on the total valuation assignable to all intrastate business, both freight and passenger, amounting to \$70,648,971, the percentage of income was 4.272 per cent. That, using the same method of calculation for the fiscal year ending June 30, 1910, the income upon such valuation was 4.771 per cent. That the rates for the years 1910 and 1911 are as great as can be reasonably anticipated for the future, and constitute a less rate than capital employed similarly in the state of Washington generally receives. That the charges fixed by the Commission are much lower than the tariffs of 1910 and 1911, and that the change will cause a reduction in freight revenue of two hundred thousand dollars annually. That complainant's road "is well and judiciously located, properly equipped and built, having reference to the business of the country and that reasonably to be expected, and is well and economically operated."

The prayer of the complaint is that the order of the Commission be declared unconstitutional and void, and the rates fixed thereby unreasonable and confiscatory; that the Commissioners and Attorney General and their successors be enjoined from enforcing the provisions of the order and the rates fixed, and that the other defendants and all other shippers be enjoined from attempting to ship under said rates or to enforce the provisions of the order; that an accounting be taken of complainant's earnings and expenses and the value of the portion of its property devoted to freight traffic in Washington; and that an ascertainment be made of the return the complainant can receive thereon under existing rates.

The bill of complaint in case No. 1,093 alleges: That complain-

ant is operating, as one system, lines of railway in the state of Washington and other states, and is engaged in state and interstate commerce. That the defendants Lee, Jones, and Wilson constitute the Public Service Commission of the state of Washington. That the defendant Tanner is its Attorney General, and that the defendants Fred Sylvester and George E. Sylvester are intrastate shippers of the state of Washington, sued as representatives of that class of shippers. That the power and duty of the Public Service Commission are defined by chapter 81, Washington Laws of 1905, as amended by chapter 226 of the Laws of 1907, as further amended by chapter 93 of the Laws of 1909, and as further amended by chapter 117 of the Laws of 1911. That by those laws it is made the Commission's duty "to supervise and regulate the operation of public carriers, including railroads in said state, \* \* \* to prohibit charging and collection of unreasonable charges, tariffs, rates and fares and to prescribe reasonable charges, rates and fares."

That complainant's railroads were constructed and acquired at the fair and reasonable value thereof. That the same are judiciously and wisely located, and have been at all times, and now are, well, properly, and economically operated.

That, upon complaint to said Commission—made by certain commercial organizations of the cities of Tacoma and Seattle—that the rates and fares of complainant and other carriers in the state were unreasonably high, a hearing was had, and the Commission made an order on December 13, 1911, reducing the intrastate freight rate. That another such order was made February 5, 1912.

That complainant has ever since complied with these orders. That the law of the state of Washington provides that each violation of these orders constitutes a separate offense, punishable by a fine of \$1,000.

That the orders were made capriciously and arbitrarily, contrary to the evidence and without regard to complainant's right to earn a fair return on its property devoted to the public use. That the rates are confiscatory and will deprive complainant of its property, without due process of law, in violation of the fourteenth amendment to the Constitution of the United States.

That complainant's outstanding bonded debt amounts to..... \$143,831,909 00  
That complainant's paid-up capital stock amounts to..... \$209,981,575 00

That said capitalization is fair and reasonable, and represents less than the actual value of its property.

That in the state of Washington it owns 875 miles of railroad. That therein it operates, as owner or otherwise, 1,080 miles.

That the Commission, in 1909, found complainant's property  
in the state to be of the fair market value of..... \$59,577,212 00  
That thereafter, in 1910, it found such property to be worth.. \$67,000,000 00

That complainant has ever since been taxed by the state authorities on these values.

That the value of its property devoted to its business as a common

carrier in the state of Washington, including its rights and franchises, is in excess of \$67,000,000. That the value—

Of that portion of its property within the state used in intra-state freight business is in excess of the sum of.....	\$15,463,678 95
And of such property devoted to intrastate passenger business is in excess of.....	\$17,365,291 86

That the complainant's total earnings from all freight traffic in the state—

For the fiscal year ending June 30, 1910, were.....	\$5,463,603 81
Of which there was intrastate.....	\$2,217,074 95
And of which there was interstate.....	\$3,246,528 86

That complainant's operating expenses, rentals and taxes, excluding fixed charges and any return on investment, for all freight business in the state—

For the fiscal year ending June 30, 1910, were.....	\$4,409,188 47
And for the fiscal year ending June 30, 1911, were.....	\$4,893,918 42

That the cost of doing intrastate business is much greater than interstate, from two to five times as great; that the amount of expense properly chargeable to intrastate traffic would reduce the income, under the Commission's order, so as to leave an insufficient amount to constitute a fair return on the property devoted to this use.

That substantially 45 per cent. of complainant's revenue on intrastate freight traffic is derived from that part of the traffic covered by the Commission's order; that, prior to the enforcement of such order, its rates were from 25 to 50 per cent. higher than under the order; that the enforcement of said order would decrease its earnings from that traffic approximately \$300,000 annually.

That its total passenger earnings from all sources in the state of Washington—

For the fiscal year ending June 30, 1910, were.....	\$3,905,050 61
Of which there was intrastate.....	\$2,543,264 70
And of which there was interstate.....	\$1,361,785 91

That the total of like earnings—

For the fiscal year ending June 30, 1911, was.....	\$4,180,310 33
Of which there was intrastate.....	\$2,512,507 48
And of which there was interstate.....	\$1,667,802 85

That its expenses on passenger business in the state of Washington—

For the fiscal year ending June 30, 1910, were.....	\$3,538,754 79
And for the fiscal year ending June 30, 1911, they were.....	\$4,221,727 82

That, if complainant should refuse to comply with such orders, a multitude of damage suits against it and its agents would result. That the earnings from any class of freight business can be readily determined, but that the expenses cannot be accurately determined, as the same property is being used at the same time in the carrying of hundreds of daily items of both state and interstate traffic. That it will require an accounting to ascertain the approximate cost of doing purely state business.

That its intrastate transportation earnings for the fiscal year ending June 30, 1910, were approximately 2 per cent. of the value of its property devoted to that business. That for the fiscal year ending June 30, 1911, it was less than 1 per cent. That for the fiscal year ending June 30, 1912, and subsequent years, its earnings, under the old tariffs, would not exceed those of 1910 and 1911, and that for such time, under the tariffs fixed by the Commission's order, its percentage of gain would be much less.

That an important part of complainant's business consists of all rail shipments from different parts of the United States to points in Eastern Washington. That in such trade it must compete with the water and rail routes by way of the Pacific ports. That, by the Commission's order, the water and rail rate for interstate traffic was materially lowered. That complainant and other all-rail carriers, to meet such lowered rate, were compelled to lower their interstate all-rail rate. That this result constitutes an unlawful interference with interstate commerce in violation of article 1, § 8, of the Constitution of the United States.

That, by reducing the rates from Western Washington commercial centers to local distributing points in Washington, near its other boundaries, there will be such a marked discrimination against interstate traffic with points just beyond the borders of the state as to force a reduction in the rate on interstate shipments. That this, also, constitutes an unlawful interference with interstate commerce.

The prayer of the complaint is that the order of the Public Service Commission be vacated as confiscatory, for injunctive relief against the defendants, and for an accounting to determine the value of complainant's property devoted to intrastate freight traffic in Washington.

[1] Under the demurrers, the first ground urged is that there is a misjoinder of parties defendant, in that certain shippers are joined with the members of the state Commission and the state's Attorney General as defendants—it being alleged that they will, unless enjoined, seek to enforce the rates fixed by the Commission. They are sued as representatives of that class of shippers, shipping the commodities affected by the modified rates. Therefore they are proper, if not necessary parties. Though not directly ruled upon, this course has been noticed with apparent approval by the Supreme Court in *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764. While it is true that, through the Commission and the state's Attorney General, the public is represented, though the state is not sued, yet the shippers joined as defendants are representatives of a class directly and particularly affected.

[2] Even if this point were not so determined, yet, as the demurrer is on the ground that the shippers are neither necessary or proper parties, it follows that they, and not the other parties, who are necessary and proper, alone can object on the ground of misjoinder. 16 Cyc. 205, and citations.

[3] The demurrer also goes to those certain paragraphs of the Great Northern bill which attack the Commission's order, because its result,

it is alleged, will be to regulate and control interstate commerce from Pacific ports with those distributing points outside of the state that are in close competition with points within the state to which latter, the rates are directly affected by the Commission's order. The bill does not name any particular towns or any points affected. Nor does it give any general or specific information concerning the disparity in rates between the points within the state and those claimed to be affected outside of the state. The allegations in these particulars are insufficient.

If the conclusion of the pleader alone, without detailed information, is considered, it is shown that the effect, which it is contended the Commission's rates would have upon interstate rates, is not a necessary or direct result; but, if at all effective, they become so because the carrier—for prudential reasons, to prevent friction with the interstate shippers and possible loss of business on account of too great a disparity between the intrastate and interstate rates to adjacent points—would lower the interstate rate to more nearly conform to the intrastate rate. This is neither the legal effect of the Commission's order nor the direct result. It is merely incidental, and would not form a basis to avoid the Commission's order on the alleged ground that it will regulate and control interstate commerce, or put a burden thereon. If the rates fixed are just and reasonable, this alone would not defeat the Commission's action. *Woodside v. Tonopah & R. G. Co. (C. C.)* 184 Fed. 358, 360; *O. R. & N. R. R. Co. v. Campbell (C. C.)* 173 Fed. 957; *Southern Pacific R. R. Co. v. Campbell (C. C.)* 189 Fed. 182.

[4] Both bills are demurred to upon the ground that neither states any equitable ground for relief, but that both show affirmatively that the Commission's order is not confiscatory, nor will it deprive complainants of a reasonable and fair return upon the value of their property devoted to the public use. It has been contended in support of the demurrers that, as long as there would be any return to complainants over and above expenses, the Commission's order could not be held to be confiscatory or avoided. *Cotting v. Kansas City Stockyards*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92. This cannot be held to be the fair and reasonable return upon the investment to which the law gives complainants the right. *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. Ed. 1154; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 23 Sup. Ct. 571, 47 L. Ed. 892. In support of the demurrer to the Northern Pacific bill, it has been earnestly contended that the court should determine as a matter of law that 4 per cent. per annum—that being approximately the rate of return which the bill admits complainant would receive under the Commission's order—is a fair and adequate return upon the value of complainant's property.

The question of what is a fair and adequate return is a mixed one of law and fact. Complainant in cause No. 1,094 alleges in its bill:



"The return which your orator received, as aforesaid, in the years 1910 and 1911 is about as large as your orator can reasonably anticipate for the future, by reason of increased competitive conditions, \* \* \* and is a less rate than your orator is entitled to have upon its capital invested in the business of transportation, and is a less rate than capital employed in other and somewhat similar business in the state of Washington generally receives."

In *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, at page 49, 29 Sup. Ct. 192, at page 199 (53 L. Ed. 382, 15 Ann. Cas. 1034), it is said:

"Under the circumstances the court held that a rate which would permit a return of 6 per cent. would be enough to avoid the charge of confiscation, and for the reason that a return of such an amount was the return ordinarily sought and obtained on investments of that degree of safety in the city of New York. Taking all the facts into consideration, we concur with the court below on this question, and think complainant is entitled to 6 per cent. as a fair return on the value of its property devoted to public use. \* \* \* Of course, there is always a point below which a rate cannot be reduced and at the same time permit a proper return upon the value of the property. \* \* \*" *Central of Ga. R. R. Co. v. R. R. Commission of Ala.* (C. C.) 161 Fed. 925; *L. & N. R. R. Co. v. Brown et al. R. R. Commissioners* (C. C.) 123 Fed. 947; *New Memphis Gas & Light Co. v. City of Memphis* (C. C.) 72 Fed. 952; *Spring Valley Water Co. v. City & County of San Francisco* (C. C.) 124 Fed. 574; *Milwaukee Elec. Ry. & Light Co. v. City of Milwaukee* (C. C.) 87 Fed. 577, 585; *Puget Sound Elec. Ry. v. R. R. Commission*, 65 Wash. 75, 117 Pac. 739.

[5] It is further contended in support of the demurrers that there is no equity in either bill because there is no allegation of the revenue derived from each class of freight affected by the order, nor an allegation of the expenses properly chargeable against each class.

The Northern Pacific bill shows that, while that complainant and the Commission agree that the total value of the railroad company's property in the state of Washington is \$127,250,000, yet they do not agree concerning what portion of this total is used in intrastate commerce; complainant alleging it to be \$70,648,971, and the Commission finding it to be \$52,172,500. In the Great Northern bill the value of its property devoted to intrastate traffic is alleged to be in excess of \$32,828,970.81; but it is alleged that the Commission has found it to be \$30,150,000. It is upon the true valuation—if either of these be so—that the complainants are entitled to a fair and reasonable return. Thus one ground of the controversy is disclosed by the bills. The complainants' general distance freight schedule, which was modified by the Commission, provided rates for ten classes of freight. For a distance of five miles the cost was graded down from 10 cents a hundred for the first class, through the intervening eight classes to 2 cents a hundred for the tenth class—class "E." The advance in each rate for the different classes was uniform regarding one another for greater distances than five miles, but the charge by mile uniformly diminished with the increase in the length of the haul. For example: For 100 miles the rate was 60 cents a hundred for first class and 12 cents a hundred for class "E." For 200 miles the rate was \$1 a hundred for the first-class freight, and 20 cents a hundred for class "E." For

500 miles the rate was \$1.80 a hundred for the first-class freight and 36 cents a hundred on class "E."

The Commission's order recognized and adopted the system of classification embodied in the complainant's tariff, but made a graduated reduction in all the rates of these classes, except the rate for the first five miles. For example, the rate for first class for 100 miles was 50 cents a hundred, instead of 60 cents, a reduction of  $16\frac{2}{3}$  per cent. For 300 miles the rate was made 91 cents a hundred, instead of \$1.40, a reduction of 35 per cent. For 500 miles the rate was made \$1.28 a hundred, instead of \$1.80, a reduction of a little more than 28 per cent. By the order of the Commission, it was provided that the rates for the second, third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth classes should not exceed 85, 70, 60, 50, 50, 40, 30, 25 and 20 per cent., respectively, of the first-class rate. Other tariffs were affected by the Commission's order, but, like the foregoing, the reduction and changes were made with mathematical uniformity. This is enough to disclose that the Commission's order, changing the tariff in this manner, was done to absorb what was conceived to be a general overcharge arising from some basic difference as an overvaluation of the property devoted to intrastate use. To absorb this general overcharge, a uniform reduction was made. It is thus made apparent that the controversy does not apply to this or that particular one of these 10 classes of freight in any way different from the others; but that it concerns them all. The Commission by adopting the same uniform ratio for the reduction in freight rates from first class down to the tenth, or "E," class, shown in the railroad's tariff, conceded the proper exercise by the railroad of a discretion in the matter of classification, so far as the class rates are related to one another.

This contention is made on what is conceived to be the authority of *Cotting v. Kansas City Stockyards*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92. But, even in that case, it is warningly said:

"The court (Supreme Court) has held that the Legislature may not prescribe rates which, if enforced, would amount to a confiscation of the property. But it has not held affirmatively that the Legislature may enforce rates which stop only this side of confiscation and leave the property in the hands and under the care of the owner, without any remuneration for its use."

If the Commission had attempted to reform the rates as a whole (*Cotting v. Kansas City Stockyards*, *supra*, at page 89 of 183 U. S., 22 Sup. Ct. 30, 46 L. Ed. 92), then the statements of totals, as in the Northern Pacific bill, would probably have been sufficient. The carrier is not primarily concerned as to the uniformity of the rates, and cannot complain of what it names as discrimination in rates "so long as the total is enough to furnish such return"—a reasonable return upon a fair valuation of its property. "It is not important that, with relation to some customers, the price is not enough." *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, at page 54, 29 Sup. Ct. 192, at page 201 (53 L. Ed. 382, 15 Ann. Cas. 1034).

But the converse is not, necessarily, true. The particular shippers and the public do have an interest in the uniformity of the rates, and there should be no discrimination "for which good reasons cannot be given." *Id.* In the absence of any allegation concerning the rates not affected by the order, under certain circumstances, the presumption might be warranted that such other rates were properly adjusted—neither too high nor too low—but in the present controversy the rates, the source of revenue, and the expenses are interdependent, and it is not only necessary to determine whether the total revenue is threatened with confiscation or depreciation beyond what is a reasonable and fair return, but it is necessary to ascertain whether the rates affected are to bear too little of the burdens of the total traffic, or whether they have been bearing too much of that burden. This cannot be shown until the modified intrastate rates are segregated from those which the Commission did not touch in its order and the rate of income from each and the expenses chargeable to each are disclosed. These rates are on trial more particularly than the entire intrastate freight rates.

Complainants have recognized the necessity of setting out the revenue from passenger business, as well as freight. This must be done under any circumstances to establish that the total revenue is not unreasonably high. Being armed with the right of eminent domain, the right to take for its use the property of the individual at its fair market value, the public is entitled to the services of the common carrier at what they are reasonably worth—at least so long as such services so furnished will afford the carrier a reasonable return upon its property devoted to the public use. The public, therefore, has the right to freight rates in which there is no unreasonable discrimination against any locality or class of freight. The tabulation of values, revenues, and expenses in both bills of complaint fail to disclose the net revenue derived in the past under the old rates from the classes of freight included in the Commission's order. They do not disclose the amount of expenses properly chargeable to those classes; nor set out any estimate of what the revenue and expense would be on the same under the Commission's order. They do not disclose what, if any, net revenue has been realized from the intrastate freight rates not affected by the order, nor whether the same were carried at a profit or loss.

The Great Northern bill does not show the expenses properly chargeable to intrastate freight, alleging that the expenses cannot be ascertained with mathematical certainty. The presumption upon demurrer would, therefore, be that freight, other than in those classes affected by the order, was not carried at a profit. There must be some point beyond which a carrier cannot go in discriminating in freight charges against various classes of freight, else one class may be compelled to bear the expense of the whole traffic.

Without deciding the question finally upon these demurrers, it is held that it is not sufficient to justify the revenue received on

the freight rates as a whole, but that the facts should be given justifying the rates, as a whole, changed by the Commission; that this cannot be done without a segregation of those classes and rates from the others. It is stated in the bills the number of ton miles carried intrastate, the cost per mile of the freight so carried, that the effect of the Commission's order would be to reduce the Northern Pacific's income \$200,000 per annum and the Great Northern's income \$300,000 per annum; that 45 per cent. of the Great Northern's intrastate freight revenue is derived from the rates modified by the Commission's order.

While the foregoing does not furnish the requisite information, it does show, with the other facts alleged, a sufficient grasp of the details of the business in these particulars to enable the complainants to furnish approximately correct statements of these amounts, and this before entering upon a reference and accounting. The difficulty in forming a reasonably accurate estimate of the amount to be credited and charged to the different classes of freight traffic is obvious, especially so as its subdivision into different classes is extended. The Supreme Court has said: "How speculative" are these figures that are "set down with delusive exactness." *City of Louisville v. Cumberland Tel. & Tel. Co.*, 225 U. S. 430, 32 Sup. Ct. 741, 56 L. Ed. 1151; *Southern Pacific Ry. Co. v. Railroad Commission (D. C.)* 193 Fed. 699; *South. Pac. Ry. Co. v. Campbell (C. C.)* 189 Fed. 182.

The foregoing shows the more need of a painstaking effort to narrow the issues and develop with precision all the equities of the cause from its inception. The allegations in the bills concerning the danger of incurring great daily penalties, if the Commission's order was not complied with, were evidently inserted as a ground justifying the asking of equitable relief and not as an attack upon the commission law itself under the fourteenth amendment to the Constitution of the United States. *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, at pages 53, 54, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Berea College v. Commonwealth of Kentucky*, 211 U. S. 45, 54, 29 Sup. Ct. 33, 53 L. Ed. 81.

The demurrers will be sustained.

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### In re WRIGHT-DANA HARDWARE CO.

Petition of CANTWELL.

(District Court, N. D. New York. October 23, 1912.)

**1. EVIDENCE (§ 471\*)—WITNESSES (§ 240\*)—EXAMINATION OF WITNESS—LEADING QUESTIONS—CONCLUSION.**

On an issue as to whether certain paint returned by a bankrupt to claimant had been sold to the bankrupt or was on consignment, a salesman of the bankrupt was asked, "That the stock of paint then was taken

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by inventory and payment was then made to W. Paint Company; that is, the proceeds of the sales for the previous year were turned over to the W. Paint Company less commission?" *Held*, that such question was leading, suggestive, and objectionable as calling for a conclusion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471;\* Witnesses, Cent. Dig. §§ 795, 837-839, 841-845, 849-851; Dec. Dig. § 240.\*]

2. BANKRUPTCY (§ 340\*)—CLAIMS—EVIDENCE—RELEVANCY.

On an issue as to whether certain paint returned by a bankrupt to claimant was sold or on consignment, evidence that when claimant's agent came to remove the same he was referred to the bankrupt's attorneys by a mere servant of the bankrupt, and after consulting with them they consented that the paint should be removed, and told him that he had a right to remove it, was incompetent and immaterial; the bankrupt's attorneys having no authority to permit such removal, or determine the question.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. § 340.\*]

In the matter of bankruptcy proceedings of the Wright-Dana Hardware Company. Application to review referee's order dismissing the petition of John A. Cantwell, as trustee, to expunge the claim of the Warren Paint Company, on the ground that it was too great, and that plaintiff had received preferences from the bankrupt and had not surrendered the same. Referee's order reversed, and cause returned for new trial.

Charles B. Mason, of Utica, N. Y., for claimant.

Martin & Jones, of Utica, N. Y., for trustee.

RAY, District Judge. The petition in bankruptcy was filed against the Wright-Dana Hardware Company on the 17th day of January, 1912, and adjudication was made on the 5th day of February, 1912. On the 27th day of February, 1912, John A. Cantwell was duly appointed trustee and he duly qualified.

April 26, 1912, Warren Paint Company, of Warren, Ohio, a corporation of that state, filed its claim on four promissory notes, viz.: One dated March 22, 1911, for \$500, due in six months; one dated October 23, 1911, for \$400, due in four months; one dated November 22, 1911, for \$600, due in four months; and one dated December 22, 1911, for \$400, due in four months—and for balance claimed to be due on open account, \$1,796.42.

The trustee filed his petition for the disallowance and expurgation of said claim, on the ground the Warren Paint Company had received preferences during the months of January and February, 1912, and particularly on the 5th and 6th days of February, 1912, and had not surrendered such preferences. On the 5th day of February, 1912, the same day the adjudication was made, the Warren Paint Company by its agent or representative, and with knowledge of the bankruptcy proceedings and adjudication, entered the store and place of business of Wright-Dana Hardware Company, and with the acquiescence of the person there in charge, but without any action on the part of that company, as such, took possession of and carried away paint to the value

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of \$1,766.80. The claim of the Warren Paint Company was and is that this paint was its own property, which it had sent to the Wright-Dana Hardware Company on consignment for sale by that company as agent of the Warren Paint Company, the said Hardware Company to pay over the proceeds of such sales, retaining a commission for doing the business, and that the bankrupt company had no other interest in such paint. The claim and contention of the trustee was and is that such paint was sold to the Wright-Dana Hardware Company and was its property, and that by taking and removing the paint as it did the Warren Paint Company received a preference.

The real question is: Who owned the paint so removed? There are facts and circumstances pointing to ownership in the Wright-Dana Hardware Company, and others pointing to ownership in the Warren Paint Company. The referee has made some 25 findings of special facts, but some of them have no support whatever in the evidence. The claimant, Warren Paint Company, claims that there was a written contract between the parties as to this paint, by the terms of which the Warren Paint Company was to send same on consignment to the Wright-Dana Hardware Company, expressly retaining title and ownership, for sale, the proceeds of such sale, after deducting commission, to be the property of said Warren Paint Company and immediately remitted to it, the paint to be insured in the name and for the benefit of said Warren Paint Company. This written agreement was not produced, and the claim is that it has been lost since the paint was taken by the Warren Paint Company. A written contract between the parties relating to the sale of paints for the Warren Paint Company by the Wright-Dana Hardware Company, made January 1, 1906, was produced and put in evidence, and evidence was given that the contract in force when the paints in question were sent to the said Hardware Company was substantially identical, except in certain unimportant particulars. That agreement contained the provision:

"The party of the first part [Warren Paint Company] agrees to insure in their own name the stock of paint consigned, and the party of the second part [Wright-Dana Hardware Company] shall not be responsible for any loss or damage by fire to said stock."

The closing clause of such contract reads:

"The goods *sold at net prices* are marked in red ink in the price list of 1906, and forms a part of this contract."

By the first clause it is provided that:

"The party of the first part hereby agrees to give the party of the second part the exclusive agency or sale of their goods from January 1, 1906, to December 31, 1906, upon all territory"

—specifying territory. It also contains the following:

"Each party to this contract is to keep on their ledgers two accounts, one known as the personal account and the other as the consignment or stock account. All consigned goods to be billed at the regular dealer's price, as shown upon the price list and discount sheet of 1906, of the Warren Paint Company, and to be f. o. b. Utica, N. Y. All goods not so consigned are to be at net prices as agreed upon by the parties hereto and to be f. o. b. Warren, Ohio. The second party is to store the goods and take care of the

same, to receive and ship all goods without any extra charge. Upon all consigned goods that are sold by the Wright-Dana Hdw. Co., or their agents, the following commissions are to be allowed: Upon outside and inside White, 15%: upon all other goods other than net goods, a discount of 20% is to be allowed. The second party have the right, upon the 15th of each month, to settle for all goods that have been sold during the month previous, and receive therefor an extra discount of 3% upon all such payments. \* \* \* An invoice is to be taken at the close of each year, and whatever shortage or deficiency may appear the second party is to settle for upon the terms stated above."

The officers of the Wright-Dana Hardware Company testified in substance that they did not understand they were purchasing the goods, but receiving them on consignment to sell for the Warren Paint Company on commission. The Wright-Dana Hardware Company did not keep the proceeds of the sales of paints received under the contract, if it existed as claimed, separate or distinct from its own funds, and did not keep any account of sales made. It put the money with its own moneys, and used it as its own money, and no objection was made by the Warren Paint Company. At long intervals account of paints sold was got at by counting up stock received and stock not on hand, and figuring the value, deducting commissions, and the Warren Paint Company took notes for the amount due. The notes in question were given for the sums found due at the dates of such notes, respectively. Some payments were made on account from time to time. This mode of dealing was, of course, wholly inconsistent with the existence of such a contract as is claimed, and with ownership of the paints by the Warren Paint Company.

The referee finds as follows:

"That the proceeds of the sale of the Warren paint were put into the general funds of the store of the bankrupt and were subsequently turned over by the bankrupt to the Warren Paint Company. That it was not a practical thing in the business of the bankrupt to keep a separate account of the sales made of the Warren paint."

These findings of fact are not only unsupported by evidence, but are contrary to the evidence. The paint was not mixed with other paints, and when any of it was sold it was not only easy, but perfectly practicable, to make an account of it in a separate book or in a separate account. While it is true that the (now) bankrupt company put the proceeds of the sales of this paint into the general funds of the store, and also used such proceeds as its own, it did not subsequently turn them over to the Warren Paint Company, except in part, making payments on account. The notes to which attention has been called were given for moneys due the Warren Paint Company for such paints sold by said company, and which paints had been received under the alleged agreement. The evidence shows, conceding payments on account to be a subsequent turning over of the proceeds of sales, that much the greater part of such proceeds were never turned over. If the contract existed as claimed, and the paints belonged to the Warren Paint Company, as there was no agreement to loan such proceeds, the Wright-Dana Hardware Company continually converted such money to its own use, and the Warren Paint Company from time to time

waived the tort by taking payments on account, and especially by taking notes. There is no evidence it charged any interest on the money so used by the (now) bankrupt company.

Up to April 29, 1911, all paints shipped to the Wright-Dana Hardware Company were billed as follows, and accounts sent, viz.:

"The Warren Paint Co., Paint and Color Manufacturers, Warren, Ohio. Sold to Wright-Dana Hardware Co., Utica, N. Y."

Then followed list of paints, with quantity, price, and amount, date shipped, name of the salesman, and "Terms, 60 (days meaning) 2 % 15 days," meaning that price was, as stated, payable in 60 days. After April 29, 1911, the paints were billed in same way, except that "Terms" had "on consignment" in place of the time, etc., just mentioned. April 5, 1911, the Wright-Dana Company wrote M. S. Clapp, secretary of the Warren Paint Company, as follows:

"We have written the factory that we want to return \$1,000 worth of Chi Namel, stating that we carried this large amount when we were wholesaling the goods for them, and that when they closed off our jobbing proposition it was unfair to expect us to carry \$1,500 worth of Chi Namel. To be absolutely frank in this matter, we are precious hard up, as Mr. Dana probably told you. This he would not put on paper to any other man in the world, excepting M. S. Clapp; but it is, nevertheless, a fact, and one which bothers the writer considerable. Now I want you to use your influence with Ford to take back \$1,000 worth of Chi Namel, and I want, also, to have it apply on the account which we owe you. This can be done, as the Ohio Varnish Co. must have an account with the Warren Paint Co., whereby they owe the Warren Paint Co. money, and can this way return the account. We shall still continue to buy paint and Chi Namel, and in fact have in a window this week in which we are advertising the goods, and when the weather is a little warmer we want a demonstration. We shall expect you to consider this matter seriously, and do not say no. We know you can arrange it with Ford, if you want to. There is no question about that."

It was immediately after the receipt of this letter that the Warren Paint Company put the words "on consignment" into the bills. June 26, 1911, Mr. Clapp, as secretary, wrote the bankrupt company:

"Another thing: I wish you would immediately ship all of the goods that are to come back here, so that we can make a final adjustment. Yet you understand, as we are not keeping the account, as per our former letter, we regard all of the shipments that have been made to you and all the goods that you retain as being on consignment, but that should not prevent you making payment as we talked when last there, that you would pay every 60 days as bills became due, thereby reducing all the time the indebtedness, instead of allowing it to grow and become large. No doubt the plan under which you are working is the best thing for you. Send all the goods at once that are coming here."

August 14, 1911, the Warren Paint Company, per M. S. Clapp, also wrote:

"I wish you would commence sending us checks along as you can to reduce this account, as it was the understanding, you know, between us, that you were to pay for this year's goods upon regular terms."

"Regular terms" were cash in 60 days, 2 per cent. off if paid in 15 days.

September 22, 1911, the Warren Paint Company also wrote and sent the following letter:

"We find that you are ordering a good deal of paint shipped to you from Buffalo. The understanding was that you were to pay for all of the goods



that you ordered this year, and up to the present time we have received no remittance covering any of the shipments that have been made, and we must ask that you send us remittance for all that is 60 days old. While it is true that we have billed these goods to you as of consignment, yet that does not change your own proposition that you would pay for the goods upon regular terms. Kindly do this by sending us a check by return mail."

The last bill of goods sent was shipped November 18, 1911, and amounted to \$14.85. January 1, 1912, the Warren Paint Company sent a bill as follows:

Warren, Ohio, January 1, 1912.

Wright-Dana Hardware Co., Utica, N. Y., to the Warren Paint Company, Dr.

Debit		Credit	
Dec. 1.	Balance..... \$3,515 24	Dec. 20.	C. M. .... \$ 3 00
Jan. 1.	Balance..... \$3,512 15.	Balance .....	3,512 15
		<hr/>	
		\$3,515 24	

All these facts and letters are inconsistent with any theory that the Warren Paint Company had sent these goods on consignment and that the title thereto was in the Paint Company. The statement of account is inconsistent with the claim that these goods were sent and sold on consignment. It appears from the evidence, uncontradicted, that the (now) bankrupt company sold the paints on a commission on the price at which billed to it, but that at retail—and nearly all sales were at retail—at an advance of 25 per cent. or such as it could get, and that when settlements were made a discount of 10 per cent. on the invoice prices was allowed.

It would seem quite clear, but for the testimony of Samuel Bennett, salesman of Wright-Dana Hardware Company, and Arthur J. Lowrey, treasurer of said company, that there was an agreement of sale and purchase, a regular shipment and billing of the goods on that theory, and payments and demands of payment on that basis, and a use of the proceeds of sales as made on the theory that the paints and proceeds of same were the property of the Wright-Dana Hardware Company. The words "on consignment" were inserted after the said Hardware Company stated it was very hard up. But it is a fair inference from the letters of the Warren Paint Company that it relied on some other agreement—one by which the Wright-Dana Hardware Company was to take the paints at the prices named and pay for them on "regular terms," for June 26th, it wrote:

"But that should not prevent you making payment as we talked when last there, that you would pay every 60 days as bills became due, thereby reducing all the time the indebtedness, instead of allowing it to grow and become large."

It is now claimed by Lowrey that this agreement referred to the unpaid notes. But the notes were not 60-day notes and the subsequent letters say—September 22, 1911:

"The understanding was that you were to pay for all of the goods that you ordered this year, and up to the present time we have received no re-

mittance from you covering any of the shipments that have been made, and we must ask that you send us remittance for all that is 60 days old."

And August 14th:

"I wish you would commence sending us checks along as you can to reduce this account, as it was the understanding, you know, between us that you were to pay for this year's goods upon regular terms."

So far as appears, the now bankrupt company did not repudiate or question these statements, but made payments on account. It is, of course, true that the Warren Paint Company could not make a contract by writing the Wright-Dana Hardware Company that one had been made between them according to terms stated; but it might conclude itself, as between itself and the trustee in bankruptcy, from disclaiming the contract as stated by it in writing on at least three different occasions.

Turning to the testimony of Mr. Bennett, we find that he was head salesman of the now bankrupt company, in charge of the retail department. He had no other duties and no power, except to sell and contract sales at retail. He says that Arthur Lowrey, the treasurer, ran the business for the last four or five years, and that up to three years ago the president of the company was in the store. One G. L. Ginther was the traveling agent of the Warren Paint Company. In January, 1912, he was at the store of the bankrupt and asked about the financial condition, and on being informed of the bad condition talked of removing the paints. Lowrey had then left the store. Says Bennett:

"After he found no head at the store, he figured about getting out the goods. He claimed they were on consignment. He said he was advised to get the goods out. Q. What was the outcome of his request that he take away the Warren paint goods? He said they were consigned, and I referred him to Mr. Kinne at Lynch & Willis'. He had a talk with them, and they would not let him take them until he could show they were consigned."

This salesman was asked, "Do you know who owned these goods?" This was duly objected to. The objection was overruled, and the witness answered, "Belonged to the Warren Paint Company." This witness did not show himself to be possessed of any information which would qualify him to give an opinion as to the ownership, and he was not a member of the firm. He then stated that he "understood" the agreement between the parties was by way of a written contract; but it is undisputed that the last written agreement was in 1909, and it is not produced. Neither its loss nor destruction was proved by any competent evidence, and the referee finds that in January, 1912, they were not operating under a written agreement.

[1] This question was put to this witness:

Q. (You say) "that the stock of paint then (about November 1st each year) was taken by inventory, and payment was then made to Warren Paint Co.; that is, the proceeds of the sales for the previous year were turned over to the Warren Paint Co., less commission of the Wright-Dana Hardware Co.?"

This was duly objected to and overruled.

"A. Proceeds put in the funds of the store and *consequently* were turned over to the Warren Paint Co."

I assume that "consequently" should be "subsequently." This was leading, suggestive, and called for a conclusion; and, further, other evidence shows that the proceeds of sales were in the main not turned over, but used by the Wright-Dana Company and treated as its own, except in a few cases and under special circumstances.

[2] Returning to the subject of the removal of the goods, the Warren Paint Company was permitted to prove its title by this witness in this way:

"Q. In regard to when Mr. Ginther came to remove these consigned goods, you referred him to Lynch & Willis? A. Yes; to Mr. Lynch. Q. Did he subsequently report to you that he had been advised that this was a consignment and that he was at liberty to remove it? (Objected to by Mr. Martin as incompetent, immaterial. Objection overruled.) A. Yes. Q. He did not offer to remove it until after he had seen Lynch & Willis? (Objected to by Mr. Martin as incompetent, immaterial. Objection overruled.) A. No; not until he was assured that he had a right to. Q. Lynch & Willis were attorneys for the Wright-Dana Hardware Company at that time? A. Yes. Q. Was it a practical thing in your business to keep a separate account of sales made of the Warren paint? (Objected to by Mr. Martin as incompetent, immaterial. Objection overruled.) A. No; it could be done, but would be an awful job."

If, on the day the Wright-Dana Hardware Company was adjudicated a bankrupt, Lynch & Willis were its attorneys, they had no right or power to give away or return this property, or decide the question of its ownership as against this trustee. The question before the referee was not the good faith of Ginther, the agent of the Warren Paint Company, or the good faith of Bennett, the retail salesman of the bankrupt company, in turning over the property in the possession of the Wright-Dana Hardware Company, then adjudicated a bankrupt. What Ginther told Bennett Mr. Lynch, of Lynch & Willis, had told him (Ginther) as to the ownership of the paint, was incompetent and immaterial evidence. The referee seems to have thought otherwise. It was an indirect mode of putting the opinion of Lynch & Willis before the referee, and which opinion, it appears, was based on a writing that has not been found or put in evidence. In view of the ruling of the referee, this evidence was harmful and prejudicial, as well as incompetent.

The evidence of Lowrey on this question does not help the matter. It does not appear from his testimony that he knew what the contract actually was under which the paints in question were sent. If he took part in the arrangement, he should state what its terms were, when made, and who made it. Lowrey says Mr. Clapp, of the Warren Paint Company, the writer of the letters referred to, was in Utica in March, 1911, and that he could recall the matters talked over. He says that the financial condition was not talked over, but does not state what was. He also says Mr.

Clapp and Mr. Dana had some talk, but does not state it. He also says:

"Q. You remember when the last written contract between you and the Warren Paint Company was entered into? A. Do not remember exactly; it happened each year. The last year or two we continued contract which was made, say, at the close of 1909."

Some changes were made, it is conceded. It is true that Lowrey says that since 1910 the Warren Paint Company has requested *him* to purchase these goods (paints) outright, and that he replied that they would not purchase the goods on any terms; "that we did not have the money to put in it, needing all our funds, and that if they insisted upon our purchasing the goods that we should not have to handle them, but that we would continue along consignment lines." Still the real contract may have been as this trustee claims it was, and as the Warren Paint Company wrote it was made by some authorized person representing the now bankrupt company.

The fifth finding of the referee shows that he placed reliance in making his decision as to the ownership of these goods on the advice Lynch & Willis gave Ginther, which is proved only by what Ginther told Bennett, the retail sales agent. There is no proof that Lynch & Willis had any power in the matter, and no legal evidence that they gave the advice or opinion that the agreement then produced constituted a valid and legal consignment. In view of the evidence pro and con on the subject of the ownership of these paints, including the bills and letters, the trustee is entitled to have the question decided on legal evidence.

The order of the referee, allowing the claim and dismissing the petition of the trustee, is reversed, and the matter is sent back for a retrial and rehearing of the question.

So ordered.

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#### RUTLAND TRANSIT CO. v. L. P. & J. A. SMITH CO.

(District Court, N. D. Ohio, E. D. January 24, 1912.)

No. 2,403.

#### NAVIGABLE WATERS (§ 26\*)—OBSTRUCTION BY PIER CRIB UNDER CONSTRUCTION—INJURY TO VESSEL BY COLLISION—LIABILITY.

Evidence considered, in a suit by the owner of a steamer to recover damages for her injury by coming into collision with a stone crib being built by respondents as a government contractor in the harbor of Cleveland, when the steamer was entering the harbor at night, and *held* insufficient to sustain the burden resting on libellant to show that the injury arose through some fault or negligence of respondent, or even to show that the steamer struck the crib, rather than some other obstruction incident to the improvement work being carried on.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 133-166; Dec. Dig. § 26.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Admiralty. Suit by the Rutland Transit Company, owner of the steamer F. H. Prince, against the L. P. & J. A. Smith Company. Decree for respondent.

Charles E. Kremer, of Chicago, Ill., Wallace, Butler & Brown, of New York City, and Hoyt, Dustin, Kelley, McKeehan & Andrews, of Cleveland, Ohio, for libelant and divers cargo interests.

Goulder, Day, White & Garry, of Cleveland, Ohio, for respondent.

DAY, Circuit Judge. This case arises by reason of a collision with the steamer F. H. Prince, while coming into the harbor at Cleveland, Ohio, on the 23d day of June, 1904. It is contended by counsel for libelant that on this date this steamer, while laden with general merchandise, struck a crib filled with stone, located at the entrance of the harbor of Cleveland; that this crib was under the control of the L. P. & J. A. Smith Company, contractors engaged in the Cleveland harbor improvement; that the collision broke a hole through her beam planks, so that she began to fill with water and it became necessary to run her onto the beach to keep her from sinking in deep water.

Certain other parties on behalf of the cargo have intervened and rely upon the allegations of the libelant.

The question here arising being one of fault, it is not necessary to give further consideration to the other phases of this inquiry.

The damages to the cargo and the steamer arising out of the disaster amount to the sum of \$110,000, and to recover this sum a libel was filed by the Rutland Transit Company, the owner of the Prince, against the L. P. & J. A. Smith Company, who, at the time I have indicated, were under contract with the United States government for the construction of two cribs at the mouth of the harbor at Cleveland. At the time of the collision they were putting in the crib which it is claimed the Prince struck. These cribs were the outer ends of piers which were to be 1,000 feet in length, and to extend out from the breakwater, which had already been constructed. Between these cribs and the breakwater more or less riprap stone had been deposited. Some of this riprap was placed around the east crib, which crib it is claimed the Prince struck. It appears from the testimony of the government engineer, which may be taken as reliable, that these cribs were sunk 1,000 feet out from the breakwater, at right angles to it. They were 700 feet apart; the top of the east crib, at the time of the collision, being 2½ feet below mean lake level. The crib was 60 feet by 60 feet, and was made of 12"x12" hemlock; the outer face being sheathed with 14-inch plank, maple and beech, down 16 or 18 feet, some of the hemlock (12"x12") being exposed below that. Parallel with the line of riprap work running along toward the breakwater were some floats on either side as guides to the vessels unloading the riprap stone. There was 22 feet of water over the riprap at the time. The west crib was sunk in the fall before the collision, and

the east crib in the month of June, 1904, I think some 8 or 10 days before the collision.

It is claimed by the libelant that the steamer F. H. Prince left Ogdensburg, N. Y., and this was her first trip of the season; that the Prince was of 240 feet keel, 42 feet beam, and tonnage of 1,547 tons; that at the time she struck she was drawing 6 feet 9 inches forward and 12 feet 6 inches of water aft. She struck at about 2:15 o'clock of the morning of June 23d. The captain described the striking in part as follows:

"We kept on going in this direction, and finally she struck something, and as she struck she keeled over to port, and it slewed her, shoved her off, and when she struck I stopped the engine and gave one whistle, and then started her again for fear that she would go around so far that she would hit aft. I gave her another whistle and started the engine, and told the wheelsman to steady, and he did so and went into the Cleveland harbor."

The captain also testified that he came in on a course of S. W.  $\frac{3}{4}$  S. being on that course for half an hour, and that he was on that course when he struck, and that on that course he picked up the Cleveland fog signal, which is on the east end of the west breakwater, and this steamer was heading on it, and finally picked up the so-called jumping jack, or red and white flash light, and she was just about heading on it, her course then being S. W.  $\frac{3}{4}$  S.

There is no dispute but that the west crib was lighted by a gas tank light, white in color, which was burning at the time of the collision, and that the east crib was lighted by a lantern some eight inches in diameter, with an oil pot which would hold an amount of oil which would burn this light for some eight days continuously, and that the light displayed was a red one. That these lights were burning there is no dispute. The weather was smoky, the government fog signals being sounded, and the Prince herself was sounding fog signals.

There is quite a serious conflict of testimony as to whether this red light was burning brightly or dimly; but that lights were maintained, and were burning, on both of these cribs under the control of the L. P. & J. A. Smith Company, there is no dispute.

It also appears that around these cribs there had been some stone placed, which came to within 8 feet or 9 feet from the top of them, and extended out from them a short distance. The Prince was going at a slow rate of speed. The captain was on the bridge, and this flash light, called the jumping jack light, was on the east end of the west breakwater. The captain testified that he knew nothing of the sinking of this east crib, or that it was to be sunk. It also appears that its existence was known to no one on board of the Prince. The only chart which the Prince carried was of an issue of 1864. It also appears from time to time that bulletins had been issued by the government mentioning the contemplated work on these cribs, and it further appears that the captain had never received any of these charts or bulletins. It is important to note that neither the captain nor any of the crew of the Prince state

that the Prince struck the crib. The captain says he struck something and keeled over to port. Then he says he saw a little dim red light on the starboard side a little past abreast. He does not give the distance, other than it looked to him to be about a width away, and then, in response to a question, says that he could have seen the light 300 or 400 feet, had he been looking for it. He also says he did not see the west crib light, which was an acetylene gaslight.

The government engineers and the government divers and surveyors, who were called as witnesses, all testified that the crib was in no way damaged or marked; that everything was intact. One fact is positive in this case, and that is that the crib bore no evidence of any sort of having been collided with. So it is evident from the testimony that the Prince did not strike the crib. On the other hand, it is positive that the Prince did strike something. She was not proceeding on the regular course, and the captain, on his examination, when asked how far the Prince was off the breakwater first, starts to say 500 or 600 feet, and then changed it to 1,000 feet. He also says he was running parallel with the breakwater, and then corrects himself, and says he was running so as to fetch up on the breakwater as she neared the entrance. He again admits that he did not know where he was, and I think perhaps the latter statement of the captain was perhaps a correct one, in view of his entire attitude in endeavoring to come into the harbor, of which he confessedly knew but little, with a chart on board not later than 1864, on a foggy night, without calling for the assistance of a tug or relying on other aids to navigation, other than his own instinct and limited knowledge of the harbor surroundings.

The captain of the Coffinberry, which came into the same port at the date of the collision, says he heard a steamer blowing off to the eastward and close to the breakwater. Now, Capt. Shay testified that he took out of the break in the Prince a certain piece of wood. He testified that in his opinion this wood was hemlock, and later admitted that he did not know much about timber. Later Capt. Benham, an expert in such matters, testified that the foreign pieces of wood found in the break were Norway pine. This incident is of not much importance of itself; but, considering that the crib was built of hemlock, and also considering that the course of the Prince was S. W.  $\frac{3}{4}$  S., it is of certain corroborating influence. It might be that these pieces of wood were not picked up at the time of the striking, but they were offered by the libellant for this purpose; and inasmuch as there was no Norway pine in the crib, the Prince most probably did not strike the crib.

Now, the government engineer testifies that there were some pieces of pine timber used as floats anchored to some very large stones, so they would float partly upright for the stone boats to make fast to them when dumping riprap work over on the line of this extension work. They were located along on both sides of the extension work. They were about 12"x12" timbers and about 12

feet long, held down by very heavy stones, some of them weighing several tons. Now, taking in consideration the course which Capt. Shay testified to, which was S. W.  $\frac{3}{4}$  S. bearing upon the jumping jack light, that the foreign timber found in the break was pine, that the timber in the crib was hemlock, and that the crib was undamaged, there is more probability from this testimony that these timber floats off of the extension of the breakwater were struck than that the crib was struck.

Were this a lawsuit, instead of a proceeding in admiralty, a verdict based upon such proof could not be permitted to stand. This testimony, then, leaves it in doubt as to what caused the damage to the Prince. I understand it to be the rule in admiralty, as stated in Marsden's Collisions at Sea (6th Ed.) p. 29, that:

"To enable the plaintiff in a collision action to recover damages, he must prove affirmatively that his loss was caused by the negligence of the defendant, or of some person for whose acts he is liable. The general rule was thus stated by Lord Wensleydale: 'The party seeking to recover compensation for damage must make out that the party against whom he complains was in the wrong. The burden of proof is clearly upon him, and he must show that the loss is to be attributed to the negligence of the opposite party. If at the end he leaves the case in even scales, and does not satisfy the court that it was occasioned by the negligence or default of the other, he cannot succeed.'"

Now, considering all of the testimony in the case, which I have very briefly referred to, and the burden undoubtedly resting upon the libelant to show that the L. P. & J. A. Smith Company had control of the instrumentality which caused the damage to the Prince, and the preponderance of the testimony being found lacking in this regard, I think it unnecessary to inquire further into the questions involved in this disaster. I am unable to say that from the evidence I am persuaded more satisfactorily with the claim set up by the libelant than I am to the contrary.

The libelant having failed to show the responsibility of the L. P. & J. A. Smith Company for this disaster, the libel will be dismissed.

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#### UNITED STATES v. HAMAKER et al. (four cases).

(District Court, D. Oregon. October 14, 1912.)

Nos. 3,671-3,674.

#### PUBLIC LANDS (§ 13\*)—TIMBER TRESPASS—ACTION FOR DAMAGES—DEFENSES—CUTTING FOR SETTLERS.

Act Cong. March 3, 1891, c. 561, § 8, 26 Stat. 1099 (U. S. Comp. St. 1901, p. 1531), provides that, in any action by the United States for trespass on public timber lands in certain designated states, it shall be a defense if defendant shall show that the timber was cut or removed for use in such state or territory by a resident thereof for agricultural, mining manufacturing, or domestic purposes, under rules or regulations made by the Secretary of the Interior, which rules permit the settler to procure timber from government land for agricultural or domestic purposes to the value of \$50 per year, and declare that, where such settler is not in a position to procure the timber himself, he may secure the cut-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Repr Indexes



ting, removing, and sawing through another by an agreement with the party acting as his agent, specifying the amount to be paid for the timber. *Held*, that under such rules the settler might employ defendants to go on the public lands and cut the amount of timber to which the settler was entitled each year and manufacture the same into lumber, so that the settler would receive the entire timber so cut into form of lumber, or to exchange the timber which he is permitted to cut annually for lumber equal in value; and hence, in an action for timber trespass, it was a good defense that defendants had delivered to settlers, in exchange for the timber cut, its value in lumber, the value of the timber in the tree not inuring in any part to defendants' benefit in making the exchange.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 16-18; Dec. Dig. § 13.\*]

Four actions by the United States against J. D. Hamaker and others. Judgment for complainant in two of the cases, and order for dismissal in the other two.

R. F. Maguire, Asst. U. S. Atty., of Portland, Or., for the United States.

Lionel R. Webster, of Portland, Or., for defendants.

WOLVERTON, District Judge. These cases, four in number, bearing docket numbers 3,671, 3,672, 3,673, and 3,674, were instituted by the government to recover damages for trespass in cutting timber on government land, the greater portion of which was removed from the land, manufactured into lumber, and sold. The defendants answer that whatever timber they cut on government land they cut at the instance and by direction and authority of settlers, and that it was taken in exchange for lumber furnished the settlers for use upon their homesteads for domestic purposes.

By a careful examination of the testimony I find that in case No. 3,671 the defendant cut from public land and manufactured into lumber 2,480,212 feet, and felled trees which were left lying on the ground, amounting in board measure to 199,384 feet. Of the amount manufactured into lumber, 630,000 feet was cut at the instance of settlers and homesteaders, and in exchange therefor the defendant delivered to such settlers and homesteaders lumber considered, and which the evidence reasonably shows to be, in value the equivalent of the timber cut. In case No. 3,674, which is against Hamaker and Stindt, a firm composed of J. D. Hamaker and John Stindt, doing business under the name of J. D. Hamaker & Co., I find that the defendants cut and manufactured into lumber 689,803 feet, of which 105,000 was cut at the instance of settlers and homesteaders. The firm also cut 25,217 feet which was allowed to lie on the ground. In each of the other two cases, namely, 3,672 and 3,673, the defendants cut and manufactured into lumber from the government land approximately 100,000 feet. The testimony shows that the timber so cut was cut at the instance of homesteaders; the defendants giving in exchange for such timber lumber equivalent in value thereto.

The defense in each of these cases was interposed under section

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

8 of the act of Congress of March 3, 1891 (26 Stat. 1099, c. 561 [U. S. Comp. St. 1901, p. 1531]), which provides that in any criminal prosecution or civil action by the United States for trespass upon public timber lands in certain states designated—

"it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such state or territory by a resident thereof for agricultural, mining, manufacturing or domestic purposes, under rules and regulations made and prescribed by the Secretary of the Interior."

This act was by Act March 3, 1901, c. 855, 31 Stat. 1436 (U. S. Comp. St. 1901, p. 1531), extended so as to comprise the states of California, Oregon, and Washington. Now, in pursuance of the act of March 3, 1891, extended by subsequent legislation, the Commissioner of the Land Office, on February 10, 1900, adopted certain rules, by the third of which it is declared that settlers upon public lands and other residents of the states and territories designated may procure timber free of charge from unoccupied, unreserved, nonmineral public lands within said states and territories, strictly for their own use for firewood, fencing, building, or other agricultural, mining, manufacturing, or domestic purposes, but not for sale or disposal, nor for use by others, nor for export from the state or territory where procured. Where the timber does not exceed \$50 in value in any one year, it is declared unnecessary for actual residents to secure permission from the Secretary of the Interior to take the timber. The fourth rule provides that:

"In cases where qualified persons are not in position to procure timber from the public lands themselves, it is allowable for them to secure the cutting, removing, sawing, or other manufacture of the timber through the medium of others upon an agreement with the parties thus acting as their agents that they shall be paid a sufficient amount only to cover their time, labor, and other legitimate expenses incurred in connection therewith, exclusive of any charge for the timber itself."

Rule 5 provides that the uses specified in section 3 constitute the only purposes for which the timber may be taken from public lands.

One of the principal questions urged at the trial involves the construction of the act of March 3, 1891, and of the rules of the Commissioner of the General Land Office made in pursuance thereof. I was strongly impressed at the trial that under the rules last enunciated the settler or homesteader would not be permitted to exchange the timber which he is entitled to cut and remove from the public lands in any one year for lumber, even assuming that the lumber was for use by him upon his homestead for improvements or domestic purposes. But from a careful study of the rules themselves, considered in connection with the case of *Shiver v. United States*, 159 U. S. 491, 16 Sup. Ct. 54, 40 L. Ed. 231, I have come to the conclusion that it is lawful for a settler to exchange the timber for its value in lumber, though in doing so he shall not pay the party taking the timber anything for the same as timber in the tree.

In the case referred to, the defendant, a homesteader, in the course of acquiring his claim from the government, claimed that the logs which he was charged with cutting from public land were exchanged for lumber and building materials, all of which were put into his improvement. I should say that the case involved the question whether a homesteader is authorized, under the Homestead Law, to exchange timber from the premises for lumber with which to make improvements upon his claim. The trial court instructed that the defendant had the right to cut timber on his homestead suitable and sufficient to build necessary and convenient houses, fences, etc., for a home, and to have that timber sawed into suitable lumber to make such improvements on his homestead, and that he could have exchanged timber for lumber to make such improvements, but only so much as was necessary, and that if he only did this, and did it in good faith, he should be acquitted. The Supreme Court, after citing Washburn on Real Property, touching the right of a tenant for life or years to cut timber from the estate, says:

"By analogy we think the settler upon a homestead may cut such timber as is necessary to clear the land for cultivation, or to build him a house, out-buildings, and fences, and, perhaps, as indicated in the charge of the court below, to exchange such timber for lumber to be devoted to the same purposes, but not to sell the same for money, except so far as the timber may have been cut for the purpose of cultivation. While, as was claimed in this case, such money might be used to build, enlarge, or finish a house, the toleration of such practice would open the door to manifest abuses, and be made an excuse for stripping the land of all its valuable timber. One man might be content with a house worth \$100, while another might, under the guise of using the proceeds of the timber for improvements, erect a house worth several thousands. A reasonable construction of the statute—a construction consonant both with the protection of the property of the government in the land and of the rights of the settler—we think restricts him to the use of the timber actually cut, or to the lumber exchanged for such timber and used for his improvements, and to such as is necessarily cut in clearing the land for cultivation."

Now, the rules of the Commissioner of the Land Office permit the settler to procure timber from government land for agricultural or domestic purposes, the same being strictly for his own use, to the amount of \$50 per year. But where he is not in position to procure the timber himself, he is allowed to secure the cutting, removing, and sawing through the medium of another, by an agreement with the party thus acting as his agent to do the service, and the amount of the payment to be made for such timber is then specified. There can be no doubt under the rules that it would be permissible for the settler to employ another to go upon the public lands and cut the amount of timber to which he is entitled each year, and manufacture the same into lumber; the settler paying the expenses for such cutting and manufacturing, so that he would receive the entire timber so cut in form of lumber. But many settlers are wholly unable to bear such expense, nor are they, from the nature of things, able themselves to do the physical work of cutting and manufacturing the timber into lumber. In order, therefore, for the settler to get any benefit of the timber where he desires the use of lumber for improving his place or

for domestic purposes, in case he is unable to pay for the cutting and manufacturing, he would have to be permitted to make an exchange of the timber which he is permitted to cut annually for lumber equal in value. In that way the proceeds of the timber received in lumber would be actually used for the settler's purposes. And so it appears to me that if a homesteader, in the course of acquiring his claim from the government, may be permitted to exchange timber, which it is permissible for him to cut off his homestead for the purposes of improvement thereon, for lumber with which to make such improvements, that it would surely be permissible under the rules of the Commissioner of the General Land Office for a settler to exchange the timber to which he is entitled for the year for lumber with which to make domestic improvements upon his land, and strictly for his own use.

I am therefore of the opinion that the defendants in the case at bar set forth a good defense to their cutting and removing timber from the government land, in so far as they have cut timber at the instance of settlers and residents, and have given in exchange therefor its value in lumber; the value of the timber in the tree not inuring in any part to their benefit in making such exchange.

In conclusion, I find that the value of the manufactured lumber is \$10 per thousand. The witnesses testifying as to its value state it at from \$10 to \$12 a thousand, and I adopt the lesser estimate. For the timber that was cut and left lying on the ground I adopt a value of \$1 per thousand, as that seemed to be the general consensus of opinion throughout the trial of the case.

In this view, the defendant in case No. 3,671 should be charged with 1,850,000 feet at \$10 per thousand, making \$18,500, and with 199,000 feet cut and left lying on the ground at \$1 per thousand, \$199—in the aggregate, \$18,699. This eliminates from said cause the 630,000 feet which is shown to have been cut for settlers and lumber given in exchange therefor.

In case No. 3,674, the defendants should be charged with 689,000 feet, less 105,000 feet, namely, 584,000 feet, at \$10 per thousand, or \$5,840, and with 25,000 feet waste logs left on the ground, \$25—in the aggregate, \$5,865.

Mr. J. D. Hamaker in his testimony strongly asserts that he cut no timber whatever on the public land, except under arrangements with and by authority of settlers; but in this he is surely mistaken. The government cruiser, who was very careful in making the cruise, testifies that the larger amount of logs were cut upon the premises all within less than five years preceding the time he made the cruise, to wit, in July and August, 1909. J. D. Hamaker first moved his mill on the premises in 1901, and he was engaged in cutting logs and manufacturing the same into lumber all the time down until he leased the mill to Sykes Hamaker, which was January 1, 1908. He asserts that he got his timber for sawing purposes in the meantime from lands owned by himself, his wife, and Sykes Hamaker. While it is true that he may have cut much timber from these lands, yet it is undoubt-

edly true that he cut a great deal from government lands, and I am compelled to so find under the testimony.

In cases No. 3,672 and No. 3,673 the defendants cut only such timber from the public lands as they were requested and authorized to cut by contract with settlers, and were justified in so doing.

The government should have judgment, therefore, in case No. 3,671 against J. D. Hamaker in the sum of \$18,699, and in case No. 3,674 against Hamaker and Stindt in the sum of \$5,865; and cases No. 3,672 and No. 3,673 should each be dismissed.

## UNITED STATES v. J. L. HOPKINS & CO.

(District Court, E. D. New York. October 19, 1912.)

### 1. CRIMINAL LAW (§ 276\*)—JURISDICTION—PLEA.

Where defendant, a corporation located in the Southern district of New York, was indicted in the Eastern district for violating the Pure Food and Drugs Law (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1911, p. 1354]), an objection that it could only be prosecuted in the district where its principal place of business was located could not be raised by plea based on the wording of the information.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 636, 637; Dec. Dig. § 276.\*]

### 2. FOOD (§ 18\*)—PURE FOOD AND DRUGS LAW—INTERSTATE COMMERCE—JURISDICTION.

Pure Food and Drugs Law June 30, 1906, c. 3915, § 2, 34 Stat. 768 (U. S. Comp. St. Supp. 1911, p. 1354), prohibits the introduction into any state of any article of food or drugs adulterated and misbranded, and provides that any person who shall ship or deliver for shipment from any state to any other state any such adulterated article shall be guilty of a misdemeanor. *Held* that, since the statute relates solely to interstate commerce, no jurisdiction to prosecute for violation of the act can be acquired, except through the existence of interstate commerce.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 20; Dec. Dig. § 18.\*]

### 3. FOOD (§ 19\*)—ADULTERATION—PURE FOOD AND DRUGS LAW—PROCEEDINGS OF SECRETARY OF AGRICULTURE—CERTIFICATION.

Pure Food and Drugs Law June 30, 1906, c. 3915, § 4, 34 Stat. 769 (U. S. Comp. St. Supp. 1911, p. 1355), provides that the Secretary of Agriculture, after an investigation of the alleged violation of the law, shall at once certify the fact to the United States district attorney. *Held*, that such section requires the certification to the district attorney in whose district prosecution for the offense charged should be had.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 19.\*]

### 4. CRIMINAL LAW (§ 113\*)—PURE FOOD AND DRUGS LAW—VIOLATION—VENUE—STATUTES.

Pure Food and Drugs Law June 30, 1906, c. 3915, § 10, 34 Stat. 771 (U. S. Comp. St. Supp. 1911, p. 1360), providing for seizure of adulterated or misbranded goods within any district where they may be found, relates to civil proceedings against the goods only, and does not determine jurisdiction of a criminal prosecution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 232; Dec. Dig. § 113.\*]

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**5. CRIMINAL LAW (§ 113\*)—PURE FOOD AND DRUGS ACT—VIOLATION—PROSECUTION—VENUE.**

Pure Food and Drugs Law June 30, 1906, c. 3915, § 2, 34 Stat. 768 (U. S. Comp. St. Supp. 1911, p. 1354), prohibits the introduction into any state of any article of food or drugs, adulterated or misbranded, and declares that any person who shall ship or deliver for shipment, from any state to any other state, any such adulterated article, shall be guilty of a misdemeanor. *Held*, that the gist of the offense is the shipping or delivering for shipment of adulterated or misbranded goods, to be introduced into another state by interstate commerce, and hence jurisdiction exists in the federal court of the district from which the goods were shipped, though defendant did not reside in such district.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 232; Dec. Dig. § 113.\*]

What constitutes a violation of pure food regulations, see note to *Brina v. United States*, 105 C. C. A. 559.]

**6. CRIMINAL LAW (§ 146\*)—PURE FOOD AND DRUGS LAW—VIOLATION—LIMITATIONS.**

The general three-year statute of limitations applicable to crimes was not repealed by Pure Food and Drugs Law June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1911, p. 1354), containing no specific limitation on prosecutions thereunder, so as to require immediate prosecution on the theory that in case of delay, the right to prosecute would be barred by laches.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 258½, 259; Dec. Dig. § 146.\*]

*J. L. Hopkins & Co.* was indicted for violating the Pure Food and Drugs Law, and filed a plea in bar. Overruled.

*William J. Youngs*, U. S. Atty., of Brooklyn, N. Y., and *William P. Allen*, Asst. U. S. Atty., of New York City.

*Hitchings & Dow*, of New York City (*Hector M. Hitchings*, of New York City, of counsel), for defendant.

**CHATFIELD**, District Judge. An information has been filed against the defendant company, charging a violation of Act June 30, 1906, c. 3915, known as the Pure Food and Drugs Law. The information alleges that the defendant corporation, on September 1, 1909, did, within the county of Kings and state of New York, unlawfully ship and deliver for shipment, by a steamboat line, from Brooklyn to Norfolk, in the state of Virginia, a certain drug, which was not properly branded as required by the statute. The other allegations have nothing to do with the questions now raised by the defendant, who has interposed a plea in bar, after appearing by attorney. This plea attacks, first, the jurisdiction of the District Court, in this the Eastern district of New York, alleging that the defendant corporation is organized under the laws of the state of New York, with its office and principal place of business within the Southern district, and not within the Eastern district.

[1] This objection cannot be raised by a plea based upon the wording of the information. On demurrer this objection would be unavailing, for the wording of the information states specifically and solely that the corporation was a corporation of this the Eastern district.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

The plea, therefore, is intended to raise an issue as to the actual district in which the corporation is domiciled. But this issue does not necessitate the taking of testimony, for the government has admitted that the place of business and principal office of the corporation is 100 William street, as stated by the defendant. For the purposes of the argument, therefore, we can take the statement of the plea to be a correct statement of fact, and consider whether or not a corporation, having its principal place of business and its home office in the Southern district of New York, and therefore having the right, under the statute relating to civil actions, to be sued only in that district, can present the same questions and insist upon the same rights, if charged with a crime under the statute upon which the present information is based.

[2] The law, in section 2, prohibits the *introduction into* any state of any article of food or drugs, adulterated or misbranded, and provides that any person who shall *ship or deliver for* shipment, from any state to any other state, any such adulterated article, shall be guilty of a misdemeanor. The defendant contends that, inasmuch as the statute relates to interstate commerce, no jurisdiction can be acquired, except through the existence of interstate commerce. That much of the defendant's contention is correct, and prosecution can be had in no district, except one in which prosecution is authorized and jurisdiction given by the statute. The question of regulation, or the manner of administration in the Department of Agriculture, could not prevail over the express language of the statute.

[3] In section 4 it is provided that the Secretary of Agriculture shall at once certify the fact to the *proper* United States district attorney. This means, and means no more, than that the proceedings shall be certified to the district attorney in whose district prosecution should be had.

[4] Section 10 provides for the seizure of goods within any district where the same may be found. But that relates to a civil proceeding against the goods themselves, and does not in any way determine in what jurisdiction a criminal proceeding can be brought. The provision of the Constitution, that the trial of all crimes shall be by jury, and such trial held in the state where the crime shall have been committed, does not in any way affect prosecution under this statute, for the state in which prosecution is to be had is clearly defined by the statute itself.

[5] The defendant claims that the prohibited act is the "introduction into" another state. Yet the defendant seems to admit that the prosecution can be had in the *state* of New York, although, if a strict construction were to be given to the defendant's argument, it would be necessary to hold that the crime occurred at the place of introduction of the goods into another state, thus making the place in which trial should be had the state where the goods are received, rather than that in which they are shipped. But this is contrary to the express provision of the statutes, which prohibits *introduction* into another state by interstate commerce, but makes the *crime* the shipping

or delivering for shipment at the place in which the commerce is instituted by the physical act of shipment.

The position taken by the defendant, however, is that the prosecution can only be brought in the district where the corporation, in so far as it is able, carries out the mental and physical process, through its agent, of setting in motion activities which shall result in the shipment of the goods through interstate commerce. But such a contention is not a literal statement of the words of the statute, nor would this law be capable of such application. Where two constructions of a statute are possible, one leading to a practical method of procedure, while the other leads only to an ineffectual or impossible position, the practical meaning should be taken, and the statute so construed as to accomplish the object for which it was intended, unless this object be plainly contrary to the results which would be obtained by the construction followed.

It is evident that the result of prosecution, in the present instance, in the Southern district of New York, would lead to a dismissal of an indictment; for no contract or order to cause the shipment of goods by interstate commerce could be construed as the actual act of shipment. Hence the result of such a holding would be to limit prosecution under the statute to a district where prosecution could not be successful, and such construction would have been made in the face of the plain statement that the crime consists of "shipping or offering for shipment," which is the act of starting the shipment of the goods by some common carrier, or other means of transportation, having as its first step a delivery for shipment. To hold otherwise would mean a differentiation in the possession of the goods by the defendant before they were packed, while they were packed up in the warehouse, and while they were on its delivery wagon or other means of transfer, and while its own possession of these goods was entirely undisturbed.

For these reasons it is plain that the information is correct in form, in charging that the crime, if committed under the statute, began with the delivery of the goods to the steamship company in Brooklyn, and that prosecution should be had in this district.

The defendant also pleads the statute of limitations in an original way. The Pure Food and Drugs Law provides for a hearing upon notice, after examination, and, if an adulteration of a drug shall be found, that an opportunity of a hearing shall be given. If, after the hearing, it appears that any of the provisions of the act have been violated, the statute is specific and technical in its description of the acts prohibited, and in the statement of the penalty therefor. The defendant, therefore, invokes the well-known doctrine that a specific statute, repealing in terms, or in necessary effect, the provisions of the general statute, shall be held to prevail over all the provisions of a general statute, which are thus expressly or impliedly set aside.

[8] The general statute of limitations, formerly two years and now three years, by the statute of 1876 (Act April 13, 1876, c. 56, 19 Stat. 32 [U. S. Comp. St. 1901, p. 725]) is claimed by the de-



fendant to have been repealed, inasmuch as no specific limitation is placed upon the prosecution under the Pure Food and Drugs Law, and as the language of the sections throughout the entire statute indicates that immediate and prompt action is to be had. The defendant invokes the doctrine of laches, not so much as a sufficient defense to the prosecution of this information itself, but it relies upon that doctrine as an argument for its claim that the general statute of limitations is inapplicable, and hence that it is inferentially repealed through the intent spelled out of the requirement for immediate action.

The defendant would apparently seek to substitute for the general statute of limitations, of three years after the commission of an offense, an ambiguous and uncertain equitable determination by the court as to whether the proceedings had been so promptly conducted that the prosecution should be allowed to go on. The theory of a statute of limitations is no longer dependent upon the presumption of some grant freeing the person interested from prosecution, or the lapse of time within which the evidence has presumably been lost. It is rather a definite period prescribed by law, within which an indictment must be filed, provided the defendant is not a fugitive. There is nothing in the Pure Food and Drugs Law which interferes with the operation of a statute of three years, beyond which delay cannot be allowed. Whether or not laches on the part of the government officials had intervened, and whether the defendant's rights had thereby been prejudicially affected, or whether the act which was charged as an offense has been reduced to a mere technicality, would be something for the court to take into account in imposing sentence. But it cannot be said that the intent of Congress was to set up different standards or time limits for the actual filing of an indictment (either greater or less than three years as the case might be) by provisions in the law intended to assure a speedy hearing and a prompt method of determining whether acts would be considered by the department as violations of the law, from which a criminal prosecution might result. Even if the acts in question had been terminated, and the prosecution might thereby depend upon methods or practices long since discontinued, or if the defendant, because of the delay in instituting proceedings, had continued upon a course which it ultimately found would bring itself in conflict with the government, these matters, again, would be questions to be considered in imposing sentence, and are not a bar to the filing of an information at any time within the three-year period.

The pleas must be overruled, and the defendant called upon to plead generally to the information.

## SINGER SEWING MACH. CO. v. BRICKELL, Atty. Gen., et al.

(District Court, S. D. Alabama, S. D. October 26, 1912.)

No. 2, in Equity.

## 1. LICENSES (§ 16\*)—OCCUPATION TAX—STATUTES—APPLICATION.

Act Ala. March 31, 1911 (Acts 1911, p. 180) § 32, provides that each person, firm, or corporation selling sewing machines in person or through agents shall pay \$50 annually for each county in which they may sell or deliver such machines, and for each team used in delivering or displaying them in each county an additional sum of \$25 annually, but that the section shall not apply to merchants selling sewing machines at their regularly established places of business. *Held*, that where complainant sewing machine company, a foreign corporation, maintained places of business throughout the state where machines and parts were sold, and also sent out agents therefrom, who traveled with sample machines through the rural districts of the state, selling the same by means of teams, in some instances the sale and delivery of machines occurring at the same time, it was subject to the tax, in so far as its business was conducted by means of such teams.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 36-40; Dec. Dig. § 16.\*]

## 2. CONSTITUTIONAL LAW (§ 230\*)—LICENSES (§ 7\*)—EQUAL PROTECTION OF LAWS—LICENSE TAX—"ITINERANT DEALERS."

Such section was not unconstitutional, as denying equal protection of the laws, since complainant's agents, who traveled through the county with teams, were "itinerant dealers"; the occupation of selling machines in regularly established places of business, and by means of such teams going through the country, being sufficiently different to form proper subjects for legislative classification.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 687; Dec. Dig. § 230; \* Licenses, Cent. Dig. §§ 7-15; Dec. Dig. § 7.\*]

For other definitions, see Words and Phrases, vol. 4, p. 3798.]

In Equity. Bill by the Singer Sewing Machine Company against Robert C. Brickell, as Attorney General of the state of Alabama, and others. Decree for defendants.

Tyson, Wilson & Martin, of Montgomery, Ala., for complainant.  
Robert C. Brickell, Atty. Gen., for defendants.

TOULMIN, District Judge. This is a bill filed against Robert C. Brickell, as Attorney General of the state of Alabama, and others, to enjoin the proposed enforcement against complainant of section 32 of "An act to further provide for the revenues of the state of Alabama," approved March 31, 1911 (Acts 1911, p. 180), which is as follows:

"Sec. 32. Sewing Machines.—Each person, firm or corporation selling or delivering sewing machines, either in person or through agents, shall pay fifty dollars annually, for each county in which they may sell or deliver said articles; and for each wagon and team used in delivering or displaying the same, an additional sum in each county of twenty-five dollars annually; but this section shall not apply to merchants selling the above enumerated articles at their regularly established places of business."

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The bill alleges that complainant ought not to be subjected to, and is not liable for the payment of, the taxes provided for therein, upon the grounds that, under the state of facts set forth in the bill, it comes within the excepting clause of said section, and is, therefore, exempt from its operation; further, that said section of the act in question is unconstitutional, in that, in its administration, it would violate the state and federal Constitutions, particularly section 1 of the fourteenth amendment of the Constitution of the United States, providing that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. And the bill alleges that the said section is an effort on the part of the state of Alabama to regulate interstate commerce, in violation of the third clause of section 8 of article 1 of the Constitution of the United States.

Defendants demur to said bill, and maintain that the facts therein set forth do not show that complainant is exempt from the payment of said taxes under the excepting proviso; nor do they show that said section 32 is repugnant to the state Constitution or the Constitution of the United States in the particulars alleged.

[1] The bill, among other things, sets forth the following state of facts: Complainant, a foreign corporation organized under the laws of New Jersey, duly authorized to transact its business in the state of Alabama, has established some 36 regular places of business, or stores, throughout the state, in various towns and cities, and engages wholly in the business of buying and selling sewing machines, parts thereof to remedy defects or breakage, and sewing machine accessories, such as oil, needles, etc., which goods and wares, as above described, are kept at its said stores, for sale to the general public.

With the exception of the county of Russell, the business of complainant in all the counties of the state of Alabama is conducted as follows:

"Some of the sewing machines sold by it in the state are delivered to its salesmen at its regularly established places of business, and placed aboard wagons and teams at such places of business, and then taken by its salesmen through the rural districts of the state of Alabama, and sold from such wagons and teams, and, in some instances, delivery to the purchasers is made contemporaneously with the sale, and in other instances such salesmen use the machines so carried about on such wagons, displaying them as sample machines, taking orders for other machines, which orders are returned by such salesmen to its regularly established places of business in the state of Alabama, \* \* \* as aforesaid, and there accepted or rejected, and, if accepted, the machines are forwarded to the purchasers on such orders; \* \* \* that complainant also sells sewing machines at its regularly established places of business in said counties, as aforesaid, and delivers such sewing machines to purchasers by using wagons and teams. \* \* \*"

Complainant has in its employ 197 sewing machine agents and employes in the state of Alabama, and has and is using 165 wagons and teams in the state of Alabama in so displaying, selling, and

delivering such sewing machines. It appears from the allegations of the bill that the complainant is a merchant engaged in the business of selling and delivering sewing machines in the state of Alabama, and that it has many regularly established places of business within said state, and that it also has a regularly established place of business in Columbus, Ga., which city adjoins Russell county, Ala., on the east. Said section 32 provides that:

"Each person, firm or corporation selling or delivering sewing machines, either in person or through agents, shall pay fifty dollars annually for each county in which they may sell or deliver said articles; and for each wagon and team used in delivering or displaying the same an additional sum in each county of twenty-five dollars annually."

It provides, however, that this section shall not apply to merchants selling the above enumerated articles at their regularly established places of business.

[2] In so far as the selling of sewing machines by the complainant at its regularly established places of business is concerned, said section does not apply to it. But it appears that it is selling and delivering sewing machines from wagons and teams by agents through the rural districts of the state and in many counties therein. It is then liable for the tax exacted by the statute under consideration, unless that statute is declared to be violative of the state or federal Constitutions. The complainant is engaged in selling sewing machines, both at its fixed places of business and from wagons and teams by agents who, as salesmen, sell the same and deliver them contemporaneously with the sale. It seems to me that the complainant thus became liable for both taxes required by the statute to be paid, assuming the statute to be constitutional.

In the *Quartlebaum Case*, 79 Ala. 1, the statute then under consideration provided that every sewing machine company selling sewing machines, either themselves or by their agents, and all persons who engage in the business of selling sewing machines, shall pay the state a tax for each county in which they may so sell; but, when merchants engaged in a general business keep sewing machines as a part of their stock in trade, they shall not be required to pay the tax therein provided. *Quartlebaum* dealt only in sewing machines, and sold them in different counties in the state. The Supreme Court held that he was not a merchant engaged in general business, and as he did not come within the exception made by the statute he was liable for the tax imposed.

In *Ballou v. State*, 87 Ala. 144, 6 South. 393, in considering a revenue statute which provided that each sewing machine company selling sewing machines, either in person or through agents, and all persons who engage in the business of selling sewing machines, shall pay to the state \$25 for each county in which they may so sell, the court said:

"There is an exception in favor of merchants engaged in a general business, which is only material as showing that the Legislature exacted a license only for those who, it was contemplated, *would be itinerant*, going from county to county."

As I understand the contention of the learned counsel for complainant, it is that the tax in question is exacted only for those who are "itinerant dealers"—"that the statute is only intended to reach that character of persons." An itinerant is defined as one who travels about—as declared by the court in the Ballou Case, *supra*, "going from county to county."

The statute does not apply to merchants who sell sewing machines at their regularly established places of business, denoting nearness, present at, as at their house or store. In my judgment, it does not except from its application those who have regularly established places of business, but who also sell and deliver sewing machines from wagons and teams away from their established place of business, leaving them behind and traveling about "from county to county"—"itinerant dealers" in the rural districts of the state. In my opinion, the bill shows these facts to exist. The Supreme Court, in the Quartlebaum Case, *supra*, said:

"When sewing machine companies sell sewing machines in any locality, they do it as a business." 79 Ala. 4.

It seems to me that there is a clear distinction between persons selling sewing machines at regularly established places of business, and selling and delivering such articles from wagons and teams traveling about over the country, "going from county to county." They are two entirely distinct occupations. It may be difficult to distinguish these classes in principle, but the power of the Legislature to make this discrimination has not been questioned. *Cook v. Marshall County*, 196 U. S. 261-274, 25 Sup. Ct. 233, 49 L. Ed. 471; *Armour Pkg. Co. v. Lacy*, 200 U. S. 226, 26 Sup. Ct. 232, 50 L. Ed. 451; *Connolly v. Union, etc.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679; *Quartlebaum v. State*, 79 Ala. 4. I think it cannot be successfully claimed that it is beyond legislative power to make its classification of occupations. Authorities *supra*.

The Supreme Court of the United States in *Oil Co. v. Texas*, 217 U. S. 114, 30 Sup. Ct. 496, 54 L. Ed. 688, said:

"The fourteenth amendment of the Constitution of the United States was not intended to cripple the taxing power of the state, or to impose upon them any iron rule of taxation. This court will not speculate as to the motive of a state in adopting taxing laws, but assumes that it was adopted in good faith. A state may prescribe any system of taxation it seems best, and it may, without violating the fourteenth amendment, classify occupations, imposing a tax on some and not on others, so long as it treats equally all in the same class."

An occupation tax on all dealers in sewing machines does not deprive dealers in those articles of their property without due process of law, or deny them the equal protection of the law, because a similar tax is not imposed on dealers in other articles. *Oil Co. v. Texas*, *supra*. The statute makes no distinction among persons selling sewing machines. The burden of the present tax falls equally on every person, firm, or corporation selling sewing machines, and an additional tax on every such person for each wagon and team used in delivering or displaying the same.

As I construe the statute, it imposes a license tax on every person selling sewing machines, for each county in which he may sell said articles; and it imposes an additional license tax on each person for each wagon and team used in delivering said sewing machines in such county. One tax is for the privilege of engaging in the business of selling sewing machines, and the other is for the privilege of using a wagon and team in delivering or displaying sewing machines. These taxes are imposed upon the business of selling, and upon the business of delivering or displaying sewing machines by the use of wagons and teams. The two businesses may be engaged in by one and the same person, or by different persons. In the case at bar the two occupations are engaged in by the same person, but that makes no difference in the principle involved. The Legislature has seen proper to classify them, and to impose a tax upon each, which we have seen it has, under its taxing power, the right to do. In the Herzberg Case, cited by complainant's counsel, the court held that the tax was not imposed upon the business, but solely upon the manner in which a party may conduct the business. I do not consider the cases at all alike. The case cited was where the Legislature undertook to tax the manner in which a party may conduct his business as the same related to the compensation of his employes; and the case at bar is one in which the Legislature has imposed a tax upon the business itself, and not upon the manner of conducting it.

On the facts alleged in paragraph 6 of the bill, as to the conduct of the business of complainant in Russell county, section 32 of the statute under consideration has no application; the sales made to buyers in Russell county being made at complainant's regularly established place of business in Columbus, Ga., and the articles sold delivered to the buyers in Russell county, Ala. Said facts, in my judgment, show a case of interstate commerce. *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719. The unconstitutionality of said section, even if conceded, would not operate to bring the complainant within the class not intended by it. *Ballou v. State*, 87 Ala. 144, 6 South. 393. The Supreme Court of the United States, in *Oil Co. v. Texas*, supra, said:

"The federal court cannot interfere with the enforcement of the statute, simply because it may disapprove its terms, or question the wisdom of its enactment, or because it cannot be sure as to the precise reasons inducing the state to enact it."

And the Supreme Court of Alabama has said:

"Unless it is clear that the Legislature has transcended its authority, it is our duty to declare its acts constitutional." *Sadler v. Langham*, 34 Ala. 311; *Stein v. Leeper*, 78 Ala. 517.

The demurrers to the bill are sustained, and to each and every paragraph thereof, except as to paragraph 6, relating to Russell county, Ala., as to which the demurrers, and each of them, are overruled.

Let a decree be entered accordingly.

## In re CROWELL.

(District Court, D. Massachusetts. May 31, 1912.)

No. 16,628.

**1. BANKRUPTCY (§ 262\*)—TAXATION (§ 87\*)—PROPERTY OF BANKRUPT.**

Though a bankrupt's estate is not withdrawn from taxation by bankruptcy proceedings, but is subject to taxation in the trustee's hands, a trustee was not required by Bankr. Act July 1, 1898, c. 541, § 64a, 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), providing that the court shall order trustees to pay all taxes lawfully due and owing by the bankrupt in advance of dividends to creditors, to pay taxes assessed against land which became a lien subsequent to a sale by the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 363-365; Dec. Dig. § 262; \* Taxation, Cent. Dig. § 177; Dec. Dig. § 87.\*]

**2. BANKRUPTCY (§ 262\*)—SALE OF ASSETS—REAL PROPERTY—TAXES—PAYMENT BY TRUSTEE.**

Bankrupt's trustee having been ordered to sell certain real property belonging to an estate "free from any incumbrances or lien of any other party" published notice of the sale to take place March 25, 1911, which recited that, by order of the United States court, each lot would be sold separately free from any incumbrances or lien of any other party, on terms of 5 per cent. cash, balance on delivery of deed within 30 days. Petitioner purchased one of the lots, paid 5 per cent. cash at the time of sale, but the deed was not delivered until April 29th following, when the remainder of the cash was paid. Prior thereto, on April 1st, the town assessed taxes against the lot for the year 1911, which became a lien on that date. *Held*, that the trustee had no jurisdiction to warrant the land free from liens or incumbrances other than those specified by the order of sale, and hence he was not bound to reimburse the purchaser for the taxes so paid.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 363-365; Dec. Dig. § 262.\*]

In Bankruptcy. In the matter of the bankruptcy proceedings of William N. Crowell. On petition for review of referee's order dismissing petition of the A. Homer Skinner Lumber Company for an order requiring the trustee to pay certain taxes. Affirmed.

John A. Kerns, for petitioner.

William H. B. Kendall, trustee in bankruptcy, pro se.

DODGE, District Judge. On February 8, 1911, the referee authorized the trustee to sell certain real estate in the town of Somersett which formed part of this estate in bankruptcy, "free from any incumbrance or lien of any other party." The trustee published notice of this intended sale, to take place March 25, 1911. The publication was on various dates in March, 1911, prior to the 25th. There were four separate lots to be sold. The notice published contained the following:

"By order of the United States court each lot will be sold separately and will be sold free from any incumbrance or lien of any other party."

The petitioner for review was the highest bidder at the sale for one of the lots, and the property was declared sold to him. The published notice further stated:

"Terms 5% cash. Balance upon delivery of deed within thirty days."

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The petitioner for review paid the 5 per cent. in cash at the time of the public sale. The trustee delivered to him a deed of the lot, according to the referee's certificate, on April 24, 1911. The deed bore that date, but there is reason to believe that the petitioner desired certain changes in the deed as first drafted and tendered on April 24th, and that the deed was not finally delivered until April 29th, at which time the remainder of the purchase price was paid. The deed itself was not put in evidence at the hearing.

So far as appears, there was no existing tax lien upon the lot when the referee's order was made, nor when the notice was published, nor at the time of the public sale. Later, however, on some date not shown, the town of Somerset assessed taxes to the amount of \$30.94 against the lot, for the year beginning April 1, 1911, which taxes became, when assessed, a lien upon the lot, taking effect from April 1, 1911. On October 3, 1911, the petitioner for review filed a petition with the referee asking that the trustee be ordered to pay these taxes. Later, on January 17, 1912, another petition was filed, making the same request upon allegations somewhat amended and amplified. After a hearing upon this petition, the referee found in the trustee's favor, thereby dismissing it. This dismissal the purchaser now seeks to review.

[1] Section 64a of the Bankruptcy Act, which requires the court to order trustees to pay all taxes legally due and owing by the bankrupt, in advance of dividends to creditors, has no direct bearing upon the question here presented. It is true that property of the estate is not withdrawn from taxation by the bankruptcy, but remains subject to taxation while in the trustee's hands, also that taxes assessed upon it after the bankruptcy, though never due or owing by the bankrupt, are to be treated by the court as preferred claims. *Swarts v. Hammer*, 120 Fed. 256, 257, 56 C. C. A. 92; *Id.*, 194 U. S. 441, 24 Sup. Ct. 695, 48 L. Ed. 1060; *Re Prince & Walter* (D. C.) 131 Fed. 546. But no attempt is now made to prove or have allowed any claim for these taxes as a claim against the estate. The town of Somerset has presented no such claim, nor does the petitioner, having paid the taxes, seek to prove against the estate, in subrogation to the town's rights. The petitioner rests its claim upon the contention that its purchase of the lot under the order of sale has entitled it to have the land free of any lien or incumbrance at the time it paid the balance of the agreed purchase money and took the trustee's deed.

[2] The referee's order to sell, made on February 28, 1911, neither had nor could have had any application to the lien afterward created by the assessment of these taxes. Not only had no such lien then come into being, but what the liens or incumbrances were to which the referee's order referred appears from the petition for the order. This set forth that there were certain mortgages on the land; that one of the mortgages was to the petitioner for review and its validity disputed; that the land had been conveyed subject to conditions; and that it had been attached. To the validity, as against him, of any order to sell free from incumbrances, it



is essential that a lienholder whose rights may be affected should have had due opportunity to defend his interest, and due notice to appear for that purpose. *Ray v. Norseworthy*, 23 Wall. 128, 135, 23 L. Ed. 116; *Re Foundry & Machine Co.* (D. C.) 147 Fed. 828. The lienholders named as above in the petition for sale are the only lienholders who could have had such notice, or who could have been affected by the order. No other lienholders can be supposed to have been within the contemplation of the court in making the order for sale, or of the trustee in advertising the sale, or of the purchaser or other bidders at the sale. Since no lien for these taxes existed when the order was made, or the sale advertised, or when the sale thus ordered and advertised took place, no such lien was or could have been removed from the property or transferred to the proceeds by virtue of the order and the sale made in pursuance thereof. What the trustee received from the purchaser at the sale, and now holds, he must be considered to hold as representing the property freed from those liens which the petition described, if any, but freed from no others. The court cannot award any part of it in satisfaction of a lien never transferred to it.

It was not for the trustee to warrant the land free from all liens or incumbrances, whether those contemplated by the proceedings or not. To do so would be beyond his official authority. He was authorized to convey only the interest in the land vested in him as trustee, free from liens or incumbrances only to the extent sanctioned by the order of court.

The trustee, as has appeared, advertised that the balance of the purchase money would be payable upon delivery of the deed within 30 days, and it is true that 30 days from the advertised time of sale did not expire until April 25th, after these taxes had been assessed. But there was nothing in the order of sale which is sufficient to make these provisions part of the terms of sale ordered by the court, nor to enlarge the scope of the order as above defined.

Had the trustee been selling his own property and undertaking with the purchaser to give a clear title, he might well be required to protect the buyer against all incumbrances existing when the deed was finally delivered and the property paid for, whether existing or not at the time he put the property up at auction. The circumstances of this transaction, however, are different, and do not require the same conclusion. I must consider this petitioner to have understood when he paid the balance of the amount he had bid at the sale that he was paying only for what the trustee had been authorized by the court to sell him. That his present application to the court was not made until nearly six months after he had made the payment, is a strong indication that such was also in fact his actual understanding at the time.

The referee's order dismissing the petition is approved and affirmed.

## In re O'CALLAGHAN.

(District Court, D. Massachusetts. May 31, 1912.)

No. 17,346.

## 1. BANKRUPTCY (§ 384\*)—COMPOSITION—FALSE STATEMENT—FRAUDULENT INTENT.

Fraudulent intent on the part of a bankrupt must be shown to sustain the charge of obtaining money on credit on materially false statements in writing, made to the lender for the purpose of obtaining such credit, urged as an objection to confirmation of a composition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 590-592; Dec. Dig. § 384.\*]

## 2. BANKRUPTCY (§ 384\*)—COMPOSITION—DEFENSES—FALSE STATEMENTS.

Bankrupt's husband conducted her business as manager. In 1908 and 1910 he made false statements concerning the bankrupt's assets and liabilities to obtain money for the bankrupt on credit from a trust company. The bankruptcy petition was not filed until June 29, 1911. During the interval the notes taken by the trust company had been repeatedly renewed or paid, and there had been a succession of transactions involving the giving of credit by the trust company. *Held*, that the facts were insufficient to show that the trust company extended credit on the faith of the statement of 1910, and that the statement given in 1908 did not constitute a continuing representation, and was not one to which Bankr. Act June 25, 1910, c. 412, § 14b (3), 36 Stat. 839 (U. S. Comp. St. Supp. 1911, p. 1496), providing that a discharge shall not be granted where the bankrupt has obtained money on credit on materially false statements in writing, etc., applied, and hence the making of such statements was not a valid objection to confirmation of a composition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 590-592; Dec. Dig. § 384.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of Margaret G. O'Callaghan. On specifications of objection to confirmation of composition. Overruled.

Robert E. Harding, for objecting creditor.

William A. Knowlton, for bankrupt.

DODGE, District Judge. The referee has reported on February 21, 1912, that everything necessary under section 12b of the Bankruptcy Act had been done, and he recommends confirmation of the composition offered. The liabilities scheduled are \$115,711.82, against assets amounting to \$21,280.60. Claims amounting to \$79,-897.84 have been allowed. The Exchange Trust Company of Boston, having a claim of \$3,250, and two New York creditors, having claims of \$500 each, are the only creditors who have appeared to object.

The referee has dealt with the specifications filed by the Exchange Trust Company as presenting, in substance, all the objections raised by either of these creditors, and it will be convenient here to follow the same course.

Specification 1 (a and b). These charge the concealment of certain jewelry or diamonds with intent to hinder, delay, and defraud

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

creditors. I agree, on the evidence, with the referee's finding of fact, and also agree with his conclusions of law relative to this charge.

Specification 1 (c). My conclusions are the same regarding this charge.

Specification 1 (d-g inclusive). These have not been insisted upon at the hearing.

Specifications 1 (h, i), and 2 (a). I agree with the referee that on the evidence the omission of the item \$19,730.90 from the books until June 30, 1911, is not shown to have been with any intent to conceal assets belonging to the estate, or with any intent to conceal the bankrupt's true financial condition. To my mind the circumstances do not show with sufficient certainty to warrant the finding of such intent that the entry of this item on the bankrupt's books in addition to those of the Adams Company was necessary in order to make the bankrupt's books show her true financial condition.

Specification 2 (b) was not insisted on at the hearing.

[1] Specification 2 (c, d, e, f, g, and h) charge the obtaining of money on credit from the Exchange Trust Company upon materially false statements in writing made to that company for the purpose of obtaining credit from it on March 1, 1908, and July 1, 1910. There is no dispute that two statements in writing bearing the above dates were presented to the Trust Company by the bankrupt. They are Exhibits A and B, and may be referred to. They purport to be statements of the bankrupt's assets and liabilities as of those dates. The statements were in some respects incorrect. They overstated the assets and understated the liabilities, and they did so to an extent sufficient to be material. Fraudulent intent, however, on the bankrupt's part, must be shown in order to sustain this charge. *Gilpin v. Merchants' Bank*, 165 Fed. 607, 91 C. C. A. 445, 20 L. R. A. (N. S.) 1023; *Re Kyte* (D. C.) 174 Fed. 867, 871. And, unless credit is shown to have been actually obtained by means of the untrue statement made with such fraudulent intent, no ground for refusal to confirm under section 14b (3) of the Bankruptcy Act has been established. *Re Shaffer* (D. C.) 169 Fed. 726.

Both the statements referred to were made up by the bookkeeper from the books of the concern, acting under the direction of J. J. O'Callaghan, who was the bankrupt's husband, and who managed the business carried on by her under the above name. It was he, and not the bankrupt, who presented the statements to the Trust Company, and there is no question that he did so for the purpose of obtaining credit, or that credit was afterward given by the company. The statement of 1908 was sworn to as true by him, and his affidavit, dated June 22, 1908, expressly recites the statement to have been made and sworn to for the purpose of obtaining credit and money. The statement of 1910 was signed by him, but not sworn to. His signature to both statements was in the following form: "O'Callaghan Cloak and Suit Co. by J. J. O'Callaghan, Mgr." According to the evidence, he relied on the bookkeeper of the concern to fill out both statements from the books, and there is evi-

dence from the bookkeeper that she, without intent on her part to deceive, was responsible for their inaccurate and misleading character, also that O'Callaghan, though he swore to one statement, did not in fact know at the time that they were inaccurate or misleading or in what respects. But assuming O'Callaghan to be chargeable with knowledge that the statements were untrue, and with the intent to use untrue statements for the purpose of obtaining credit, there is nothing to charge the bankrupt with such knowledge or intent, except the fact that she permitted her husband to manage her business and represent her in dealing with the Trust Company; and on the authorities it is at least doubtful whether under such circumstances section 14b (3) applies to her. *Re Hyman* (D. C.) 97 Fed. 195; *Re Meyers* (D. C.) 105 Fed. 354; *Hardie v. Swafford*, 165 Fed. 591, 91 C. C. A. 426, 20 L. R. A. (N. S.) 785, reversing the District Court in *Re F. Hardie*, 143 Fed. 609.

[2] Assuming, however, that such knowledge and intent on her husband's part would render section 14b (3) applicable to the bankrupt herself, and that credit to her was in fact obtained from the Trust Company in 1908 by means of the untrue statement dated March 1, 1908, the petition upon which she was adjudged bankrupt was not filed until June 29, 1911, and during the three intervening years the notes taken in 1908 by the Trust Company had been repeatedly renewed or in some cases paid. There had been a succession of transactions involving the giving of credit, and the evidence is hardly sufficient to show that anything due from the bankrupt to the Trust Company at or within four months prior to the bankruptcy had been obtained on the strength of the credit given in 1908. The statement of that year cannot be regarded as a continuing representation, and I must hesitate to hold that section 14b (3) applies, without limit of time, to any obtaining of credit, however long before the bankruptcy, and irrespective of intervening transactions with the creditor. See *Re Terens* (D. C.) 172 Fed. 938; *Re Cotton and Preston* (D. C.) 183 Fed. 181.

As to credit given after the statement dated July 1, 1910, I am unable to regard the evidence as sufficient to prove that such credit was given in reliance upon that statement. A fair conclusion from the evidence seems to me to be that what the Trust Company then lent was lent with the knowledge that the bankrupt was in difficulties, that an investigation of her affairs would be necessary to justify further credit in any large amount, and with the intent to advance her only so much as would postpone immediate collapse before such investigation could be had.

I agree with the referee in regarding the evidence as insufficient to prove the bankrupt guilty of any of the acts or of failure to perform any of the duties such as would bar her discharge. I further agree with him that the composition offered will be for the best interests of the creditors.

The offer of composition is therefore confirmed.

## In re GOLDSTEIN.

(District Court, D. Massachusetts. June 19, 1912.)

No. 18,203.

## 1. BANKRUPTCY (§ 341\*)—CLAIMS—ALLOWANCE IN PART—AMENDMENT.

Bankr. Act, July 1, 1898, c. 541, § 57, cls. "d," "f," 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443), providing for the hearing and determination of objections to claims before allowance, and clauses "k," and "l," authorizing reallocation or rejection in whole or in part of a claim reconsidered after allowance, does not preclude the referee from allowing a claim in part only without its being amended and resworn.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 528; Dec. Dig. § 341.\*]

## 2. BANKRUPTCY (§ 127\*)—ELECTION OF TRUSTEE—CREDITORS' MEETING—ADJOURNMENT.

A vote for trustee at a creditors' meeting having resulted in no election, and the supporters of both candidates having informed the referee that an agreement was hopeless, the referee properly denied an application for an adjournment of two weeks, and proceeded to the appointment of a trustee on his own motion.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 183; Dec. Dig. § 127.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of Simon Goldstein, bankrupt. On petition for review of referee's orders allowing claim of the Salem Safe Deposit & Trust Company in the sum of \$1,700, permitting it to vote on the claim as allowed, and refusing to adjourn the creditors' meeting on failure to choose a trustee. Affirmed.

Joseph B. Jacobs, of Boston, Mass., and Daniel C. Manning, of Salem, Mass., for creditors.

DODGE, District Judge. The Trust Company presented for allowance at the first meeting a proof of claim, which set forth indebtedness by the bankrupt to it of \$2,000 in all, on six different promissory notes, which it had discounted. The six notes ought all to have been filed with the proof, in order to comply with section 57b of the Bankruptcy Act. Five of the notes only were so filed; of the sixth, the amount claimed on which was \$300, only a copy was filed. The referee allowed the claim in the amount of \$1,700, the total amount claimed on the other five notes, and permitted the Trust Company to vote on the claim as thus allowed. The first question certified is: Did he err in so doing?

[1] The petitioner for review contends that the referee ought to have disallowed the proof altogether, but that, instead of doing so, he "amended it of his own volition, and reduced it to the amount of \$1,700," and that he had no right to allow it for \$1,700 without requiring it to be resworn.

If this contention is sound, a proof of claim must be regarded as an entirety, which the court must either accept in full or reject altogether. I find nothing in the act which requires me so to regard it. There are express provisions in section 57, cls. "k" and

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"1," for the reallocation or rejection "in whole or in part" of a claim reconsidered after allowance. But it is not only upon reconsideration that objections to a claim, either by parties in interest or by the court of its own motion, may be dealt with. Clauses "d" and "f" of section 57 provide for the hearing and determination of such objections before allowance, and I am unable to believe it a necessary result of clauses "k" and "l" that the original allowance of a claim can only be for its full amount, and may not be for a part of that amount. To say that this is what the act requires, and that a claim, of which a part, but not the whole, is sustained by the proof, must be amended and resworn before it can be allowed at all, would be, in my opinion, a departure, unwarranted by anything in the act, from the recognized principle that the practice regarding proof of claims is to be liberal and free from technicalities. See *Streeter v. Lowe*, 184 Fed. 263, 265, 106 C. C. A. 405, although it is true that the controversy there dealt with arose upon reconsideration. More especially does it seem unreasonable to hold, in a case like the present, where distinct debts or demands are included in one claim, that none of them can be allowed, unless all are allowed. I find no reason to suppose that the creditor might not have presented separate proofs upon his separate claims, or that a proof of one is to be regarded as a waiver of all the others. See *Remington, Bankruptcy*, § 615. Reported cases, in which claims have been allowed in amounts less than set forth in the proof, are not wanting. Two recent instances are *In re Dr. Voorhees, etc., Co.* (D. C.) 187 Fed. 611, and 188 Fed. 425, 110 C. C. A. 215, and *In re Greenfield* (D. C.) 193 Fed. 98. I must hold that the referee's allowance of this claim for \$1,700 was not erroneous.

[2] The creditors' vote, taken after allowance of the claim as above, showed no choice of trustee. One candidate had a majority in number; the other, a majority in amount. The petitioner for review thereupon asked an adjournment to the next regular court day, two weeks distant. The request was refused by the referee, on the ground, as he reports, "of expense to the estate, and that, if a new vote was taken, it would result then in a disagreement." The supporters of both candidates had informed him, as he also states, that an agreement was hopeless. It would seem, although his report does not expressly so state, that he thereupon appointed a trustee under the last clause of section 44. The remaining question certified is: Did he err in refusing to adjourn the meeting for the purpose of allowing the creditors to vote again?

No unanimous request was made for an adjournment. There is nothing to show that reasonable opportunity for choice by the creditors at the regular time had not been afforded, or that the refusal to adjourn can be regarded as having abridged the creditors' right to such reasonable opportunity. If all the claims proved had been objected to and continued for consideration, the referee might lawfully have proceeded to appoint a trustee himself, as Judge Lowell held in this court, in *In re Cohen* (D. C.) 131 Fed. 391. I must hold that there was no error in his refusal to adjourn the meeting.

The referee's orders are therefore approved and affirmed.

## WATERMAN v. CHESAPEAKE &amp; O. RY. CO.

(District Court, D. New Jersey. October 25, 1912.)

## 1. REMOVAL OF CAUSES (§§ 11, 26\*)—CAUSES REMOVABLE—JUDICIAL CODE—CONSTRUCTION.

Under Judicial Code (Act March 3, 1911, c. 231) §§ 24, 28, 51, 36 Stat. 1091, 1094, 1101 (U. S. Comp. St. Supp. 1911, pp. 135, 140, 150), providing for the removal of causes from state to federal courts, no cause may be removed that might not have been originally commenced in the federal court, and where jurisdiction depends solely on diversity of citizenship, only the court in the district in which either plaintiff or defendant resides obtains jurisdiction.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 29-31, 60-63; Dec. Dig. §§ 11, 26.\*]

## 2. REMOVAL OF CAUSES (§ 34\*)—FEDERAL COURTS—JURISDICTION—ASSIGNMENT.

Where plaintiff claims as an assignee, the residence of the assignor, and not that of plaintiff, determines the question whether diverse citizenship exists, so as to justify a removal of the cause.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 76; Dec. Dig. § 34.\*]

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

At Law. Action by Frank N. Waterman against the Chesapeake & Ohio Railway Company. On motion to remand. Motion granted.

George Whitefield Betts, of New York City, for plaintiff.

McCarter & English, of Newark, N. J., for defendant.

RELLSTAB, District Judge. This suit was removed into this court from the Supreme Court of the state of New Jersey. The plaintiff is the assignee of a number of claims against the defendant. He is a citizen and resident of such state, but none of his assignors is. The defendant is a corporation of the state of Virginia, and not an inhabitant or resident of the state of New Jersey.

[1] The right to remove depends upon the construction to be given to sections 24 (granting original jurisdiction), 28 (limiting the causes that may be removed), and 51 (prescribing the court where suit is to be brought) of the act entitled "An act to codify, revise and amend the laws relating to the judiciary," approved March 3, 1911 (U. S. Comp. St. Supp. 1911, pp. 128, 135, 140, 150), which, so far as pertinent to the question here raised, provide:

Section 24. That—

"the District Courts shall have original jurisdiction as follows: First. Of all suits of a civil nature, at common law or in equity, \* \* \* where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and \* \* \* is between citizens of different states. \* \* \* No District Court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

## Section 28. That any—

"suit of a civil nature, at law or in equity, of which the District Courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, in any state court, may be removed into the District Court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state."

## Section 51. That—

"no civil suit shall be brought in any District Court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Reading these sections together—the only way the legislative intent can be ascertained—it is apparent, first, that no cause may be removed that might not have been originally commenced in a federal court; second, that, where jurisdiction depends solely upon diversity of citizenship, only that court obtains jurisdiction in whose district either the plaintiff or defendant resides; and, third, that, when the plaintiff is an assignee, the particular court having cognizance of the suit is fixed, not by his place of residence, but by his assignor's. Under such interpretation, this suit cannot be heard in this court.

[2] The causes of action sued upon are founded upon express contracts between the assignors and the defendant for the carriage of freight, and the alleged breaches are the failure to carry out such contracts. The suit is, therefore, to recover on assigned choses in action, a term which includes all claims for damages for breach of contract or for torts connected therewith. *Bushnell v. Kennedy*, 9 Wall. 387, 390, 19 L. Ed. 736. As none of the assignors could have maintained this suit against the timely objection of the defendant, the plaintiff could not. What the plaintiff could not do, because of the lack of proper residential qualifications, the defendant cannot achieve, at least, without the former's consent. *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264; *In re Moore*, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904; *In re Winn*, 213 U. S. 458, 29 Sup. Ct. 515, 53 L. Ed. 873. (These cases though disapproved in part and qualified by *Ex parte Harding*, 219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. [N. S.] 392, are not affected as authorities in this regard.) *Tierney v. Helvetia Swiss Fire Ins. Co. (C. C.)* 163 Fed. 82; *Cons. Rubber Tire Co. v. Ferguson*, 183 Fed. 756, 106 C. C. A. 330.

The motion to remand is granted.

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In re MARBLE PRODUCTS CO., Inc.

(District Court, E. D. New York. October 2, 1912.)

1. BANKRUPTCY (§ 482\*)—SERVICES OF ATTORNEYS BEFORE BANKRUPTCY—CLAIM.

Services of attorneys rendered to voluntary trustees, acting for creditors during an unsuccessful attempt to administer the assets without resort to bankruptcy proceedings, and giving rise to no liens on the assets subsequently surrendered to a trustee in bankruptcy, could not be

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



regarded as services rendered to the bankrupt before the filing of the petition, nor to the bankrupt estate thereafter, under Bankruptcy Act July 1, 1898, c. 541, §§ 60d, 63b, 30 Stat. 562, 563 (U. S. Comp. St. 1901, pp. 3446, 3447), and could not, therefore, be compensated for as claims against the estate in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897; Dec. Dig. § 482.\*]

**2. BANKRUPTCY (§ 482\*)—PROPERTY OF BANKRUPT—SURRENDER—VOLUNTARY TRUSTEES.**

Where the property of a bankrupt was turned over to voluntary trustees as agents for creditors in an attempt to administer the assets without resort to bankruptcy proceedings, such trustees, in accounting to the trustee in bankruptcy, were entitled to have their attorney's fees allowed, if proper in amount.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897; Dec. Dig. § 482.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Marble Products Company, Inc. On application for payment of counsel fees to certain attorneys rendered to voluntary trustees representing creditors before bankruptcy. Denied.

Lewkowitz & Schaap, of New York City, for petitioners.  
Thompson & Ballantine, of New York City, for trustee.

CHATFIELD, District Judge. Application has been made for the payment of counsel fees to certain attorneys for services rendered to one Cohen and one Pisani prior to bankruptcy, and while the said Cohen and Pisani were acting as voluntary trustees; that is, as agents for the creditors of the bankrupt, in an attempt to administer the assets and straighten out the affairs of the Marble Products Company without the necessity of a trustee in bankruptcy.

Certain assets in the possession of Cohen and Pisani were transferred to the trustee in bankruptcy, under an order which provided that a certain lien claimed by the present petitioners, for services as attorneys, be transferred to the proceeds of the sale, and that the extent and validity of the lien be fixed by this court upon application. The present motion is an attempt to fix the existence and validity of this so-called lien, and to obtain compensation for the services which the alleged lien was said to cover.

[1] It is apparent, in the first place, that the assets transferred to the trustee in bankruptcy were not in the possession of the attorneys who make the present application, and that therefore no lien attached and no claim existed which could be urged by them as a set-off. Nor have the present petitioners shown any other ground upon which they have any secured claim to the assets so transferred. The services which they rendered were to the so-called trustees, and a personal obligation existed on the part of those trustees for the work done by the attorneys whom they employed. This claim has no standing in bankruptcy, except as it may be based upon the title or possession of the so-called trustees to certain property which later became the bankrupt estate. Such

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a claim cannot be asserted in bankruptcy directly by the attorneys; that is, by the present petitioners. Nor can the attorneys apply for an allowance under section 60d or section 63b of the Bankruptcy Law. The services rendered by them were not to the bankrupt before the filing of the petition, nor to the bankrupt estate since the petition was filed.

[2] But, by analogy, these attorneys would seem to be entitled to compensation for services to those individuals who were placed in charge of what later became a bankrupt estate, and previous payment for such services by the so-called trustees would be allowed in the accounting by those trustees, if proper in amount. In this way, if the trustees had not yet paid for these services when the assets were turned over, and if the assets were turned over subject to the right of these trustees to deduct their proper expenses therefrom before delivery to the trustee in bankruptcy, then, upon application by the so-called trustees, the amount of their attorneys' services should be allowed them.

The motion in its present form, therefore, must be denied, but Messrs. Cohen and Pisani, the so-called trustees, may apply, upon proper petition, for an approval of a reasonable expenditure for attorneys' services for the matters in question, to have this expenditure allowed them, and to have the same paid from the property turned over by them, if no other questions have arisen upon their accounting interfering with that result.

The application of the said Cohen and Pisani, when so made, will be referred to the referee as special commissioner to report upon these questions, in connection with whatever answer the trustee in bankruptcy may interpose thereto.

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In re RELIABLE BOTTLE BOX CO.

(District Court, E. D. New York. October 19, 1912.)

**1. BANKRUPTCY (§ 114\*)—RECEIVERS—ACCOUNT—SETTLEMENT.**

Where the account of a bankrupt's receiver had been settled and the amount due determined by a court of competent jurisdiction, he could be ordered to pay the balance into court by summary order, and his surety could be held liable therefor in case of the receiver's failure.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 164-166; Dec. Dig. § 114.\*]

**2. BANKRUPTCY (§ 114\*)—RECEIVERS—ACCOUNTING—FUNDS.**

Where the account of a bankrupt's receiver had been settled, and he had been ordered to pay over the balance found due, his ability to do so was not measured by the funds or property of the bankrupt estate, though such funds could be used to diminish his personal liability; a determination that he was personally liable for the expenses of the receivership being determinative of the fact that he could not rely on the estate, except to reduce the deficit.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 164-166; Dec. Dig. § 114.\*]

**In Bankruptcy.** In the matter of bankruptcy proceedings of the Reliable Bottle Box Company. On motion for an order compelling

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a former receiver to pay \$1,583.40, with which his account was surcharged. Motion granted.

Conway, Williams & Kelly, of New York City, for trustee.  
John M. Coleman, of New York City, for respondent.

CHATFIELD, District Judge. This motion is for an order compelling the former receiver herein to pay the sum of \$1,583.40, with which amount his account as receiver was surcharged, and also to punish him for contempt for failure to obey a subsequent order to pay at once three items included in the above total. The language of the order surcharging the account is as follows:

"Ordered, that the account of Charles Soble, as custodian or receiver under the order entered herein on the 6th day of April, 1912, is hereby surcharged with the sum of sixteen hundred twenty-one dollars and six cents (\$1,621.06), being the amount of merchandise shipped by him as said custodian or receiver, and payment for which is uncollected."

The amount in question was subject to certain deductions or credits claimed by the receiver, which reduce its amount to \$1,583.40; but the court sees no reason why the last amount should not be paid.

[1] As to the items ordered paid separately, the receiver is in contempt. He is an officer of the court and under bond. His account has been settled properly and the amount due determined by this court, which plainly had jurisdiction. He can be ordered to pay by a summary order, and his surety can be held liable if he does not make good; but the court can also compel him to pay the amount if he is able so to do.

[2] His ability is to be measured by the funds he can apply thereto, and is not limited to property or funds of the bankrupt estate. Any such funds could be used to diminish his personal liability, but the determination that he is personally liable for the expense of the receivership settles, also, that he cannot rely upon the estate, except to reduce the deficit.

Motion granted.

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McGARVEY v. BUTTE MINER CO. et al.

(District Court, D. Montana. October 26, 1912.)

No. 103.

**1. REMOVAL OF CAUSES (§ 102\*)—DEFENDANTS—FRAUDULENT JOINDER—NON-LIABILITY OF ONE DEFENDANT.**

Where, in an action for libel against two defendants, the cause was removed by one of them on the ground of diverse citizenship, and that the other defendant was not liable, but it appeared that the law was locally unsettled and fairly debatable, the complaint could not be said to show fraudulent joinder on its face, and, the exercise of the right to join being a matter to be settled on the trial, the cause would be remanded.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 218-220, 223, 224; Dec. Dig. § 102.\*]

Fraudulent joinder of parties to prevent removal of cause, see note to *Offner v. Chicago & E. R. Co.*, 78 C. C. A. 362.]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**2. REMOVAL OF CAUSES (§ 36\*)—DEFENDANTS—FRAUDULENT JOINDER.**

Fraudulent joinder of defendants, in order to justify removal of the cause, must in general essentially consist in a willful or negligent misstatement of fact.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. § 36.\*]

At Law. Action for libel by Charles McGarvey against the Butte Miner Company and J. L. Dobell. The cause having been removed for diverse citizenship, plaintiff moves to remand. Granted.

J. E. Healy, of Butte, Mont., for plaintiff.

Geo. F. Shelton and A. J. Verheyen, both of Butte, Mont., for defendants.

BOURQUIN, District Judge. Motion to remand. Action for libel and removal for diverse citizenship.

[1] Upon the facts that may be taken as proven hereon, the removing defendant contends that the law is that its codefendant, whose joinder, unless proven fraudulent, defeats removal, is not liable; and hence the conclusion, fraudulent joinder. Plaintiff, contra.

The law is fairly debatable. But if plaintiff knew the aforesaid facts, and if the law be as claimed by the defendant, these are but circumstances, and not conclusive of fraudulent joinder. Where the law is locally unsettled, it is the right of plaintiff to adopt and fairly urge that view thereof that best serves his interests, to join defendants accordingly, and, if the case be not otherwise removable, to secure a trial and determination of the disputed issues, fact and law, upon his theory and in the forum of his choice, the state court. This being plaintiff's right, its exercise is not fraudulent, though its chief motive be to prevent removal and compel trial in the state court. The case on removal is taken to be what plaintiff in good faith has made it. He may be in error in respect to both facts and law, his complaint may show misjoinder on its face, but fraud cannot be predicated upon his mere mistakes, though they defeat removal. The exercise of the right aforesaid is consistent with good faith, for law is not settled by a litigant's belief or contention, but by the court's determination. This determination is for the trial, and not on remand.

[2] On remand, the issue is not what is the law of the case, but is the joinder fraudulent? And the fraud to be alleged and proven to make out fraudulent joinder is essentially that in any case—in general, willful or negligent misstatement of fact. See *Railway Co. v. Willard*, 220 U. S. 419, 31 Sup. Ct. 460, 55 L. Ed. 521, and cases cited.

Fraudulent joinder is not proven here, this court has no jurisdiction of the action, and the motion to remand is granted. Costs to plaintiff.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

## NEWBERRY v. WILKINSON et al.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1912.)

No. 2,102.

## 1. COURTS (§ 259\*)—JURISDICTION—FEDERAL COURTS—ADMINISTRATION OF ESTATES.

Federal equity jurisdiction extends to the administration of decedents' estates, where it concerns citizens and residents of different states; but in the exercise of such jurisdiction the courts will be governed by the statutory rules and regulations of the states in which they are located with reference to the administration and settlement of such estates, since the general equity jurisdiction of the federal courts to administer the estates of deceased persons, as between citizens of different states, cannot be defeated or impaired by laws of the state undertaking to give its own courts exclusive jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 795, 796; Dec. Dig. § 259.\*]

Probate jurisdiction of federal courts, see note to Bedford Quarries Co. v. Thomlinson, 36 C. C. A. 276.]

## 2. COURTS (§ 365\*)—FEDERAL COURTS—JURISDICTION—STATE LAW—DECISION OF STATE COURTS—CONCLUSIVENESS.

The equity jurisdiction of federal courts to administer the estates of deceased persons, as between citizens of different states, is concurrent with the probate jurisdiction of the state courts, and, being so, the orders and judgments of the probate courts in the due and orderly administration of such estates are conclusive and binding on the federal courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 950; Dec. Dig. § 365.\*]

Conclusiveness of judgment between federal and state courts, see notes to Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478; Union & Planters' Bank of Memphis v. City of Memphis, 49 C. C. A. 468.]

## 3. COURTS (§ 262\*)—CHANCERY JURISDICTION—FRAUD—ACCOUNTING.

A federal court of equity had jurisdiction of a suit by a nonresident against the administratrix, heirs, and sureties of a deceased guardian to compel an accounting, alleging that he had been deprived of his inheritance by the guardian's fraud.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 797, 798; Dec. Dig. § 262.\*]

## 4. GUARDIAN AND WARD (§ 174\*)—LIABILITY ON BOND—RECEIPT OF WARD'S ESTATE—ESTOPPEL TO DENY.

Decedent, having been appointed guardian of an estate of plaintiff and his sister, since deceased, executed a receipt to a referee in partition for the minors' share of the property sold therein, without having actually received the money, pursuant to a scheme by the minors' father to possess himself of the inheritance. *Held*, that the guardian's administrator and the sureties on the guardian's bond were estopped to deny that he received the money.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 590-599; Dec. Dig. § 174.\*]

## 5. GUARDIAN AND WARD (§ 73\*)—LIABILITIES OF DECEDENT—ENFORCEMENT AGAINST ADMINISTRATRIX AND HEIRS.

Where a guardian's estate was insolvent, and insufficient to pay the expenses of administration, neither the administratrix nor the guardian's heirs, who received nothing from him, were liable for a devastavit committed in his capacity as guardian.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 322-324; Dec. Dig. § 73.\*]

6. EXECUTORS AND ADMINISTRATORS (§ 225\*)—"CLAIMS"—STATUTE OF NON-CLAIM—SCOPE.

Rem. & Bal. Code Wash. § 1470, provides for the publication of notice to creditors by every executor or administrator, and requires presentation of claims within a year of the date of the notice, and section 1472 declares that, if a claim is not presented within such time, it shall be barred. *Held*, that the word "claim," as so used, included the right of a ward, after he became of age, to recover against the estate of his deceased guardian for a devastavit, and that, in the absence of fraud or equitable considerations, his failure to present the claim to the administrator of the guardian's estate constituted a bar to his right to sue either the estate of the deceased guardian or his surety.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 789-805; Dec. Dig. § 225.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1202-1211; vol. 8, p. 7604.]

7. GUARDIAN AND WARD (§ 182\*)—DEVASTAVIT BY GUARDIAN—ACTION AGAINST SURETY.

Rem. & Bal. Code Wash. § 1432, provides that all actions against sureties shall be commenced within six years after the revocation or surrender of letters of administration or death of the principal, and section 1633 declares that section 1432 shall apply to bonds of guardians. *Held*, that where a guardian died January 25, 1904, and suit was not instituted against his estate and against his surety for an alleged devastavit until February 2, 1910, it was barred.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 623-636, 638-663; Dec. Dig. § 182.\*]

8. LIMITATION OF ACTIONS (§ 104\*)—FRAUD—CONCEALMENT.

Where fraud, forming the basis of a suit in equity, has been willfully concealed from complainant until limitations have run, equity will disregard the statute in the interest of justice.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 511-513; Dec. Dig. § 104.\*]

9. EQUITY (§ 87\*)—LIMITATIONS—LACHES.

Equity may cut short the limitations of the law, and will adopt its own limitations to meet the special and peculiar exigencies of the case.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 242-244; Dec. Dig. § 87.\*]

10. EQUITY (§ 67\*)—"LACHES"—WHAT CONSTITUTES.

In general, "laches" is neglect to do what in the law should have been done for an unreasonable or an unexplained length of time under circumstances permitting diligence.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 191-196; Dec. Dig. § 67.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 3969-3972; vol. 8, p. 7700.]

11. GUARDIAN AND WARD (§ 182\*)—ACTION ON GUARDIAN'S BOND—FRAUD—LACHES.

Decedent, having been appointed guardian of claimant and his sister to receive the proceeds of their share of certain real property belonging to his mother's estate, in a partition suit, receipted for such share without receiving the same, pursuant to a scheme to enable complainant's father to obtain the benefit thereof. The father lost the property, without any part of the proceeds ever coming into decedent's hands. Complainant became of age September 8, 1906. In 1904 he was informed of his interest in the property by his stepmother, who stated that, if he tried to recover the same, it would probably get his father into trouble. Complainant, though mentally capable of understanding the situation,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

made no further inquiries until after October 30, 1909, when he caused the records to be searched, and brought suit against decedent's administratrix, heirs, and sureties on his bond as guardian February 2, 1910. Decedent's estate was insolvent when administered, and the suit was finally dismissed as to all the sureties except defendant M. *Held*, that complainant's claim against M. was barred by laches.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 623-636, 638-663; Dec. Dig. § 182.\*]

12. GUARDIAN AND WARD (§ 173\*)—FRAUD OF GUARDIAN—PARTICIPATION BY SURETY.

Where complainant's guardian, by a fraudulent conspiracy with complainant's father, receipted for complainant's estate without actually receiving it, so that the father might obtain possession thereof, a surety on the guardian's bond was not bound to actively concern himself to see that the guardian accounted for complainant's estate, and his failure to do so was insufficient to charge the surety with participating in concealment of the fraud.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 576-588; Dec. Dig. § 173.\*]

Appeal from the Circuit Court of the United States for the Eastern Division of the Eastern District of Washington.

Action by William Fraser Newberry against Clara Wilkinson, as administratrix of the estate of B. C. Van Houten, deceased, and others. Judgment for defendants (190 Fed. 62), and complainant appeals. Affirmed.

The plaintiff, appellant here, was born September 8, 1885, and is the son of Arthur A. and Pauline B. Newberry. Pauline died intestate August 4, 1890. Her husband and son and a daughter survived her. At the time of her death she was the owner in community right with her husband of certain real property situated in the city of Spokane and vicinity. The children took an estate by inheritance in her community property. The entire property, including her husband's interest, was under mortgage. On January 29, 1891, Arthur A. Newberry applied to the superior court in and for the county of Spokane, state of Washington, for the appointment of a guardian for plaintiff and Laura Isabel, his sister, recommending B. C. Van Houten as a suitable person for the trust. Van Houten was accordingly appointed, and, by order of the court, gave a bond for the faithful discharge of his trust, and for rendering and paying all moneys, goods, and chattels which should come into his hands to such minors when they became entitled thereto, or to any subsequent guardian, should the court so direct, with the defendant J. Monaghan, and Lane C. Gilliam, W. H. Taylor, and J. F. McEwen, as sureties. The bond was approved and filed, and Van Houten took the oath of office as guardian.

On February 7, 1891, A. A. Newberry commenced a suit against Laura Isabel Newberry and William Fraser Newberry, B. C. Van Houten, guardian, and others, for partition of certain of the lands in which Pauline B. Newberry was possessed of a community interest with her husband at the time of her death. Van Houten, as guardian, filed an appearance in said suit, and subsequently answered, denying that he was possessed of any knowledge or information sufficient to form a belief as to the matters and things set forth in the complaint, and demanding strict proof thereof. The cause was referred for taking testimony. Upon the report of the referee it was found and declared by the court that it was impossible to make partition of the real property without great injury to the estate, and decreed that the property be sold for cash. A referee was designated to make such sale. The property was accordingly sold, J. F. McEwen becoming the purchaser of the several parcels, at the aggregate sum of \$66,800, and the referee made report that he had paid to plaintiff one-half thereof, to wit, \$33,400, and the remaining

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

one-half to B. C. Van Houten, general guardian and guardian ad litem of the said Laura Isabel and William Fraser Newberry, taking receipts therefor. The sale was confirmed on June 8, 1891, and it was ordered that, upon making the conveyance to the purchaser and receipt of the money therefor, said conveyance be presented to the court for approval. It was further ordered that the costs of the proceeding and an attorney's fee taxed at \$1,000 be paid out of the proceeds of the sale, and the balance distributed, one-half to A. A. Newberry and one-half to B. C. Van Houten, guardian ad litem and guardian of the estate of said minor heirs. There were filed on the same day—June 8, 1891—the receipts of both Newberry and Van Houten, the receipt of Van Houten reading:

"Spokane, Wash., May 29, 1891.

"Received of B. E. Barinds, referee, for and on behalf of Laura Isabel Newberry and William Fraser Newberry, minors, \$33,400, being one-half of the cash proceeds of the sale at public auction on the 29th day of May, 1891, of the following described property, in accordance with the decree entered by the superior court of the county of Spokane and state of Washington, on the 28th day of April, 1891" [describing the property].

"[Signed] B. C. Van Houten,

"Guardian of Estate of Said Minors, Laura Isabel Newberry and William Fraser Newberry."

The complaint in this suit filed sets up the fact of the death of Pauline B. Newberry, the names of her husband and heirs left surviving her, the subsequent decease of Laura Isabel while a minor, leaving plaintiff as the only heir, the appointment of B. C. Van Houten as guardian of the estate of plaintiff and his sister, the execution of the guardian's bond, the coming into possession and control of the guardian of the certain real property, the subsequent proceedings for partition in the superior court of Spokane county, Wash., the sale of the property to J. F. McEwen for the sum of \$66,800, the execution by B. C. Van Houten to the referee of his receipt for \$33,400, being for part of the proceeds of sale, that said sum of \$33,400 came into the hands of Van Houten as guardian of plaintiff and his sister, that as such guardian he, the said Van Houten, has at all times failed, refused, and neglected to account for the proceeds of such sale, and, among other things, that the defendant Clara Wilkinson is the administratrix of B. C. Van Houten, deceased, and that she, the widow, and defendant Eugene Van Houten, a son, are his only heirs at law. Complainant further complains as follows:

"That at the time said B. C. Van Houten was appointed guardian of plaintiff's estate, and said sale above mentioned was made and said moneys received, plaintiff was of tender years, to wit, of the age of five years, and that he had no knowledge of said proceedings, and that he never was informed of the same, or of the fact that his said mother, Pauline B. Newberry, died possessed of any estate whatsoever, and that at no time did he know, or did he have any means of knowing, that he was entitled to any moneys as heir of the estate of his said mother, until on or about the 16th day of November, 1909, when for the first time he learned that his said mother died intestate, and left to the plaintiff and to his minor sister, Laura Isabel Newberry, the moneys and estate hereinbefore mentioned. That the first knowledge or intimation this plaintiff had that his said mother died possessed of the estate aforesaid was gained in the following manner, to wit: That on or about the 10th day of November, 1909, this plaintiff received a certain quitclaim deed to certain real estate situated in Spokane county, together with a letter from his said father, A. A. Newberry, requesting plaintiff to sign said quitclaim deed for the purpose of clearing the title to said lands therein mentioned, and that plaintiff was informed by said letter that said lands were a part or portion of the estate of his deceased mother, Pauline B. Newberry. That immediately upon receipt of said deed this plaintiff took the same to his legal advisers in Salt Lake City, Utah, who caused investigation to be made, and that plaintiff was for the first time informed of his rights by his attorneys herein on or about the 16th day of November, 1909. That shortly after plaintiff attained the age of 14 years he left said town and city of Spokane, Wash., and on or about the 15th day of April, 1901, enlisted in the



United States Navy at Brooklyn Navy Yard in the state of New York, and was thereafter continually in the United States naval service, and was at all times away from said town and city of Spokane during his said term of service in said navy. That plaintiff received his discharge on or about the 7th day of September, 1908, and shortly thereafter became a resident of Salt Lake City, Utah, and has at all times since said date resided in said state of Utah. That by reason of the facts hereinbefore alleged the plaintiff has lost his entire estate and inheritance from his said mother, and particularly said sum of \$33,400, and that he is entitled to an accounting from the personal representatives of the estate of B. C. Van Houten, deceased, and to recover from said estate and the heirs thereof, and from said J. Monaghan as surety upon the bond of said B. C. Van Houten, said principal sum of \$33,400, together with interest thereon at the legal rate from the 29th day of May, 1891, until paid, and for such other sum or sums as may be found due to be plaintiff herein upon an accounting being had in said estate."

The property sold under partition was at once conveyed by McEwen to A. A. Newberry, and by the latter mortgaged for an increased loan; it having been under mortgage at the time of the partition. Later the entire property was lost through foreclosure. The record further shows that Van Houten died testate, in King county, Wash., January 25, 1904, that his widow (now Clara Wilkinson) was appointed in said county administratrix of his estate, that in due course the administration was settled and closed, and that the property which came into the hands of the administratrix was not sufficient to pay the expenses of administration.

The plaintiff testifies that he resides in Salt Lake City, and has resided there for four years; that he first heard of the proceedings in which Van Houten was appointed guardian for himself and sister from Messrs. Belden & Losey, when he first started these proceedings; that that was a circumstance when he first started to look into the matter, being the latter part of 1909 or first of 1910; that the first intimation he had that he had any property interest in and about Spokane was while he was on leave of absence from his ship on a short visit to his father and stepmother, the present Mrs. Newberry, in the fall of 1904; that his stepmother was giving him a "little talking to about saving money," and told him that she thought he had some property in Spokane, mentioning the Carnegie Library site; that she told him his mother had left the Carnegie Library site, which rightfully belonged to him, that his father had mortgaged it and the mortgage had been foreclosed, and that if he brought suit within a year after he became of age he might possibly recover the property, but it would get his father into trouble; that he believed what his stepmother told him, that if he brought suit he would get his father into trouble, and that he was influenced in his silence and failure to bring suit by such statement; that he did not bring the suit within the year, as suggested, for that reason; that he was very young when he left Spokane first; that the family went to Europe when he was between 9 and 10 years old; that they returned to Spokane, but did not bring him with them; that he was left in Amherst, Mass., and attended school there for over a year and a half, when he returned to Spokane; that he remained in Spokane a short time, and then went with the family to New York; that he was in school in New York; that he entered the navy when he was a little over 15 years of age, and was discharged the day before his twenty-first birthday; that he visited his people from time to time while he was in the navy; that it was during one of these visits that he had the conversation with his stepmother regarding the Carnegie Library property; that he was about 19 years old at the time of the conversation, and that she gave him no reason why he might be able to bring the suit; that he knew of the old home site, where the Carnegie Library now stands, in a vague sort of way; that he was in Spokane once after he became of age, some time in March, 1908, but stayed only a few hours, and departed, his father having given him some money; that he received a letter from his father in the fall of 1909, asking him for a quitclaim deed to some land; that he answered this, making inquiry about the point involved, and his father replied that there was a technical question involved, which it was thought should be straightened out; that thereupon he took the matter up with his lawyers, and through their

investigation the guardianship proceedings were discovered, which was the first he knew of such proceedings.

Mrs. Newberry, the stepmother of plaintiff, corroborates him relative to the conversation respecting the Carnegie Library property, about which she says: "I told him he could bring this suit to recover his mother's interest in the property where the public library now is; that his father had tried to save it for him, and did as long as he could, and finally he had to give it up; if he would save his money, when he was 21 he could bring suit himself; but I further explained to him, if he didn't bring suit before he was 22, the statute of limitations would run against him." She further testifies that, when plaintiff was very young and in school at Amherst, Mass., he received a notice of some kind, which the boy did not understand, although she attempted to explain the meaning to him. This notice was perhaps a summons in the foreclosure proceeding by the mortgagee against the property formerly partitioned.

Arthur A. Newberry testifies in effect that, at the time of the sale under the partition suit no money whatever passed from McEwen to the referee appointed by the court to sell the property, and none passed from the referee to either Newberry or Van Houten as guardian for the minors, but that Newberry and Van Houten each gave his receipt to the referee, acknowledging payment by him to each of the sum of \$33,400; that no money whatever passed during the partition proceedings and the sale of the property, or the execution of the referee's deed therefor; that the entire proceeding was a scheme contrived by Newberry, so that he could get the title to the property in his own name, and thereby be enabled to mortgage the same for additional money; and that McEwen, as soon as he received a deed from the referee, deeded the property to Newberry without consideration, which was also a part of the scheme.

Belden & Losey and Graves, Kizer & Graves, all of Spokane, Wash., for appellant.

H. M. Stephens, of Spokane, Wash., for appellees Wilkinson and Van Houten.

P. F. Quinn and E. J. Cannon, both of Spokane, Wash., for appellee Monaghan.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge (after stating the facts as above). This country adopted the equitable jurisdiction of the High Court of Chancery of England when the Constitution was framed, and it is the jurisdiction exercised by the federal courts to the present time, saving such modifications as it has undergone through usage and by action of Congress, and, in practice, through the rules adopted by the Supreme Court. It has been said that the jurisdiction "is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the Union." *Payne v. Hook*, 7 Wall. 425, 430, 19 L. Ed. 260. See, also, *Robinson v. Campbell*, 3 Wheat. 212, 4 L. Ed. 372; *McConihay v. Wright*, 121 U. S. 201, 7 Sup. Ct. 940, 30 L. Ed. 932; *Arrowsmith v. Gleason*, 129 U. S. 86, 9 Sup. Ct. 237, 32 L. Ed. 630. This jurisdiction in its parent country undoubtedly extended to the administration of estates of deceased persons. Says Mr. Pomeroy:

"The relation subsisting between executors and administrators on the one hand, and legatees, distributees, and creditors on the other, has so many of the features and incidents of an express active trust that it has been com-

pletely embraced within the equitable jurisdiction in England, and also in the United States, where statutes have not interfered to take away or to abridge the jurisdiction." 1 Pom. Eq. Jur. § 156.

The states, however, through their statutes and procedure, have vitally encroached upon this special subject of equitable jurisdiction. In a great majority of the states, the original jurisdiction over administrations in all ordinary cases, unless attended with special circumstances, such as fraud, or with some equitable feature, such as a trust, is either expressly or practically abrogated. Courts of equity, in the absence of such special circumstances or distinctly equitable feature, either do not possess or will not exercise the jurisdiction, but leave the whole matter of administration to the special probate tribunals. In a few of the states only does the full equitable jurisdiction over administrations remain unimpaired, and in these it is not exclusive, but concurrent with systems of administration conferred upon probate courts. Sections 348, 349, 350, Pom. Eq. Jur.; 16 Cyc. 92-95.

So it is the doctrine of the English chancery that, whenever an infant succeeds to property, that court takes the management of its person and estate. "In this matter, however," says Mr. Pomeroy, "as in the administration of decedents' estates, the Legislature has intervened, and the probate courts practically appoint all guardians, and control their official actions. Under their general power in cases of trust and of accounting, the American courts of equity may give all proper relief to wards against their guardians; but the peculiar jurisdiction over the persons and estates of infants, possessed by the English chancery, does not, to any extent, exist in the American equity jurisprudence." Pom. Eq. Jur. § 78. At another place (section 1097) the author further says:

"Equity has, therefore, a general jurisdiction, at the suit of the wards or other beneficiaries, to compel a performance of the trust duties, to relieve against violations of these trust obligations, to direct an accounting and final settlements of the quasi trust, and to grant other special relief made requisite by the circumstances."

[1] Equity jurisdiction in the federal courts, however, may yet be said to extend to the administration of the estates of deceased persons *sub modo*—that is, where it concerns citizens and residents of different states; but it is an inexorable rule that, in the exercise of such jurisdiction, such courts will be governed and controlled by the statutory rules and regulations of the states pertaining to the administration and the settlement of such estates. *Security Trust Co. v. Black River National Bank*, 187 U. S. 211, 23 Sup. Ct. 52, 47 L. Ed. 147. In short, the federal equity courts, when occasion requires, for the protection of proper parties concerned, will administer the local probate procedure, but in obedience to the local law governing the same. While it is said that "the several states of the Union necessarily have full control over the estates of deceased persons within their respective limits" (*Yonley v. Lavender*, 21 Wall. 276, 279, 22 L. Ed. 536), and that the federal court "has no original jurisdiction in respect to the ad-

ministration of a deceased person" (*Byers v. McAuley*, 149 U. S. 608, 619, 13 Sup. Ct. 906, 37 L. Ed. 867), it is further declared that "the general equity jurisdiction of the Circuit Courts of the United States to administer, as between citizens of different states, the assets of a deceased person within its jurisdiction cannot be defeated or impaired by laws of a state undertaking to give exclusive jurisdiction to its own courts." *Lawrence v. Nelson*, 143 U. S. 215, 223, 12 Sup. Ct. 440, 36 L. Ed. 130. See, also, *Green's Administratrix v. Creighton et al.*, 23 How. 90, 16 L. Ed. 419; *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260.

It is upon the ground of a trust impressed by law that the equitable jurisdiction over estates primarily rests, and its remedial powers may be exercised as in administration suits, and in creditors' bills instituted against executors or administrators, or after distribution against legatees, for the purpose of charging them with a liability to apply the assets of the decedent to pay his debts and the like. *Borer v. Chapman*, 119 U. S. 587, 600, 7 Sup. Ct. 342, 30 L. Ed. 532.

[2] The federal courts being governed and controlled by the local laws respecting the administration of estates, their jurisdiction, in so far as it is exercised, is necessarily concurrent with the probate jurisdiction of the several states; and, being concurrent, it follows that the orders and judgments of such probate courts in the due and orderly administration of such estates are conclusive and binding upon the federal courts. This latter deduction has been observed to be the case in the matter of the succession of estates. *Johnson v. Waters*, 111 U. S. 640, 667, 4 Sup. Ct. 619, 28 L. Ed. 547.

[3] This court has chancery jurisdiction of the present controversy because of fraud alleged in the bill and shown by the testimony, and for an accounting. Sections 78 and 1097, Pom. Eq. Jur.; *Johnson v. Waters* and *Arrowsmith v. Gleason*, *supra*.

[4] Whatever good intentions may have prompted Newberry in disposing of his children's inheritance, the disposition made was a manifest constructive fraud upon their rights, and it is bootless to speculate as to the probability or possibility of the property being lost to the estate in any event by reason of prior incumbrance or financial entanglement. Van Houten became a party to the fraud by lending himself to become guardian of the minor heirs, and by receipting in his official capacity for money which he never actually received, purporting to be the proceeds of the sale at partition of their inheritance. The device enabled Newberry, the father, to possess himself of the inheritance, and afterwards to use it for his own purpose, so that it was lost to the heirs. Being a party to such device, Van Houten by the plainest principles of estoppel by record and in pais, was ever afterwards precluded from denying that he received the money. Neither can his sureties be heard to say that he never received it. *Judge of Probate v. Sulloway*, 68 N. H. 511, 44 Atl. 720, 49 L. R. A. 347, 73 Am. St. Rep. 619;

Cranford et al. v. Brewster, 57 Ga. 226; Pfeiffer & Sullivan v. Knapp, 17 Fla. 144; Byrd & Chrisfield's Executors v. State, Use of Stewart, 44 Md. 492; State ex rel. Weaver v. Weaver et al., 92 Mo. 6, 4 S. W. 697.

[5] As it concerns Clara Wilkinson, either as administratrix of the estate of B. C. Van Houten or in her individual capacity, and Eugene Van Houten, there can be no relief whatsoever against them. The estate of Van Houten proved to be hopelessly insolvent, to the extent that it was insufficient to pay even the expenses of administration, and was wholly and finally settled in probate, and the administratrix discharged. There is no suggestion that this proceeding in probate was attended with any irregularity whatever. Thus the order and judgment of the probate court in settling the estate and discharging the administratrix are conclusive and binding upon this court. Being discharged, it is futile to attempt to charge Mrs. Wilkinson in her administrative capacity; and, neither she nor Eugene Van Houten having come into possession of any of Van Houten's property or estate, they could not be held personally for Van Houten's defalcation, unless they had violated some duty which they owed to the complainant entailing such liability. It has been held that:

"The administrator is the usual and proper person to present the account of the deceased guardian for settlement." Chapin, Judge, v. Livermore et al., 13 Gray (Mass.) 561, 562.

But there is no rule of law of which we are aware rendering the administrator personally liable to the ward for a failure to render such service. Indeed, in the present case, if the account of Van Houten as guardian had been presented, it is evident it would have been of no avail to the ward, as the administratrix had at no time property or funds in her hands in any way applicable to the account. So that, in either view, there could be no personal liability on the part of Mrs. Wilkinson arising from her acts as administratrix. Much less would any personal liability arise on her part, or on the part of Eugene Van Houten, by reason of being heirs of Van Houten's estate. It is clear, therefore, that the complaint should be dismissed as against Mrs. Wilkinson and Eugene Van Houten.

[6] In defense of plaintiff's cause of suit, the defendant Monaghan invokes the statute of nonclaim, and also the statute of limitations fixing the time beyond which an action cannot be maintained against the sureties upon an executor's, administrator's, or guardian's bond after the death of the principal, prescribed by the statutes of the state of Washington. The statute of nonclaim is presented as barring all right of action or suit upon the demand relied upon for recovery; and, that being barred, it is insisted that the surety is released also. Section 1470, Rem. & Bal. Code, provides that:

"Every executor or administrator shall, immediately after his appointment, cause to be published in some newspaper printed in the county, if there be one, if not, then in such newspaper as may be designated by the court, a

notice to the creditors of the deceased, requiring all persons having claims against the deceased to present them, with the necessary vouchers, within one year after the date of such notice, to such executor or administrator, at the place of his residence or transaction of business, to be specified in the notice. Such notice shall be published as often as the court shall deem necessary, but not less than once in a week for four successive weeks."

And section 1472 that:

"If a claim be not presented within one year after the first publication of the notice, it shall be barred."

The word "claim," in the sense as used by the statute, has been construed by the Supreme Court of the state of Washington to be of broad significance, and "to include every species of liability which the executor or administrator can be called on to pay, or to provide for the payment of, out of the general fund belonging to the estate." *Barto v. Stewart et al.*, 21 Wash. 605, 59 Pac. 480, 482. This case expressly overrules the case of *Neis v. Farquharson*, 9 Wash. 517, 37 Pac. 697, in any bearing it has upon the point so decided. This would seem to include the claim of plaintiff, when it is considered that no funds whatever of his went into the hands of his guardian, and none, therefore, could have gone into the hands of the administratrix of his guardian's estate. He could have no other demand, except a personal claim against the estate, occupying the position of a general creditor, for so much money as might have been found due on a proper showing or accounting. It could have been in no sense a claim or demand for a specified fund or specific property traceable as the fund or property of the ward separable from the property of the estate.

The statute is not without its prototype elsewhere, which has received the like broad construction, and, as remarked by the trial court, is enforced with even greater strictness than general statutes of limitation; its object being to secure an early and final settlement of estates, to the end that what shall remain may be distributed to the heirs or next of kin free from incumbrances or charges which would lead to protracted litigation. *Fretwell et al. v. McLemore et al.*, 52 Ala. 124; *Rhodes v. Hannah's Administrator*, 66 Ala. 215; *Taylor, Adm'r, v. Robinson, Adm'x*, 69 Ala. 269; *Walker v. Byers*, 14 Ark. 247; *Bennett et al. v. Dawson, Adm'x, et al.*, 18 Ark. 334; *Brearily v. Norris*, 23 Ark. 169; *Patterson v. McCann*, 39 Ark. 577; *Purcelly et al. v. Carter, Adm'r, et al.*, 45 Ark. 299; *Fowler v. True*, 76 Me. 43; *Attorney General v. Brigham*, 142 Mass. 248, 7 N. E. 851; *Lathrop v. Bampton*, 31 Cal. 17, 89 Am. Dec. 141; *McGrath v. Carroll*, 110 Cal. 79, 42 Pac. 466.

Such statutes are in proper cases given ample effect in the federal courts, and, to illustrate with what scope and strictness they are enforced, we quote from *Morgan v. Hamlet*, 113 U. S. 449, 451, 5 Sup. Ct. 583, 28 L. Ed. 1043, a case instituted in equity to enforce certain demands against the heirs at law of John G. Morgan, deceased, who came into property of the estate sufficient to satisfy the demands of claimants, where it was answered that the demands were not presented to the administrator within the limita-

tion of the nonclaim in Arkansas. Of the complainants, one became of age less than three years and one within a year and five months prior to the date of the institution of the suit. Neither of these ever had a guardian, and they allege their ignorance of the frauds charged which form in part the basis of the suit. The court says:

"It is sought, in argument on behalf of the appellants, to distinguish their case, at least the case of the two infant children of Samuel D. Morgan, from any case within the statute of nonclaim, on the ground that at the death of their father his title to the real estate, which constituted the plantation, descended to them as his heirs at law, and thereafter as to the operations conducted by John Morgan in 1864 and 1865, having no guardian, the latter was in equity their representative and guardian de son tort and trustee, so that upon his death, and until they arrived at age, there was no one competent to make a demand against his administrator, within the terms of the statute. But we are unable to appreciate the force of this supposed distinction. The statute in question contains no exception in favor of claimants under disability, of nonage, or otherwise. The claim of the complainants against John G. Morgan was adverse to his administration, although it may have originated in consequence of a relation of trust; and there is no ground, that we are able to understand, on which it can be excepted out of the operation of the statute in question. Their claim was equally against the administrator of John G. Morgan, whether the latter be considered as the defaulting partner of themselves or of their father. Whatever its description, it was a claim against the estate of John G. Morgan, and for which his personal representative was in the first instance liable; and the statute is a bar to every such claim, unless presented within the time prescribed."

The doctrine was reaffirmed in *Security Trust Co. v. Bank*, supra, with even stronger emphasis. It will be observed, also, in the examination of this case, that it is controlled by the decisions of the Supreme Court of Arkansas in its construction and application of the statute of nonclaim obtaining in that state; the opinion of the court citing the cases of *Walker v. Byers*, *Bennett v. Dawson*, and *Brearily v. Norris*, supra.

Further than this, it is settled that the federal courts will adopt and follow the decisions of the highest courts of the states in construing and applying local statutes of limitation. *Bauserman v. Blunt*, 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316. This statute of nonclaim, unless suspended or barred because of equitable considerations—a matter to be considered later—is effective to extinguish the liability of the principal, and, that being extinguished, there can exist none against the surety. *Spokane County v. Prescott*, 19 Wash. 418, 53 Pac. 661, 67 Am. St. Rep. 733.

[7] As to the other statute of limitation, it is provided (section 1432, Rem. & Bal. Code) that:

"All actions against sureties shall be commenced within six years after the revocation or surrender of letters of administration or death of the principal."

And by section 1633 the provisions of this section are made to "apply to bonds taken of guardians." Van Houten, the guardian, died January 25, 1904, and this suit was instituted February 2, 1910, so that the six-year limitation of the statute had clearly run. There is strong authority to the effect that the terms of the statute inhere in the surety's contract in entering upon the bond of the guardian, and

that he is not bound beyond the terms of the bond; that is to say, one of the terms being, when read in view of the statute, that he shall not be bound beyond six years after the death of his principal. *Hudson v. Bishop* (C. C.) 32 Fed. 519; s. c., 35 Fed. 820. But this question we do not decide.

It is stoutly urged that neither of these limitation statutes can stand in the way of equitable interposition on account of fraud practiced, and the concealment thereof by the alleged delinquent party, where the fraud remains undiscovered until a recent date prior to the institution of the suit for relief from the effect of such fraud. Counsel's position is that, in a court of equity, these statutes of limitation do not run against one who, because of active fraud or concealment equivalent thereto, had no notice of his rights, and the cause of action will be deemed to have accrued only when he knew, or by reasonable diligence could have known, that such cause existed.

In general, courts of equity, being courts of conscience, are not bound by the rigidity of statutes of limitation, as are courts of law. When conditions are equal—that is, when the reasons prompting the exercise of judicial power are of equal potency and applicability—no further reasons being present, they will act upon the analogy of, or, to be more exact, rather in obedience to, the limitations of law. *Badger v. Badger*, 2 Wall. 87, 94, 17 L. Ed. 836. But otherwise they will adopt such reasonable limitations as are prompted by equity and good conscience, in view of the special exigencies of the case. This is not to say that the appropriate legislative authority might not adopt limitations that would be binding upon courts of equity as well as upon courts of law; but, as respects the general legislation pertaining thereto, although it may extend to special subjects, courts of equity have never been inexorably restrained or circumscribed by such legislation or the limitation of actions by general law. This observation bears with peculiar force where the equitable jurisdiction is exercised in the federal courts and the limitations are regulated by state legislation.

[8, 9] Limitations of actions are designed for the peace and repose of society against interminable litigation, and are justly regarded as wholesome and salutary regulations. But they sometimes operate as engines of injustice, where parties have not had fair opportunity with their adversaries of presenting their cause in time. A familiar case is where fraud forming the basis of suit has been willfully concealed and purposely kept from the knowledge or cognizance of the party concerned until the statute has run. In such a case equity will interpose to remove the bar and do justice, and it acts here without regard to the letter or analogy of the statutes of limitation. It may even cut short the limitations of the law, and it will adopt its own limitations, to meet the special and peculiar exigencies of the occasion. Reference may be made to a few cases only which establish the principle. In *Stearns v. Page*, 7 How. 819, 828 (12 L. Ed. 928), the court says:

"Statutes of limitation form a part of the legislation of every government, and are necessary to the peace and repose of society. When they are addressed to courts of equity as well as to courts of law, as they seem to be in



all cases of concurrent jurisdiction (as in matters of account), they are equally obligatory on each court. In other cases, courts of equity act upon the analogy of limitations at law, and sometimes upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross laches or unreasonable delay. They also interfere in many cases to prevent the bar of the statutes, where it would be inequitable or unjust; as, for example, if a party has perpetrated a fraud which has not been discovered till the statutable bar may apply to it in law, courts of equity will interpose and remove the bar out of the way of the injured party. In cases of mistake, also, as well as fraud, they will not consider the statute as running till after the discovery of the mistake, as laches cannot be imputed to the injured party till the discovery of the fraud or mistake has been made. 2 Story's Eq. § 1520. But as lapse of time necessarily obscures the truth and destroys the evidence of past transactions, courts of chancery will exercise great caution in sustaining bills which seek to disturb them. They will hold the complainant to stringent rules of pleading and evidence, and require him to make out a clear case."

In *Williams v. Neely*, 134 Fed. 1, 13, 67 C. C. A. 171, 183 (69 L. R. A. 232):

"In the application of the doctrine of laches, the settled rule is that courts of equity are not bound by, but that they usually act or refuse to act in analogy to, the statute of limitations relating to actions at law of like character. \* \* \* The meaning of this rule is that, under ordinary circumstances, a suit in equity will not be stayed for laches before, and will be stayed after, the time fixed by the analogous statute of limitations at law; but if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it."

In *Kentucky Coal & Timber D. Co. v. Kentucky Union Co.*, 187 Fed. 945, 948, 110 C. C. A. 93, 96:

"State statutes of limitation are prescribed for the tribunals of the state. They are not, *ex propria vigore*, of any force in the courts of the United States. They may be, and in many instances have been, adopted by acts of Congress as laws of the United States. There is no general statute of limitations in the laws of the United States relating to suits in equity. But, speaking now of the equity courts of the United States, there has been for the sake of conformity a disposition to accept the statutory regulations of the states prescribing the time within which suits may be brought. And this practice has ripened into a rule which will be enforced whenever by observing it the court is not required to abrogate its own principles, in which case it will protect its own jurisdiction. *Alsop v. Riker*, 155 U. S. 448, 460, 15 Sup. Ct. 162, 39 L. Ed. 218; *Patterson v. Hewitt*, 195 U. S. 309, 25 Sup. Ct. 35, 49 L. Ed. 214. Instances are found where those courts have enforced the doctrine of laches in favor of defendants where the lapse of time has been shorter than that prescribed by state laws, but where the peculiar circumstances gave rise to an equity which the court was bound to protect. By the same token it would allow a longer period for bringing suit than that prescribed, when by fraud or concealment of the cause of action had not been discovered, or would not by reasonable diligence have been discovered."

And in 19 Am. & Eng. Enc. of Law (2d Ed.) 243, it is said:

"It has always been the rule in equity that the defendant's fraudulent concealment of a cause of action will postpone the running of the statute until such time as the plaintiff discovers the fraud. The defendant having, by his own wrongdoing, prevented the plaintiff from instituting his suit, will not be permitted to take advantage of his own wrong by setting up the statute as a defense."

See, also, *Bailey v. Glover*, 21 Wall. 342, 22 L. Ed. 636; *Rosenthal v. Walker*, 111 U. S. 185, 4 Sup. Ct. 382, 28 L. Ed. 395; *Kirby v. Lake Shore, etc., Railroad*, 120 U. S. 130, 136, 7 Sup. Ct. 430, 30 L. Ed. 569; *Schroeder v. Young*, 161 U. S. 334, 344, 16 Sup. Ct. 512, 40 L. Ed. 721; *Eddy v. Eddy*, 168 Fed. 590, 93 C. C. A. 586; *Horton v. Stegmyer*, 175 Fed. 756, 759, 99 C. C. A. 332, 20 Ann. Cas. 1134.

As it pertains to the statute of nonclaim, we find cases of marked analogy to the present. *Allen v. Conklin*, 112 Mich. 74, 70 N. W. 339, cited by plaintiff's counsel, is one of them. Without reciting the facts, it is sufficient to say that it was held that:

"Where a guardian, since deceased, has fraudulently appropriated funds of the ward to his own use, equity has jurisdiction to require his executors to account to the ward and to decree a sale of land of the estate to pay the amount found due, though, because of lapse of time, the probate court cannot allow the claim nor decree a sale of land to pay it."

Another case decided in the federal court is *Johnston v. Roe* (C. C.) 1 Fed. 692. The debtor having died, his estate was administered under the laws of Missouri and fully settled and closed, and the claim in question was not proven in probate. Certain real and personal property passed to the heirs. The claim sued on was one having its origin in fraud, which was successfully kept concealed from the claimant, and the purpose of the suit was to subject the property of the heirs to the payment of the claim. It was held that a federal court would assume jurisdiction of the suit against the estate of the decedent for the recovery of the debt alleged to have been fraudulently concealed, although the claim was barred by the statute of limitations of the state in which such court had territorial jurisdiction. At the close of his opinion the learned judge said:

"The rule that the statute of limitations does not run in favor of one who perpetrates a fraud while he conceals it from the party injured, as a general doctrine of equity jurisprudence, is too well settled to require the citation of authorities."

And in a still later case—*Chewett v. Moran* (C. C.) 17 Fed. 820—which was to subject real estate in the hands of the heirs to the payment of the debts of their ancestors, it was held that:

"It is not an absolute bar to the maintenance of such bill in a federal court that the estate of the ancestor was administered in the probate court of the state, that commissioners were appointed to audit claims against the estate, that a time was limited within which all claims must be presented, and that plaintiff did not appear before such commissioners or offer to make proof of her debt, notwithstanding a law of the state declared that all claims against such estate not so presented should be forever barred."

[10] In a general sense, laches is defined as:

"A neglect to do what in the law should have been done for an unreasonable or unexplained length of time under circumstances permitting diligence." 24 Cyc. 840.

It is in large sense a relative term, dependent upon the attendant and peculiar conditions and circumstances of the case in hand. What would be laches in one case would fall short of it in another. It was

said by Mr. Justice Lord, in *Neppach v. Jones*, 20 Or. 491, 26 Pac. 569, 849, 23 Am. St. Rep. 145, quoting from an English case:

"Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party, and cause a balance of justice or injustice in taking one course or the other, so far as relates to the remedy."

Many cases might be cited illustrating its application. See *Alsop v. Riker*, 155 U. S. 448, 460, 461, 15 Sup. Ct. 162, 39 L. Ed. 218; *Patterson v. Hewitt*, 195 U. S. 309, 317, 318, 25 Sup. Ct. 35, 49 L. Ed. 214; *Northern Pac. Ry. Co. v. Boyd*, 177 Fed. 804, 823, 824, 101 C. C. A. 18; *Wilson v. Wilson*, 41 Or. 459, 69 Pac. 923; *Miller v. Ash*, 156 Cal. 544, 105 Pac. 600.

[11] Now to apply the authorities to the present controversy. It is sought to hold the defendant Monaghan to strict accountability by way of estoppel upon a purely legal right. He cannot be heard to say that the money coming into the hands of his principal, the guardian of plaintiff, is either more or less, although, if it were not for the peculiar force of the estoppel, it might or might not (we cannot say from the record) have been shown that the plaintiff's real demand was of greatly diminished proportions. No accounting is in fact permissible that the just and actual sum due plaintiff, if in reality there is any, may be ascertained. The plaintiff arrived of age September 8, 1906. This suit was instituted February 2, 1910, more than three years and four months later. In the fall of the year 1904 plaintiff had a conversation with his stepmother, in which he was told that, if he would bring a suit within a year after he was of age, he could probably recover an interest in his mother's property, referring particularly to the Carnegie Library site. There is no doubt about the conversation. His stepmother affirms it, and plaintiff himself admits it. He was then 19 years of age, and mentally capacitated to grasp the suggestion and realize what it meant to him. It was furthermore suggested at the time that a lawsuit of the kind would probably get his father into trouble, which latter suggestion impelled him to silence. Hence he made no further inquiries until his father wrote to him, at Salt Lake City, Utah, after his discharge from the navy, requesting him to sign a quitclaim deed for clearing up the title to some property which his father had conveyed years before. The letter bears date October 30, 1909. This led to his submitting the matter to attorneys for inquiry, and a search among the superior court records led to discovery of the receipt of Van Houten which forms the basis of the controversy.

Counsel for plaintiff contends that this was the first discovery of the fraud, and that suit was timely instituted after such discovery. We are firmly of the view, however, that plaintiff was chargeable with knowledge of this fact from the information given to him by his stepmother. The receipt related to the same matter spoken of by his stepmother, and was found in and constituted a part of the same record which was involved by her suggestion. The record was one which imports constructive notice, and, almost without question, if he had pursued inquiry from his stepmother's suggestion, with a view to possessing himself of his supposed interest in his mother's property, he

would have ascertained the true conditions, which were subsequently ascertained by the later search. He then delayed pursuit of the matter on account of consideration for his father; but he is now, at a much later date, insistent upon his alleged rights. In *Miller v. Ash*, supra, in an exhaustive and well-considered opinion, the court says:

"It is one of the settled general rules in this class of cases that if the party seeking to avoid the operation of the statute of limitations, or to excuse the delay which would, in the absence of a sufficient excuse, amount to such laches as would defeat his right of action, possessed information or knowledge of extraneous facts and circumstances, or, in other words, of matters in pais, which, although not directly tending to show the existence of a prior conflicting right, are sufficient to put him, as a prudent person, upon inquiry, he is then charged with constructive notice of all that he might have learned by an inquiry prosecuted with reasonable diligence. Pom. Eq. Juris. § 610. It is said by the same author that from the existence of such circumstances 'the legal presumption arises that he has obtained information of what he might thus have learned. In every such case the first question is whether the facts of which the party has information are sufficient to put him upon an inquiry, so as to raise the prima facie presumption. The further question is then presented whether he has made a due inquiry without discovering the truth, so as to overcome the presumption and defeat the notice, or whether he has so neglected this duty that the presumption remains unshaken and the notice effective.'"

Again, says the court, in *Nash v. Ingalls*, 101 Fed. 645, 648, 41 C. C. A. 545, 548:

"The law requires that, in order to relieve himself from the consequence of delay in seeking a remedy for a wrong, the party should have given reasonable attention to his own affairs, and he is chargeable with knowledge of such facts as such reasonable attention would have afforded him."

So, also, in *Foster v. Railroad Co.*, 146 U. S. 88, 99, 13 Sup. Ct. 28, 32 (36 L. Ed. 899):

"The defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold the plaintiff to a rigid compliance with the law which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts."

Reasonable attention to an affair peculiarly his own would have led plaintiff, at least soon after his arrival at age, to the possession of all the knowledge he acquired immediately prior to the bringing of the suit. But he delayed the institution of his suit until the statute of limitations had fully run against him and in favor of the surety. If it be said that the delay has placed the defendant Monaghan in no worse condition than if the suit had been promptly instituted when the plaintiff arrived of age, it may be answered as to this: We cannot say. It is a fact that four sureties signed Van Houten's bond, and but one is made a party here. All were made parties to the original complaint, but for some reason all have been dropped from the second amended complaint except Monaghan, for what reason we have not been advised. Whether the others have died or become insolvent, or why they are not here, is not explained. It is reasonable to suppose that, if alive and solvent, they also would have been retained as parties.

It might not have been necessary to the cause of suit to retain them, but it should at least have been shown that Monaghan's position is no worse now by reason of the delay than it was previously.

[12] It is suggested that it was Monaghan's duty to present the guardian's account to his administrator for settlement and allowance, and that in not doing so he participated in concealing the fraud complained of. He might have so presented the account, and it would not have been amiss for him to do it; but it is not expected that a surety on a guardian's bond will actively concern himself with the interest of the ward. That is a matter for the guardian, and Monaghan's failure so to interest himself can hardly entail the charge of participation in concealment of the fraud.

We are of the opinion that, had the suit been seasonably instituted after the plaintiff became of age, the bar of the statute of nonclaim would not have stood in the way of his recovery, and, of course, had the suit been brought but a few days earlier, the statute of limitations respecting sureties on guardians' bonds would not have run at all. We are impelled to the conviction, however, that the delay suffered by plaintiff after he was in possession of information challenging further inquiry on his part, and after he had arrived at legal age, under the facts and circumstances attending the controversy, amounts to laches on his part, and a court of chancery will not now interpose to remove the bar of either of such statutes of limitation, nor will it afford him the relief prayed.

The decree of the District Court will be affirmed, with costs to the appellees.

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SMITH et al. v. MOORE.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1912.)

No. 2,067.

1. EVIDENCE (§ 352\*)—CORPORATE BOOKS—ENTRIES AGAINST MAJORITY STOCKHOLDERS—PRESUMPTION.

Under Civ. Code Mont. 1895, § 540 (Rev. Codes, § 3902), providing that all corporations for profit shall keep a record of all business transactions, it will be presumed that all entries made in the books of the corporation against the president and controlling stockholder were rightfully made, such books being therefore admissible against him and his personal representatives in an accounting against him arising out of the fraudulent purchase of certain shares of the corporation's stock from the executor of a deceased owner.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1298-1403; Dec. Dig. § 352.\*]

2. CORPORATIONS (§ 155\*)—FUNDS—WITHDRAWAL—DIVIDENDS—DECLARATION.

Where the owner of a majority of the stock in a private corporation fraudulently purchased the stock of a deceased stockholder from his executor, and thereafter profits were divided and paid to such majority stockholder, he was accountable therefor as dividends on the stock so fraudulently purchased, though they were not formally declared as dividends by the directors of the company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 560-563, 568, 576-578, 593-603; Dec. Dig. § 155.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes 199 F.—44

### 3. CORPORATIONS (§ 1\*)—NATURE—LEGAL ENTITY—FRAUD.

A corporation will be regarded as a legal entity, separate and distinct from its stockholders, unless such consideration is offered to defeat public convenience, justify wrong, protect fraud, or defend crime, in which case the corporation will be regarded as an association of persons.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1, 3-6; Dec. Dig. § 1.\*]

### 4. EXECUTORS AND ADMINISTRATORS (§ 149\*)—SALE OF ASSETS—FRAUD—ACCOUNTING—EVIDENCE.

In a suit to set aside an executor's sale of corporate stock to the owner of the controlling interest in the corporation, the sale having been declared fraudulent, evidence *held* to warrant the finding that the profits of the corporation distributed to such stockholder between the date of the sale and the vacation thereof amounted to a sum at least equal to that received by the beneficiary under the purchase, and that she was, therefore, not required to return anything as a condition to receiving a return of the stock.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 602-606; Dec. Dig. § 149.\*]

Appeal from the Circuit Court of the United States for the District of Montana.

Suit by Nellie Mae Moore against John M. Smith and others. Decree for complainant, and defendants appeal. Affirmed.

This is the second time this case has been brought here. On the first occasion the present appellee was the appellant, and the present appellants the appellees. The opinion of this court on that appeal will be found reported in (C. C. A.) 182 Fed. 540, where the facts out of which the cause arose will be found fully stated, and which appeal resulted in the reversal of the then judgment of the trial court, with directions to it "to enter a decree for the complainant to the effect that upon the return to the representative of the estate of John M. Smith, deceased, of the money received by her for her interest in the stock from her guardian, with legal interest thereon, her proportion of the stock be returned to her, and providing for an appropriate accounting on her behalf, and for such proceedings as may be requisite and appropriate as will place her in such position as she would have been in if the sale of said stock had not been made, and with costs."

In brief, the main facts are: That for many years John M. Smith and William A. Smith, who were brothers, were the owners of a large amount of land in the state of Montana, upon which they carried on the sheep, cattle, and horse business. At first they managed the business as partners, but in 1890 they organized a corporation under the laws of Montana under the name of Smith Bros. Sheep Company, to which corporation they conveyed all of the property of the firm. Each of them was married, and to the wife of each was given 5,000 shares of the capital stock of the company, which amounted to 250,000 shares of the par value of \$1 a share. The remainder of the stock was divided equally between the brothers. The wife of William A. Smith deserted him in 1891, leaving three small children, the eldest a boy then seven years old, and two younger girls, the elder of whom is the present appellee. Napoleon B. Smith was the nephew of William A. and John M. Smith, and an attorney at law residing at White Sulphur Springs, Meagher county, Mont., in which county most of the property of the brothers was situated, and in which they both resided. William A. Smith died there on February 13, 1897, and on his deathbed made his will, which was drawn by Napoleon B. Smith, by which will he left all of his estate to his three children, and appointed his said nephew executor thereof. John M. Smith was himself then in poor health, as was his wife, in consequence of which they spent much of their time in Pasadena, Cal. Shortly after the business was incorporated, one McNaught, who was a brother-in-law of John M. Smith, became manager of the property

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

under the direction and supervision of the latter, and he was subsequently succeeded as such manager by one Flatt, who was also a family connection. At the time of his death William A. Smith was the owner of 122,950 shares of the stock of the Smith Bros. Sheep Company, John M. Smith then owning a majority of the stock; and upon the probate of the will of William A. Smith Napoleon B. Smith was appointed its executor, and as such subsequently sold all of the stock of William A. Smith, deceased, to John M. Smith, who had been appointed and then was guardian of the children, which sale this court on the former appeal adjudged fraudulent and void as against them. One hundred shares of the stock of the company had been divided between N. B. Smith and McNaught to qualify them as directors, and the 50 shares standing in the name of McNaught were transferred to Flatt in 1901, when he succeeded McNaught as manager of the ranch. Neither N. B. Smith nor Flatt claimed to own the stock so standing in their names, but held it in trust for John M. Smith.

On the going down of the mandate from this court pursuant to its decision on the former appeal, an interlocutory decree was entered by the court below in accordance therewith, referring the case to a master to ascertain and determine "what amount of money was received by the complainant from John M. Smith, deceased, for her undivided one-third interest in the stock of the Smith Bros. Sheep Company, referred to in the bill of complaint herein, to wit, 122,950 shares, claimed to have been purchased by the said John M. Smith from the defendant Napoleon B. Smith as executor of the last will and testament of William A. Smith, deceased, and likewise to ascertain and determine the amount of such payments with legal interest thereon to the date of his report, figuring interest on each payment made to or on behalf of the complainant by said John M. Smith, deceased, at the legal rate of interest from the time such payment was actually made," and likewise to ascertain and determine "what amount of money has been received by and paid to said John M. Smith or the said Mary M. Smith as executrix of the estate of John M. Smith, deceased, by said Smith Bros. Sheep Company, as dividends upon said stock of complainant, being an undivided one-third interest in said 122,950 shares of said stock of said Smith Bros. Sheep Company, since the 23d day of May, 1899, with interest thereon at the rate of 8 per cent. per annum to the date of the report of said master, interest to be figured on each sum so paid said John M. Smith or said Mary M. Smith as such executrix, as dividends upon the said stock of complainant from the date said dividend or dividends were received by them or either of them from said Smith Bros. Sheep Company down to the date of said report, and making annual rests in such computations"; and, further, to ascertain and determine "the difference between the amount so found to be due from the said John M. Smith and the said Mary M. Smith as executrix of the estate of John M. Smith, deceased, to the complainant, and the amount so found to be due to the said John M. Smith and the said Mary M. Smith as executrix of the estate of John M. Smith, deceased, from the complainant."

The interlocutory decree contained this further clause: "Upon the accounting hereby ordered, so much of the testimony heretofore taken as is pertinent to said accounting and the matters properly included therein shall be available to either of the parties, and shall be considered by the master as though taken for the purposes of said accounting, said testimony to be subject, however, to any and all objections as to its competency, relevancy, and materiality that either party may desire to make thereto or to any part or portion thereof, but either party may submit additional testimony in relation to the statement of said account as herein designated and defined."

In denying a motion made by the complainant in the cause for leave to amend the bill so as to bring within the scope of the accounting ordered moneys of the corporation claimed to have been appropriated and converted by John M. Smith prior to as well as after the date of the sale of the stock, and in making the interlocutory decree referred to, the court below in its opinion accompanying it said, among other things: "The sole and only object of the suit as exhibited by complainant's bill was the vacating and setting aside of the sale of complainant's proportional amount of the shares of stock of the defendant company, and a return of the same to the plaintiff, and an

accounting by the defendant John M. Smith of the 'profits, dividends, and increments thereof and which have accrued thereon.' There is no suggestion made or intimation given by the bill that prior to or since the sale of the stock in question John M. Smith received from the defendant corporation or appropriated to his own use any funds belonging to the corporation other than such as had accrued as dividends or profits upon the stock held by him. \* \* \* The scope of the accounting to be had is therefore limited by the bill itself to one between the complainant and the representative of the John M. Smith estate, and confined to the amounts received by the deceased in his lifetime, and since his death by the representative of his estate, as profits, dividends, or increments upon the shares of stock. \* \* \* As has been said, the purpose of the suit was the cancellation of the sale of the stock and an accounting of profits accrued thereon. \* \* \* The accounting will therefore be confined to such amounts as John M. Smith may have received during his lifetime as dividends upon the stock since the date of the sale of the stock to him, and as may have been received by the representative of his estate since his death to the present time. In using the term 'dividends,' it is not intended to restrict the accounting to such amounts as may have been received as formally declared dividends, but the term is intended to apply to all amounts received in consequence of any division of the profits of the corporate business, whether for the purpose of such division a formal dividend was declared by the proper officers of the corporation or not. A division of the profits without the formality of declaring a dividend is equivalent to declaring a dividend, and such division of the profits is a dividend even though not called such and not considered such by the directors and stockholders."

The result of the findings and report of the master showed the extinction of the obligation on the part of the appellee by her proportionate share of the moneys received and appropriated by John M. Smith, with a balance due her of \$25,825.94, which findings and report were approved by the court below and its final decree entered accordingly.

The appeal is from that decree.

R. Lee Word, of Helena, Mont. (L. O. Evans, of Butte, Mont., of counsel), for appellants.

William Scallon, of New York City, and Thomas J. Hoolan and Walsh & Nolan, all of Helena, Mont., for appellee.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

ROSS, Circuit Judge (after stating the facts as above). To the report of the master numerous exceptions were filed on behalf of the defendants to the cause. Among the findings of the master excepted to by the defendants and approved by the court is the following:

"Total amount of money received by and paid to John M. Smith by Smith Bros. Sheep Company as informal dividends since the 23d day of May, 1899, with interest thereon at 8 per cent. per annum, with annual rests, to the 23d day of May, 1911 (See Complainant's Exhibit A—24) \$401,008.45"

—from which appears deducted as improperly charged to John M. Smith certain items aggregating \$68,380.87. The case shows that the books of the Sheep Company contain the only record of John M. Smith's transactions with it. They were kept by McNaught during the time he acted as manager of the company under John M. Smith's directions, and thereafter by one Flatt, and contained a ledger account with John M. Smith. The account opens in Jan-



uary, 1897, and shows at the end of that year a balance due from Smith to the company of \$8,324.38. This balance is carried into the account as a debit at the beginning of 1898, and the balance for that year, \$14,682.70, is carried over to the next year, the account for which is opened with it. In the early part of 1899 John M. Smith made the purchase from the executor of the estate of the deceased, William A. Smith, which was held fraudulent and void by this court on the former appeal. And in the account of John M. Smith with the company no balance is struck at the end of the year 1899, nor is any balance carried over into the account for 1900. The account for the latter year appears balanced by this entry on the credit side: "P. & L. \$17,507.02." That P. & L.—evidently profit and loss—item is not carried over to the next year, but a new account opened as at the beginning of 1900. At the end of 1901 is an entry on the credit side "By dividends \$7,500," and the balance—\$1,098.85—is carried over to the beginning of the account for 1902, which account does not appear to have been balanced, and nothing is carried from it to the account for 1903. At the close of the account for 1903 is a credit entry of "D. I. to balance \$19,232.45." The accounts for 1904, 1905, and 1906 consist of various debit items, and that of 1907 of various debit items and one "Credit by dividends, 900.50" at the bottom of which account are the words: "The above all settled by John and May (or Mary)—[in red ink]." According to the testimony of the complainant's expert witness, J. C. Ricker, the aggregate of the withdrawals shown by the account over the credits shown by it down to 1907 was \$211,302.38, which amount was somewhat reduced by further credits to which John M. Smith was entitled, as shown on the trial. In 1907 this suit was begun, and thereafter dividends were declared by the board of directors of the company as will afterwards appear.

The main contentions on the part of the appellants are that the debtor balances shown by the John M. Smith accounts cannot be properly considered as dividends or profits received by him, that there was no proof that the Smith Bros. Sheep Company had any profits on hand out of which dividends could be declared or profits divided, and that dividends can only be paid by a corporation after being regularly declared by its board of directors, and that prior to the year 1907 it is not pretended that any dividends were so declared, from all of which it is urged on their behalf that for such debts he, and subsequently his estate, became liable to the Sheep Company, and that whatever of such moneys belong to the appellee as the owner of stock in that corporation can only be first collected through the corporation, and thereafter from the representative of the estate of the deceased John M. Smith.

It appears that John M. Smith subsequent to the death of his brother owned a majority of the stock of the Sheep Company, and that, after he acquired from the executor of his brother's estate all of the stock of the latter, he and his wife together held nearly all of the stock, the few remaining shares being held by relatives,

those held by the other directors being held in trust for him. So that John M. Smith was not only the holder of a large majority of the stock, but was in absolute control of the board of directors and of all of the affairs of the corporation. The suggestion on the part of the appellants that there were no profits out of which dividends could have been paid is negatived by the record. Evidence introduced by them is to the effect that from the time Flatt succeeded McNaught in 1901 the only minutes of the meetings of the directors of the Smith Bros. Sheep Company until after the commencement of this suit in 1907 were kept on sheets of paper, which were offered in evidence by the appellants. They are the following exhibits:

"Defendants' Exhibit A—1.

"At a meeting of stockholders of Smith Bros. Sheep Company held at their office on ranch Sept. 14th, 1903,

"The following stockholders were present:

"J. M. Smith representing 193,900 shares.

"Mary M. Smith " 56,000 "

"W. W. Flatt representing 50 shares.

"N. B. Smith " 50 shares.

"Moved and seconded that J. M. Smith act as chairman of meeting, motion carried.

"Moved and seconded N. B. Smith act as secretary of the meeting. Motion carried.

"By unanimous vote of all the stockholders J. M. Smith, Mary M. Smith, and N. B. Smith were elected trustees for the ensuing year.

"The following resolution was unanimously adopted:

"Resolved that J. M. Smith, president of Smith Bros. Sheep Company be and is hereby authorized to sell, deed and transfer in the name of said company all lands which said company owns in the county of Park, state of Montana.

"The following resolution was unanimously adopted:

"Resolved that J. M. Smith, president of Smith Bros. Sheep (Company), be and is hereby authorized to sell, deed and transfer all lands which said company owns in Sec. 13, Tp. 8 N., R. 9 East.

"No further business appearing on motion meeting adjourned.

"N. B. Smith, Secretary."

"Defendants' Exhibit A—2.

"At regular meeting of the trustees of Smith Bros. Sheep Company, held at their ranch on the 10th day of September, 1904, present at said meeting J. M. Smith and Mary M. Smith, and N. B. Smith trustees.

"The following officers were duly elected for the ensuing year as officers of said company:

"J. M. Smith, president.

"N. B. Smith, vice president and treasurer.

"W. W. Flatt, secretary.

"On motion W. W. Flatt's salary was fixed at \$200.00 per month.

"N. B. Smith, Secretary."

"At a regular meeting of the stockholders of Smith Bros. Sheep Company held at ranch of said company on the 10th day of September, A. D. 1904, present at said meeting the following stockholders: J. M. Smith, Mary M. Smith, N. B. Smith, W. W. Flatt, being all the stockholders of said company. J. M. Smith was elected temporary chairman and N. B. Smith secretary.

"J. M. Smith, Mary M. Smith, and N. B. Smith were unanimously elected trustees for the ensuing year.

"On motion the meeting was adjourned.

N. B. Smith, Secretary."

"Defendants' Exhibit A—3.

"At a special meeting of trustees of Smith Bros. Sheep Company held at their ranch in Meagher County, State of Montana, Aug. 21, 1905.

"Present, J. M. Smith, Mary M. Smith and N. B. Smith, trustees.

"On motion W. W. Flatt's salary for year commencing Sept. 1905 was fixed at \$200.00 per month. N. B. Smith, Secretary."

"Defendants' Exhibit A—4.

"Meeting of trustees of Smith Bros. Sheep Company, held at office of said company near Martinsdale, Montana, Aug. 23, 1906. Present at meeting: John M. Smith, Mary M. Smith, and N. B. Smith, trustees.

"On motion John M. Smith was elected chairman and N. B. Smith secretary.

"On motion of N. B. Smith, John M. Smith was elected president. On motion of Mary M. Smith, N. B. Smith was elected vice-president of said company. On motion of N. B. Smith, W. W. Flatt was elected secretary and manager of said company.

"No further business appearing the meeting was, on motion, adjourned. N. B. Smith, Secretary."

"Annual meeting of the stockholders of Smith Bros. Sheep Company, held at the office of said company on ranch near Martinsdale, Mont., Aug. 23d, 1906.

"Present at meeting: John M. Smith, representing 198,950 shares, Mary M. Smith, representing 50,950 shares, N. B. Smith, representing 50 shares, W. W. Flatt, representing 50 shares of stock of company. On motion John M. Smith was elected chairman and N. B. Smith secretary of the meeting. The following-named parties were elected trustees by unanimous vote of all stock of company, to wit: John M. Smith, Mary M. Smith, and N. B. Smith for ensuing year.

"On motion John M. Smith as president was duly authorized to execute a deed to Mary M. Smith for lots 3 and 4 in block 'O' 17 of the original townsite of Lewistown according to official plat of said townsite on file in office of clerk and recorder of Fergus county, for consideration of ten thousand dollars.

"No further business appearing the meeting adjourned.

"N. B. Smith, Secretary."

As has been stated, this suit was commenced in 1907, and the record shows these further minutes:

"Defendants' Exhibit A—5.

"Smiths Ranch, August 17th, 1907.

"Meeting of trustees of Smith Bros. Sheep Company held at ranch of said company on the 17th day of August, 1907. Present at meeting: John M. Smith, Mary M. Smith and N. B. Smith, trustees of said company. John M. Smith, president, presided at said meeting. Minutes of the previous meeting read and approved. N. B. Smith moved that company declare a dividend for year 1907, of ten per cent. on the capital stock of company. The motion was seconded by Mary M. Smith and was carried by unanimous vote of all trustees. No further business appearing the meeting adjourned.

"W. W. Flatt, Secretary."

"Martinsdale, Mont., Sept. 14th, 1907.

"Meeting of trustees of Smith Bros. Sheep Company held at office of the company on its ranch in Meagher county, Montana, on the 14th day of September, 1907. Present at said meeting, Mary M. Smith and N. B. Smith trustees of said company. At said meeting the following officers of said company were elected for the ensuing year: J. M. Smith, president, N. B. Smith, vice president, W. W. Flatt, secretary. It was moved and carried that the company borrow from John M. Smith for the period of one year the sum of ten thousand four hundred ninety-nine &  $\frac{50}{100}$  dollars with interest at the rate of five per cent. per annum. On motion, the officers, president and secretary, were authorized to go ahead and complete the purchase of state lands heretofore selected by president and secretary and contracted for by

said officers. On motion dividend of twenty per cent. was declared on capital stock of the company, ten per cent. payable at *once* and remaining ten per cent. payable November 15th, 1907. No further business appearing the meeting adjourned.

W. W. Flatt, Secretary."

"Defendants' Exhibit A—6.

"Martinsdale, Mont., Sept. 14, 1907.

"Annual meeting of the stockholders of Smith Bros. Sheep Company held at the office of said company in Meagher county, Montana, on the 14th day of September, 1907. The whole of the capital stock of said company was represented by stockholders present and by proxy as follows: Mary M. Smith, 51,000 shares, John M. Smith, by Mary M. Smith, 164,000 shares, W. W. Flatt, 25,000 shares, Lizzie Flatt, 5,000 shares, and N. B. Smith, 5,000 shares. Mary M. Smith was elected president and N. B. Smith secretary of said meeting. John M. Smith, Mary M. Smith, and N. B. Smith were, by unanimous vote of all the stock of said company, elected trustees of the company for the ensuing year. On motion, unanimously carried, all the acts and transactions of the trustees and officers of the company for the past year were approved. On motion unanimously carried, the trustees were authorized to declare a twenty per cent. dividend for year 1907, payable in two payments of ten per cent. each at such times as the trustees may designate. No further business appearing the meeting adjourned.

N. B. Smith, Secretary."

"Defendants' Exhibit A—7.

"Martinsdale, Mont., Sept. 15, 1908.

"Annual meeting of stockholders of Smith Bros. Sheep Company held at the office of said company, on ranch of said company, in Meagher county, state of Montana, on the 15th day of September, 1908. The whole of the capital stock of said company was present and represented by stockholders present and by proxy as follows: John M. Smith, 164,000 shares, Mary M. Smith, by John M. Smith, proxy, 51,000 shares, W. W. Flatt, 25,000 shares, Lizzie Flatt, 5,000 shares, N. B. Smith, 5,000 shares. John M. Smith was elected president and N. B. Smith secretary of said meeting. John M. Smith, Mary M. Smith and N. B. Smith were, by unanimous vote of all the stock of said company, elected trustees of said company for the ensuing year. On motion unanimously carried, all the acts and transactions of the trustees and officer of said company for past year was approved. On motion unanimously carried the trustees were authorized to declare a five per cent. dividend payable at such time as trustees may designate. No further business appearing the meeting adjourned.

N. B. Smith, Secretary."

"Defendants' Exhibit A—8.

"Martinsdale, Mont., Sept. 15, 1908.

"Meeting of trustees of Smith Bros. Sheep Company held at the office of said company, on ranch of said company in Meagher County, Montana, on the 15th day of September, 1908. Trustees present at meeting: John M. Smith and N. B. Smith. At said meeting the following officers were elected for ensuing year: John M. Smith, president, N. B. Smith, vice president, and W. W. Flatt, secretary. On motion made and carried a dividend of five per cent. was declared on capital stock of said company, dividend payable at this date. On motion the president or in his absence the vice president of the company was authorized to deed to Andrew Berg all of Sec. 13, Tp. 8 N., R. 9 East in Meagher county, Montana, except the N. E.  $\frac{1}{4}$ , provided the said Andrew Berg will deed to the company the S. E.  $\frac{1}{4}$  of Sec. 18, Tp. 8 N., R. 10 East in said Meagher county besides paying to said company the sum of four hundred and eighty dollars. No further business appearing the meeting adjourned.

Secretary, W. W. Flatt."

The capital stock of the Sheep Company consisting of 250,000 shares of the par value of \$1, it will be seen that the dividend thus declared August 17, 1907 was \$25,000, that declared September 14,

1907, \$50,000, and that declared September 15, 1908, \$12,500, and there is evidence going to show that the business of the company was profitable at all times after the death of William A. Smith. Such books of account of its business as were kept were kept under the supervision and control of John M. Smith.

[1] The statute of the state required that all corporations for profit should keep a record of all their business transactions. Montana Civil Code, § 540 (Rev. Codes, § 3902). McNaught was his brother-in-law, and Flatt was also a family connection. John M. Smith was not only a director of the company, but its president, general manager, and in control of all of its operations, financial and otherwise. Under such circumstances, the books were admissible in evidence, and no presumption can be indulged that any entry made in them against him was erroneous. On the contrary, the presumption is that all such entries were rightly made. His position was that of trustee, and it was incumbent upon him to see that proper books of account were kept. *Bacon v. United States*, 97 Fed. 35, 38 C. C. A. 37; *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 74, 53 Pac. 410; 2 *Encyc. of Evidence*, 678; *Cook on Stock* (4th Ed.) 727, note.

[2] He cannot escape accountability upon the contention that prior to 1907 there was no formal declaration of dividends, nor, under the circumstances appearing, can any of the appellants be heard to say that the moneys shown by the books to have been withdrawn by John M. Smith during the period in question were ever intended by him or expected by them to be repaid to the corporation. In the first place, while it is true that in general a corporation is a distinct entity from its stockholders, nevertheless, where an individual owns practically all of its stock and controls all of the operations of the corporation, they are, in proper cases, regarded by the courts as one and the same. We had a case of that sort before us at the last term—*Linn & Lane Timber Co. et al. v. United States* (C. C. A.) 196 Fed. 593—where will be found a reference to a number of cases to that effect. So may a court of equity, which always looks through the form to the substance of things, avoid the necessity of driving a wronged party to a circuitry of actions, and treat as dividends all amounts received in consequence of a division of the profits of the corporate business, as the court below directed the master to do, and as he did do, as shown by his report confirmed by the trial court.

In the case of *Groh's Sons v. Groh*, 80 App. Div. 85, 80 N. Y. Supp. 438, the corporation in question grew out of a partnership. Until April 16, 1897, the stock of the corporation was owned by John Groh and his mother, Julia Groh. On that day one Flammer bought the stock of the mother. In passing upon the questions which arose in the case the court said:

"When Flammer assumed control of the corporation on April 17, 1897, John Groh directed Schwarzer to draw two checks—one for \$5,241.65 and the other for \$1,521.47. The bookkeeper testifies that, after the checks were drawn, John Groh went to the desk of Mr. Flammer, in the same office, and said: 'Here is two checks I wish you to sign. They are moneys due me from

the old firm. Mr. Flammer said, "Well, if you say they are all right, I will sign them." They were thereupon signed and handed to Groh. Of the proceeds of these checks John Groh paid one-half to his mother. The fact that he had these two checks and their proceeds is undisputed. John Groh's estate, therefore, is liable to pay the same, unless it is made to appear that he and his mother were entitled to receive this sum of money as due to them from the corporation. It is claimed by the defendant that such is the fact; that these persons were entitled to have and receive such sums as profits or earnings upon their stock in the corporation between December 30, 1896, and April 17, 1897, during which time they were the owners and holders of all the stock, and would be entitled to a dividend therefrom, if in fact it had been earned and declared. The corporation at this time was a family affair. It had changed none of its business methods from what had existed when it was a partnership. John Groh and his mother owned all the stock and bonds. They were a majority of the board of directors. The third member was an employé, and followed Groh's instructions. All the offices of the corporation were held by John Groh and his mother, and the former conducted the business of the corporation without going through the form of holding directors' meetings, or evidencing any act of the corporation by written minutes. In so far as John Groh dealt with third parties in connection with the business carried on by the corporation, he could create a legal liability against it, and a third party would not be driven to the necessity of showing a resolution authorizing such dealing, or other minute vesting him with authority to act. Under such circumstances, the business of the corporation may be lawfully carried on without formal votes, and, if the obligation incurred is within the general scope of the business of the corporation, the transaction will be upheld, and the third party need not prove formal action, to establish the liability of the corporation. *Sheridan Electric L. Co. v. Chatham Nat. Bank*, 52 Hun, 575, 5 N. Y. Supp. 529; affirmed on appeal, 127 N. Y. 517, 28 N. E. 467; *Hall v. Herter*, 83 Hun, 19, 31 N. Y. Supp. 692; s. c. on another appeal, 90 Hun, 280, 35 N. Y. Supp. 769; affirmed on appeal on opinion below, 157 N. Y. 694, 51 N. E. 1091. As between the owners and holders of all the stock of the corporation, it must, in principle, follow that the members of such corporation, entitled to receive dividends, may agree among themselves, either by conversation or otherwise, to appropriate of the funds of the corporation a specified sum, as agreed upon, and distribute the same; and the stockholder, upon the receipt of it, will acquire good title thereto as against the other members of the corporation. It amounts to a mere division of the property by agreement of all the parties in interest, and, as between them, it is perfectly good, and may not be attacked, where the act does not impair the rights of third parties. \* \* \* Equitably, Mrs. Groh and her son were entitled to the profits which the stock of the corporation had earned during the time they were the exclusive owners thereof. The defendant Flammer by his purchase did not acquire the right to such profits, unless it was understood that no dividend was to be paid therefrom. The profits having been earned, and Mrs. Groh and her son being equitably entitled thereto, they had the right to agree upon the withdrawal of a sum which should not exceed their interest prior to the time when Flammer's interest attached. That they did so agree is meagerly established by the testimony, but enough, we think, appeared to authorize the jury so to find. Mrs. Groh understood that she was to have and receive the sum of money on account of this matter. What its exact amount was she did not know. Nobody could have known from the manner and method in which the business was conducted. That John Groh so understood it is also made clear. His mouth is closed, but the fact that he made the claim that this sum was due him, and that he asserted such claim when the checks were drawn and signed, had previous to that time negotiations with his mother, and subsequently gave to her one-half of such proceeds, is sufficient evidence from which the jury could find that the agreement to distribute this sum of money was made between them, and that such sum represented the earnings of their stock for the period of time they were exclusively entitled to have and receive the same. We think, therefore, that the jury were authorized to find that the plaintiff was not entitled to recover upon any of its causes of action."

The judgment in that case was reversed by the Court of Appeals upon the ground that certain evidence was improperly admitted, but the legal principles upon which the case was decided were impliedly approved, since the case was remanded for a new trial for the reason stated. *Groh's Sons v. Groh*, 177 N. Y. 8, 68 N. E. 992.

In *Thompson on Corporations* (2d Ed.) § 1074, it is said:

"The rule that the board of directors must act as a body or a unit is not iron-clad. It has already been seen that a by-law may be created by custom or usage. For similar reasons a board of directors may, by acting separately and in an individual capacity, establish a custom or usage that will be binding upon them and upon the corporation. Thus, where it appeared that from a long practice or a customary usage corporate business was transacted by securing the separate consent of the directors, or that the business was customarily transacted at either a casual or an informal meeting of the board, it was held as a matter of law to constitute a sufficient approval, in the absence of any law or by-law restricting the directors to a different mode. *Am., etc., Bank v. First Nat. Bank*, 82 Fed. 961, 27 C. C. A. 274; *Powers v. Blue, etc., Ass'n* (C. C.) 86 Fed. 705; *Longmont Supply, etc., Co. v. Coffman*, 11 Colo. 551, 19 Pac. 508; *Stanley v. Luse*, 36 Or. 25, 58 Pac. 75; *Tenney v. East Warren, etc., Co.*, 43 N. H. 343. In a Vermont case it was held that the directors might bind their corporation by acting separately, if this was their usual practice in transacting corporate business. *Bank, etc., v. Rutland, etc., R. Co.*, 30 Vt. 159. So it was held that stockholders might agree among themselves to distribute a certain sum as a dividend without taking formal action. *Groh's Sons v. Groh*, 80 App. Div. 85, 80 N. Y. Supp. 438. And, in the absence of creditors, it was held that the consent of directors and stockholders to a conveyance by the president of the corporate property was sufficient authority without any action by the directors as a board. *Arkansas Pass Harbor Co. v. Manning*, 94 Tex. 558, 63 S. W. 627. So it was held in Indiana that the directors acting separately could authorize the president to execute mortgages and other corporate instruments. *Bank v. Sandford Fork, etc., Co.*, 157 Ind. 10, 60 N. E. 699. Another exception to this general rule requiring directors to act as a body is shown in a case where the directors themselves owned all the stock of the corporation, and authorized the president to sell all the assets, and it was held that it was immaterial that such authority was not given at a regular meeting of the directors. *Jordan v. Collins*, 107 Ala. 572, 18 South. 137. See *Teitig v. Boesman, etc., Co.*, 12 Mont. 404, 31 Pac. 371. Acquiescence by the stockholders in the action taken by directors separately, and where such action was carried out by the corporation, was held sufficient to render the acts valid. *Limer v. Traders Co.*, 44 W. Va. 175, 28 S. E. 730; *Morisette v. Howard*, 62 Kan. 463, 63 Pac. 756; *Anderson v. Wallace Lumber, etc., Co.*, 30 Wash. 147, 70 Pac. 247. So the separate assent of a majority of the directors to the employment of a physician to attend an injured employé of the corporation, where a majority of them, including the officers, actively participated in the employment, and counselled with him concerning the care and treatment of the patient, was held sufficient to make such employment binding on the corporation. *Scott v. Superior Sunset Oil Co.*, 144 Cal. 140, 77 Pac. 817."

In *United States v. Milwaukee Refrigerator Transit Co.* (C. C.) 142 Fed. 247, 255, the court said:

[3] "A corporation from one point of view may be considered an entity, without regard to its shareholders, yet the fact remains self-evident that it is not in reality a person or thing distinct from its constituent parts. The word 'corporation' is but a collective name for the members who compose the association. *Home Fire Ins. Co. v. Barber*, 67 Neb. 644, 93 N. W. 1024, 60 L. R. A. 927, 108 Am. St. Rep. 716; *City of Nashville v. Ward*, 16 Lea (Tenn.) 27; *People v. North River, etc., Co.* (Cir. Ct.) 3 N. Y. Supp. 401, 2 L. R. A. 33; *Ford v. Chicago Milk Shippers' Ass'n*, 155 Ill. 166, 39 N. E. 651, 27 L. R. A. 298; *First Nat. Bk. v. Trebein Co.*, 59 Ohio St. 316, 52 N. E. 834; *Buffalo*

Loan, etc., Co. v. Medina Gas, etc., Co., 12 App. Div. 199, 42 N. Y. Supp. 781. If any general rule can be laid down in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons. This much may be expressed without approving the theory that the legal entity is a fiction, or a mere legal creation; or that the idea of invisibility or intangibility is a sophism. A corporation, as expressive of legal rights and powers, is no more fictitious or intangible than a man's right to his own home or his own liberty."

In sustaining certain acts of a corporation, although there was no formal meeting of its board of directors, in the case of Harbor Co. v. Manning, 94 Tex. 558, 63 S. W. 627, the court said:

"It was well held that, where the directors own all the shares, they may agree among themselves—not in their character of directors, but rather in their character of stockholders—to authorize the president to sell all the property of the corporation, and that this authorization will be none the less valid because not given at a regular directors' meeting. Other decisions tend to the conclusion that whilst, in theory of law, the corporation and its shareholders are distinct persons, and the latter have no agency for the former, yet equity, which looks to the substance of things, may, in an appropriate case, and for the purposes of justice, treat a debtor corporation and an individual owner of all its shares as identical."

[4] In the case at bar all of the facts and circumstances go to show that all of the appellants treated as profits of the business the withdrawals shown upon the books of the company to have been made by John M. Smith. By none of them, nor by the corporation itself, so far as appears, was it claimed that the annual debits shown against him were debts due the company. McNaught, though available, was not produced as a witness by those called on to make the accounting. Flatt testified that the first entries he made in the books were made January 8, 1901. He was questioned and answered in respect to the entry of "December, By dividends, \$7500," and the "D. I. to balance, \$19,232.45" entry hereinbefore referred to, as follows:

"Q. I notice, Mr. Flatt, that on page 257 of the printed record an account entitled, 'Account of John M. Smith for 1900 to 1901,' that in December, on the credit side, there is an entry, 'December, By dividends, \$7500?' A. Yes, sir.

"Q. Have you any explanation to offer as to that entry, Mr. Flatt, as to how it came there? A. Yes, sir; I have. It might take quite a little time to explain just exactly what that dividend meant.

"Q. I will ask you first what it was. Was it a dividend? A. No, sir; it was not.

"Q. Why was it not a dividend? A. Well, because there was never a dividend declared at that time when that entry was made. We expected to declare a dividend, but before that dividend was ever declared the business had changed altogether, and we never declared any. At that time I held an option on 100,000 shares of stock from John M. Smith, and we was to declare a 3 per cent. dividend each and every year, but before that time, with the outlook of the company and the proceeds that we had, I saw that I couldn't meet my payments in any way at all, and I had to let the option go back.

"Q. So that it simply represents a book entry? A. That is all, that is all there is to it.

"Q. Now, I notice in the printed record on page 261 an entry of December



1st: 'D. I. to balance, \$19,232.45.' How, as a matter of fact, does that read? A. That is debtor to balance.

"Q. It should not be misunderstood to be dividends?' A. Oh, no; nothing of that kind. That is debtor to balance."

Flatt was further questioned and answered as follows:

"Q. I will ask you, Mr. Flatt, when you became a stockholder in the company? A. In 1907.

"Q. About what time? A. Well, now, I don't know as I could just give the date, but it was possibly July or August. I think it was some time in there.

"Q. Now, did you hold any stock of the company prior to that time? A. I did, yes, sir.

"Q. How many shares? A. Fifty shares.

"Q. From whom, if any one, did you get that number of shares? A. From J. A. McNaught.

"Q. Who owned that 50 shares, if you know, who had held the title to it? A. Why, I suppose that J. A. McNaught did. Now, I never knew anything to the contrary.

"Q. Well, did you buy it from McNaught? A. No; I didn't. That is, at that time I never paid him any money for it.

"Q. Now, you were asked if you had ever filed any claims against the estate of John M. Smith. You said you had not? A. Yes, sir.

"Q. You said as far as you felt—how did you express it? A. I said that we had no claim against it.

"Q. When you said 'we,' whom did you mean? A. Meaning the company.

"Q. Why do you say that? A. Well, up prior to the time of 1907 John M. Smith was practically the owner of the company. He owned the largest amount of stock. Outside of his wife he really owned all of it, and each and every fall before he went away we had a meeting and went over the books and accounts and everything was settled up, and everything we didn't keep, and we always felt that we settled up each year as we went along, and that was satisfactory to everybody; but from 1907 on, when I became a stockholder and some others became stockholders, he had to balance his account every fall before he went away.

"Q. In other words, you felt, as I understand it, that you, after you bought your stock, had no claim as against John M. Smith for anything he owed the company prior to that time? A. Oh, sure, anything that John M. Smith got, any checks that he drew on the company or any checks drawn on him by the company for his own private use after 1907, he settled for every fall.

"Q. But, as to his account prior to that, you felt that whatever he owed the company, you had no claim on that? A. We had no claim on that whatever."

The explanation thus given by Flatt of the entries "By dividends, \$7500," and "D. I. to balance, \$19,232.45," cannot be accepted in the face of the fact that neither of those entries were carried forward into the debit account for the next or any succeeding year, any more than was the "P. & L. (manifestly meaning profit and loss) \$17,507.02" entry, concluding the account for the year 1900. Flatt testified that in 1906 or 1907 he bought 25,000 shares of the stock from John M. Smith, and paid him a dollar a share for it. About the same time Napoleon B. Smith acquired 5,000 shares from John M. Smith by gift and 5,000 shares more by purchase from the latter's wife—the price not appearing. It is most significant that neither Flatt nor N. B. Smith then claimed that John M. Smith was then indebted to the company in more than \$200,000 or in any other amount; nor did they so claim when shortly after that purchase a dividend of \$25,000 out of the profits of the business was declared. The payment of any such indebt-

edness into the treasury of the company would naturally have greatly increased such dividends. Moreover, it appears that in the latter part of 1907 the Sheep Company executed to John M. Smith its promissory note for \$10,499.50. We quote from the record the following in respect to that matter:

"Q. Well, Mr. Flatt, can you give us any information as to how that amount was arrived at, \$10,499.50? A. I believe that that was just the size of a dividend check that was declared. Now, this is only an assumption.

"Q. There is a memorandum to that effect under date of September 16, 1907. Read that, please. A. 'Income by money borrowed from John M. Smith, turned over from his dividends, gave him company's note for same at five per cent. interest, payable annually.' And then I took that check that I got from him—that was a check—and I took that check and deposited it in the bank.

"Q. Now, the deposit is shown in the check-book under date of September 16th, is it? A. Yes, sir.

"Q. Well, Mr. Flatt, when you paid the interest on that a year after, you paid something over \$1,200 apparently? A. I think that that was renewed by a new note, if the transaction—if I remember it right. We took up that old note of ten thousand four hundred and something and give a new note for an even ten thousand, and paid him the difference, with the interest. Now, that is just my recollection of the transaction."

It is impossible to reconcile such a transaction with the claim now made that John M. Smith was then indebted to the sheep company in a very large sum of money, in the absence of some satisfactory explanation, which is not given.

In addition to the foregoing considerations, it appears that no claim was ever presented by or on behalf of the Sheep Company against the estate of John M. Smith, and thus the right to enforce payment out of his estate, if such an obligation existed at his death, has been lost by the negligence of the appellants Mary M. Smith and N. B. Smith, and of Flatt, the directors of the company. Flatt was questioned and answered in respect to that matter, as follows:

"Q. Now, Mr. Flatt, you have continued in office as secretary (of the company), of course? A. Yes, sir.

"Q. And I wish you would tell the court, if you please, whether you have ever filed any claim on behalf of the Smith Bros. Sheep Company against the estate of John M. Smith? A. No; I never did, or I never had anything to file on.

"Q. That is to say, you had no claim? A. No, sir.

"Q. That is to say, at the time of the death of John M. Smith, you did not calculate that he was owing Smith Brothers Sheep Company anything? A. Not the way we calculated the business he wasn't.

"Q. Anyway, you didn't file any or present any statement or claim? A. No, sir."

We are of the opinion that there is no merit in the appeal, and the judgment is accordingly affirmed.

## BANK OF BRODHEAD v. SMITH.

(Circuit Court of Appeals, Seventh Circuit. April 23, 1912.)

No. 1,820.

## BANKRUPTCY (§ 140\*)—DEPOSITS—SPECIAL PURPOSE—OWNERSHIP.

While B. was insolvent, and a month before his adjudication, defendant bank and the S. Company agreed with him to advance money to compromise with his creditors at 50 per cent. During the effort to compromise it was agreed that B. should retain custody of his goods, should sell the same at retail, retaining \$12 a week for his services, hold the balance of the proceeds in lieu of the goods, together with the goods unsold, for the benefit of all parties and creditors, and deposit the cash balances in the bank for safe-keeping for the purposes aforesaid. *Held*, that the depositing of the funds was sufficient consideration for the bank's agreement to hold them for the purposes stated, and that the trustee in bankruptcy was entitled both to the deposit and to the unsold goods.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 221, 225; Dec. Dig. § 140.\*]

Appeal from the District Court of the United States for the Western District of Wisconsin.

Action by Frank L. Smith, as trustee in bankruptcy of George B. Bement, against the Bank of Brodhead. Judgment for plaintiff, and defendant appeals. Affirmed.

E. D. McGowan, for appellant.

Edwin F. Carpenter, for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge. Nothing is involved in this appeal but a question of fact.

Bement was adjudged a bankrupt, and the bank thereupon applied certain deposits upon a past-due note executed by Bement to the bank.

A month before the adjudication Bement was insolvent; and the bank and Smith & Sons Company of Chicago, also a creditor, entered into an executory contract in writing to advance money to compromise with all of Bement's creditors at 50 cents. This contract was not performed.

So much is beyond dispute. We have examined the evidence, and it sustains the following finding: After the bank and Smith & Sons Company had made their above-mentioned contract, the question arose between Bement and the bank and Smith & Sons Company as to what should be done, pending the attempt to compromise, with Bement's stock of goods. It was agreed that Bement should remain in possession and sell at retail, retain \$12 a week for his services, hold the balance of the proceeds in lieu of the goods so sold, together with goods unsold, for the benefit of all parties and creditors, and deposit the cash balances with the bank for safe-keeping for the purposes aforesaid. Deposits were accordingly made. Efforts at settlement failed. Adjudication of bankruptcy followed. The trustee's demand

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for the deposits was refused, on the ground that the bank had properly applied them upon its own claim.

Contentions that the executory written contract signed by Smith & Sons Company and the bank was void, because Smith & Sons Company was a foreign corporation that had not complied with the Wisconsin statutes, because the bank had no power to make such a contract, and because there was no consideration, are all beside the mark, for the reason that the only question relates to the conditions under which the deposits were made. The depositing of the funds was a sufficient consideration for the bank's agreement to hold them for the purposes stated; and the trustee in bankruptcy, representing Bement and all his creditors, was the proper party to take the unsold goods, and also the funds that stood for the goods that had been sold.

The judgment is affirmed.

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CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK v. CHICAGO  
TITLE & TRUST CO.

(Circuit Court of Appeals, Seventh Circuit. June 24, 1912.)

No 1,894.

1. BANKRUPTCY (§ 166\*)—PREFERENCES—INTENTION.

Evidence held to sustain a master's finding that, by certain transactions, through which defendant bank received and applied certain assets of the bankrupt to his indebtedness, it intended to obtain a preference over other creditors, and that the bankrupt intended to give a preference, with mutual knowledge of his insolvency.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-258; Dec. Dig. § 166.\*]

2. BANKS AND BANKING (§ 153\*)—DEPOSITS—RELATION OF PARTIES.

While ordinarily the relation between a bank and a depositor is that of debtor and creditor, yet deposits may be made and accepted for a special purpose, and when so accepted they are not within the general rule, but the bank becomes a bailee of the depositor.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 483-501; Dec. Dig. § 153.\*]

3. BANKS AND BANKING (§ 134\*)—SPECIAL DEPOSITS.

A bankrupt being indebted to his bank, in which he had a deposit account, the bank called his loans, and, after applying the deposit account to the indebtedness, agreed that, if the bankrupt would make certain deposits to cover, it would pay certain salary and pay roll checks and other checks issued to a board of trade clearing house. Deposits aggregating \$3,079 were made, and after paying checks aggregating \$2,506.46 there remained a balance of \$575.79, which the bank also charged off as a payment on its claim. Held, that such balance was a balance of a special and not a general deposit, and that the bank was not entitled to apply the same to the bankrupt's pre-existing indebtedness, or to an allowance thereof against the trustee by way of set-off.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 353-374; Dec. Dig. § 134.\*]

4. BANKRUPTCY (§ 326\*)—PREFERENCES—MARGIN CERTIFICATES.

Defendant bank, a board of trade depository, issued margin certificates to customers to be used as margins in board of trade transactions,

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and, having certificates aggregating \$4,250, issued to a bankrupt at the time of his failure, arranged with the A. Company to take over the bankrupt's outstanding trades, which resulted in the return to defendant of the certificates, the value of which it applied to the bankrupt's pre-existing indebtedness, with knowledge of his insolvency. *Held*, that the delivery of the certificates to the bank constituted a transfer, in violation of the Bankruptcy Act, for which the bankrupt's trustee was entitled to recover, and that the bank was not entitled to credit the value of the certificates against the bankrupt's indebtedness, nor to a set-off under Bankr. Act July 1, 1898, c. 541, § 68a, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), providing for a set-off of mutual debts or mutual credits; the transaction being within clause "b," subd. 2, providing that a set-off shall not be allowed, where it was purchased by or transferred to the creditor after the filing of the petition, or within four months before such filing, with the view to such use, or with the knowledge that the debtor was insolvent or had committed an act of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 514; Dec. Dig. § 326.\*]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by the Chicago Title & Trust Company, as trustee in bankruptcy of Earl H. Prince, against the Continental & Commercial Trust & Savings Bank, as successor, substituted for the Federal Trust & Savings Bank, to recover certain alleged preferences. From a decree confirming a master's report in favor of complainant, defendant appeals. Affirmed.

This appeal is from a decree of the District Court, confirming the master's report and awarding recovery against the appellant bank, as successor substituted for the Federal Trust & Savings Bank, defendant, under a bill filed by the appellee, as trustee in bankruptcy, charging that the defendant received unlawful preferences from the bankrupt. W. P. Anderson & Co. were joined as defendants in the bill; but the District Court entered a dismissal as to them, and no question is raised in respect thereof. The material facts constituting the alleged preference are undisputed, largely embraced in stipulations, and appear as findings of fact in the master's report, from which the following summary is extracted:

(1) The proceedings in bankruptcy against the bankrupt, Earl H. Prince, were instituted February 15, 1905. For several years theretofore he was a member of the Board of Trade of Chicago, engaged in the buying and selling of commodities subject to the rules of the Board of Trade. During the same period the defendant Federal Trust & Savings Bank was engaged in general banking business in Chicago, and Prince was transacting his banking business with such bank, and had a general deposit and checking account therein up to February 10, 1905.

(2) The rules of the Board of Trade provided for a method of trading between its members in a so-called "ringing up of trades," whereby settlements were made through the Board for such transactions. On time contracts it was provided that purchasers shall have the right to require of sellers as security a deposit of 10 per cent. based upon the contract price of the property bought, and further security from time to time as the market advances, and that sellers shall also have the right to require as security from buyers a deposit of 10 per cent. of the contract price of the property sold and in addition any differences that may occur between the estimated value of the property and the price of sale. For these purposes the rules further provided that banks may be authorized to issue margin certificates to be used in such cases and become authorized depositories for securities on giving bonds for the proper disposal of deposits by them, and that banks so authorized be designated as "Board of Trade Depositories."

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The certificates to be issued by the depository in such case were to be made in duplicate and nontransferable for all deposits made with them, were to state by whom the deposits are made and for whose account they are held, and that the same are payable upon the return of the certificate or the duplicate thereof duly indorsed by the parties to the contract, or on the order of the president of the Board of Trade. The form of the certificate is prescribed by the rules and the memorandum thereof which shall be kept, and all certificates when issued are required to be placed in the office of the Clearing House of the Board, and all business pertaining to the issuance and use of the said certificates is required to be carried on in accordance with the rules of the Board.

(3) From and after August 20, 1902, the Federal Trust & Savings Bank was a Board of Trade depository. On and prior to February 10, 1905, the bankrupt had a deposit and checking account with the bank, and at the date named was largely indebted to the bank on demand notes and otherwise. On February 10, 1905, the bank "called the said loans and they were not paid, and thereupon the bank applied as a payment upon the same \$3,095 then on deposit in the bankrupt's checking and deposit account in the bank," thus leaving to the credit of the bankrupt in that account only the sum of \$3.25. On the same day the bank agreed with the bankrupt "that, if he would thereafter make deposits to cover the same, it would pay certain salary and pay roll checks of employes of Prince and checks issued to the Board of Trade Clearing House." Pursuant to such agreement the bank did pay such checks issued on several days up to February 14th, amounting to \$2,506.46; and Prince deposited with the bank on February 10th, \$1,450, on February 11th, \$310, and on February 14th two deposits, one for \$820 and the other for \$499, making a total of his deposits of \$3,079; all of these items being entered on the books of the bank under date of February 14, 1905. The amounts thus deposited exceeded the amount of checks paid under the arrangement in the sum of \$572.54. This balance, together with the \$3.25 remaining to the credit of Prince on February 10th, making the sum of \$575.79, was applied by the bank on February 14th as a credit upon the general indebtedness of Prince to the bank. Other checks drawn by Prince on and prior to February 10th, which were not included in the above-mentioned arrangement then made, were subsequently presented to the bank, but payment refused.

(4) At various dates between September 15, 1904, and February 9, 1905, the bank had issued to Prince margin certificates to be used by him in his Board of Trade transactions, which were placed by him in the office of the Clearing House of the Board for various sums, ranging from \$250 to \$500 in amount, aggregating \$4,250. To procure such certificates Prince either gave checks against his checking account or deposited with the bank the requisite sum of money. A record of these margin certificates was kept in the bank in a "Margin Register," and the total of each day's margin certificates issued was entered in the ledger of the bank in an account called the "Margin Account," and the total of all unpaid margins appeared on the bank's ledger as one of the items constituting its total liabilities.

(5) On February 14, 1905, Mr. Castle, the vice president of the bank, and Mr. Prince, had a conference at the bank in reference to the financial affairs of Prince, and, while together, Mr. Castle telephoned to W. P. Anderson, president and treasurer of W. P. Anderson & Co., to join the conference. On the arrival of Mr. Anderson Mr. Castle informed him that Prince was in financial troubles in quite a number of open trades, and asked Mr. Anderson's advice as to the best way to close them. "Mr. Anderson suggested that Prince transfer them to some other dealer and close them up in that way. Prince asked Mr. Anderson if his company would take them and he agreed that it would if, after examination, the trades showed a profit. Investigation was made by Mr. Anderson, and he was satisfied with the conditions, and on the same day, February 14th, or the day following, Prince transferred all of his open trades in accordance with the rules of the Board, and Anderson & Co. assumed and agreed to carry out the contracts with the various parties with whom they were made." On February 15th the secretary of

the Board of Trade, on request of Anderson & Co., notified members having trades with Prince to transfer them to Anderson & Co., and "that Prince's sheet would clear on that day, as usual, but that rings made for the following day would be closed by Anderson & Co." Anderson & Co. thereafter settled the transactions, putting up its own securities in the place of the certificates deposited by Prince, to secure the same, and the Prince certificates were taken up by Anderson & Co. and turned over to the bank on that day. When these certificates were turned over to the bank, Prince was indebted to it in a sum greatly exceeding the amount of the certificates, and the bank thereupon credited the amount thereof, \$4,250, on account of such indebtedness.

The finding further states: At the date of these transfers of the open trades of Prince, the condition of the market was such "that the aggregate sum of the amounts due thereon to Prince from the members of the Board of Trade, if he had then settled the trades, would have been greater than the aggregate sums of the amount then due thereon from Prince to others of said members of the Board. Among the open trades so transferred and settled were trades with members of the Board who held securities on margin certificates furnished by Prince." The market was constantly changing, and "if the trades with the members holding Prince margin certificates had been closed at the opening of the Board of Trade on that day by the members holding them, there would have been due from them to Prince in the aggregate a balance of approximately one-third of the amount of the certificates after deducting therefrom the amount that would have been due to them from Prince. If the trades had been closed later in the day, the balance coming to Prince would have been considerably less. However, if Prince had carried out all of these contracts, the profits which would have been made upon some of them would have been about balanced by the losses which he would have sustained on others."

(6) On February 15, 1905, the proceedings in bankruptcy were instituted, and the appellee was eventually appointed trustee in bankruptcy. The indebtedness of the bankrupt at the date of the above-mentioned transfer of his trades exceeded the sum of \$100,000 to numerous creditors, aside from the bank, and his assets were less than \$50,000 in value.

(7) Circumstances appear in the relations between the bank and Prince which leave no room for doubt that the bank had, on and after February 10th, reasonable cause to believe that Prince was insolvent; that the transactions between February 10th and February 14th were "calculated to keep Prince going and to protect the Clearing House, as well as the bank," without protection for general creditors; that the transactions of February 14th and 15th were "primarily in the interest of the bank" and were intended for its benefit.

The master thus states his ultimate finding of fact thereupon: "The conduct of Prince's affairs for the five days preceding the filing of the petition against him is of such a character as to exclude every other conclusion, except that it was the intention of both Prince and Castle to reduce Prince's indebtedness to the bank as much as possible, by applying thereon all of his available assets and by so disposing of his business and open trades on the Board as to realize the greatest possible amount for the bank to the exclusion of his other creditors."

The master reported his conclusions of law, which were adopted by the District Court, in substance, as follows: (1) That the transaction of February 10th, whereby the bank applied the sum of \$3,095 out of the balance of Prince's credit then appearing in his banking account upon his indebtedness to the bank on promissory notes, was not an unlawful preference; (2) that the application made February 14th on such prior indebtedness of \$575.79 then remaining as a credit to Prince under the special deposit arrangement entered into February 10th constituted an unlawful preference; (3) that like application of \$4,250 on February 15th as the amount of "margin certificates" delivered to the bank under the arrangement with W. F. Anderson & Co., constituted an unlawful preference; (4) that the complainant, trustee in bankruptcy, is entitled to recover, accordingly, \$4,825.79, together with interest from November 25, 1905, when payment was demanded and refused.

Horace Kent Tenney, for appellant.  
Edwin Terwilliger, Jr., for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The appellant bank is successor in interest and liability to the Federal Trust & Savings Bank, original defendant named in the bill filed by appellee, as trustee in bankruptcy, to recover the amount of alleged unlawful preferences obtained from the bankrupt, Earl H. Prince; and this appeal is from a decree which approves the master's report therein and awards such recovery upon two transactions, namely: One of \$575.79, as a balance of certain deposits made by the bankrupt under special arrangement with the bank, between February 10th and 14th, appropriated by the bank immediately prior to the bankruptcy proceedings, and the other amounting to \$4,250 for so-called "margin certificates" theretofore issued by the bank for special deposits made by the bankrupt, which were obtained and appropriated by the bank on February 15th, the day on which the proceedings in bankruptcy were instituted. Both amounts were applied by the bank as credits upon pre-existing indebtedness of the bankrupt under promissory notes. The circumstances attending these transactions, together with the facts from which the nature of each must be ascertained, are not only settled by the master's findings of fact, but are undisputed.

[1] While objection is urged to inferences of fact found by the master as to the mutual intention of the parties in the outcome—in substance to benefit the bank out of such assets to the exclusion of other creditors—as unwarranted by evidence, we believe no doubt is entertainable of the intention to give and obtain a preference over other creditors, with mutual knowledge of the bankrupt's insolvency, if, in other respects, the transactions (one or both) were violations of the Bankruptcy Act. The issue in each instance, therefore, is one of law, whether the amounts thus obtained and applied constituted unlawful preferences, with the solution of each resting on established facts as to the relation existing between the bankrupt and the bank in the matters so applied.

Counsel for the appellant contends for reversal mainly, if not entirely, on this proposition in substance: That the various deposits by the bankrupt, out of which these appropriations arose, were made and carried in the common relation of debtor and creditor, and were thus subject to the right of set-off provided by section 68 of the Bankruptcy Act—as upheld and defined by the Supreme Court in *N. Y. County Bank v. Massey*, 192 U. S. 138, 141, 24 Sup. Ct. 199, 48 L. Ed. 380, and by this court in *Re George M. Hill Co.*, 130 Fed. 315, 64 C. C. A. 561, 66 L. R. A. 68, so that both method and fact of appropriation by the bank become immaterial, either amount being enforceable in such relation, as against the trustee in bankruptcy.

[2] The citations referred to rest on the general and well-settled doctrine of the relation created between banker and depositor, when



deposits are made upon general account in the ordinary course peculiar to banking business; and in the absence of proof that the deposit was otherwise intended and received, it may rightly be presumed that such was the nature of the transaction. On the other hand, it is equally well settled that deposits may be made and accepted for specified purposes, not within the general rule, whereby "the bank becomes bailee of the depositor" (*Marine Bank v. Fulton Bank*, 2 Wall. 252, 256, 17 L. Ed. 785; *Scammon v. Kimball*, Assignee, 92 U. S. 362, 370, 23 L. Ed. 483), or trustee of the fund, with title thereto remaining in the depositor until the purpose of deposit is discharged; and the relation thereby established is not that of debtor and creditor, although it was not intended that the identical money so deposited was to be held for the payment. It is the fund, not the particular money deposited, which becomes the subject-matter of the bailment or trust (*Woodhouse v. Crandall*, 197 Ill. 104, 64 N. E. 292, 5 L. R. A. 385, and notes; *Shopt v. Indiana Nat. Bank*, 41 Ind. App. 515, 83 N. E. 515), as illustrated in *Bank of Brodhead v. Smith*, Trustee, 199 Fed. 704, decided by this court in an opinion filed April 23, 1912. The tenability, therefore, of the foregoing contention, hinges upon the inquiry whether the transactions in controversy arose out of general or special deposits under one or the other above-mentioned rules.

[3] 1. The first item of \$575.79, charged as an unlawful preference, was a balance of deposit account standing in favor of the bankrupt and appropriated by the bank, February 14th, one day prior to the bankruptcy proceedings. Prince, the bankrupt, had long been engaged in business as dealer on the Chicago Board of Trade, and up to February 10th had an active general banking account with the Federal Trust & Savings Bank; also was indebted to the bank upon promissory notes in excess of \$30,000. On February 10th, the bank "called" these loans and applied thereon \$3,095 of the balance in favor of Prince in his bank account, leaving \$3.25 as a balance of deposit account. Thereupon it was proposed and agreed on the part of the bank, if Prince "would thereafter make deposits to cover the same, it would pay certain salary and pay roll checks of employes of Prince and checks issued to the Board of Trade Clearing House." Pursuant to this agreement deposits were made by Prince, February 10th, 11th, and 14th, aggregating \$3,079, but entered on the books of the bank February 14th. Checks made by Prince for the stipulated purposes were paid by the bank aggregating \$2,506.46. On February 14th—at a conference and arrangement for closing out the entire business of the bankrupt, as hereinafter mentioned—the balance of the deposit account then standing in his favor, \$575.79, was charged off by the bank and applied upon his indebtedness to the bank. Irrespective of the master's findings, that the arrangement of February 10th was "calculated to keep Prince going," was "primarily in the interest of the bank," and intended for its benefit to the exclusion of other creditors, we are of opinion that the deposits left and made thereunder constituted special deposits, well within the above-mentioned rule, whereby title to the un-

expended fund remained in the bankrupt, so that the bank was without right, either to apply the residue upon his pre-existing indebtedness, or for allowance thereof against the trustee by way of set-off. *Libby v. Hopkins*, 104 U. S. 303, 306, 26 L. Ed. 769; *Western Tie Co. v. Brown*, 196 U. S. 502, 507, 25 Sup. Ct. 339, 49 L. Ed. 571; *Bank of Brodhead v. Smith*, Trustee, *supra*.

[4] 2. The other charge of preference—in obtaining “margin certificates” for the aggregate sum of \$4,250, on the day the petition in bankruptcy was filed, which were then credited upon the pre-existing indebtedness of the bankrupt to the bank—involves like inquiry as to the nature of the certificate and deposit thereby certified, and consideration as well of the circumstances under which they were acquired by the bank. For both phases of the inquiry the facts in evidence are recited in the preceding statement for the purposes of this opinion, and the details do not require repetition, but the crucial facts may be briefly stated.

These certificates were issued by the bank, in its representative capacity as a “Board of Trade Depository,” under the rules of the Board of Trade and its undertakings as such depository. Each certificate in controversy was issued to Prince, the bankrupt, upon his deposit of the amount thereof (either in money or by his check accepted as cash), for the purpose specified in the certificate, namely, as pledge or security on his Board of Trade contract with a second party named therein. Each certifies the amount deposited to be payable on its return indorsed by both parties named therein, or “on the order of the president of the Board of Trade,” as provided by the Board rules “under which the above-named deposit has been made,” and each bears designation as “not negotiable or transferable,” and is signed by the cashier of the bank. The purpose of each further appears in evidence, in accord with the recitals and plainly within the understanding of all the parties. Each of the outstanding certificates so issued to the bankrupt was on deposit with the “Clearing House of the Board,” as required by the rules, evidencing the amount thus pledged with the bank as security for the trade therein mentioned, which had not been closed. Under this state of facts, we believe the deposits thus made and accepted at the bank were plainly so limited in their purpose, that the rule in reference to general deposits by a customer of the bank is without force therein; that each was received and certified by the bank, as depository of the fund thus pledged by the bankrupt for performance of his trade, creating no title thereto in the bank, nor other right than that of bailee or stakeholder, to hold for payment in conformity with the stated purpose. So the fact of deposit and holding thereunder vested no right in the bank to divert the fund from such purpose and apply it upon the bankrupt’s indebtedness.

The bank, however, secured possession of these certificates before making such application and the further contention is thereupon pressed that it is entitled to an allowance for their amount, either in that form or by way of set-off against the trustee, notwithstanding the circumstances under which they were acquired. Arrange-

ment to that end was made on February 14th, with the bank as the moving party, after its closure of the bankrupt's credit account as above mentioned. Mr. Anderson, another operator on the Board of Trade, was called in by the bank for conference in respect of the bankrupt's open trades, of which "quite a number" were then outstanding, inclusive of trades secured by the "margin certificates." On examination thereof Anderson was satisfied that they "showed a profit," taken as an entirety, and agreed to their assumption by his corporation. All the open trades were then transferred by the bankrupt to such corporation, and its substitution was carried out in the Board of Trade on the following day, resulting in release of the certificates issued to the bankrupt and on deposit for a portion of the trades thus taken over; and these certificates were received by the Anderson Company, pursuant to the Board rules on substitution of their own securities, and were thereupon delivered by them to the bank, without intervention of the bankrupt. On the same day the bankruptcy proceedings were instituted, doubtless precipitated by the substitution.

These transactions establish, as we believe, an unlawful preference in favor of the bank, with Anderson & Co. serving as intermediary to that end. The various propositions advanced as to results which may have arisen through default in the bankrupt's trades, in whole or in part, in the absence of such substitution, are beside the inquiry; nor is it material what may have been the estimate of net profit in the trades, nor what portions were profitable respectively. As the transfer was made and performance of the several trades assumed by the purchaser, release of the certificates to secure performance on the part of the bankrupt was plainly intended. Thereupon the bankrupt became entitled to them. Delivery of the certificates to the bank, therefore, consummated a transfer in violation of the Bankruptcy Act, for which recovery by the trustee is expressly provided. Thus their appropriation by the bank for credit upon the indebtedness of the bankrupt was unauthorized.

Is the bank, however, entitled to like benefit out of the transactions through set-off in its favor, as contended? We are of opinion that no such right exists under the terms and obvious purpose of section 68 of the act. The first clause (68a) cited in support thereof, provides only "for cases of mutual debts or mutual credits" between the estate and a creditor, wherein "the account shall be stated and one debt shall be set off against the other." In our understanding of the authorities (as above stated), these special deposits and liabilities are not embraced in such provision for set-off. But, if it be assumed that the relation of debtor and creditor was created between the bank and the bankrupt at any stage, such relation must arise through the transaction which released the pledge, making the amount deposited payable to the bankrupt, whereby the bank (under the assumption) becomes his debtor. Thus viewed, the claim of set-off must be rejected under the express limitations prescribed in clause "b" (2) of the section. Moreover, in *Western Tie & Timber Co. v. Brown*, 196 U. S. 502, 510, 25 Sup. Ct. 339, 49 L. Ed. 571,

the last-mentioned clause is construed to be applicable as well to a case of trust relation, and the opinion states that allowance of the claim of set-off "under the circumstances disclosed would violate the plain intentment of the inhibition" of that clause.

The transcript of testimony on the part of a witness (Wolf), received in evidence under objection, upon which error is assigned, does not enter into consideration for the purposes of the appeal, and the question raised as to its admissibility becomes immaterial.

The decree of the District Court, therefore, is affirmed.

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PERKINS v. NORTHERN PAC. RY. CO.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1912.)

No. 2,081.

1. JUDGMENT (§ 199\*)—NON OBSTANTE VEREDICTO—REVIEW OF EVIDENCE.

On a motion for judgment for defendant non obstante veredicto, the court has no right to weigh the evidence, but is bound to take the most favorable view for plaintiff of the evidence introduced on her behalf, and of all inferences that could be reasonably drawn therefrom by reasonable men, to the exclusion of the evidence on defendant's behalf, and deny the motion if the evidence so considered is sufficient to sustain a verdict.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 367-375; Dec. Dig. § 199.\*]

2. MASTER AND SERVANT (§ 278\*)—DEATH OF SERVANT—CAUSE—NEGLIGENCE—EVIDENCE.

The cause of death of plaintiff's intestate, a railroad engineer, *held* not speculative or open to conjecture under the evidence, but the evidence was sufficient to sustain a verdict finding that the same was caused by decedent's head coming in contact with an upright timber of a bridge located too close to the track while he was leaning out of the gangway between the engine and the cab in the course of his duty made necessary because of the railroad company's negligence in failing to have the tender properly equipped with power brakes.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954-972, 977; Dec. Dig. § 278.\*]

In Error to the Circuit Court of the United States for the Eastern Division of the Eastern District of Washington.

Action by Nellie Perkins against the Northern Pacific Railway Company. From a judgment for defendant non obstante veredicto (193 Fed. 219), plaintiff brings error. Reversed.

This was an action brought by the surviving widow and sole heir of H. C. Perkins, deceased, for the recovery of damages sustained by the alleged negligent killing of her husband by the defendant in error, defendant also in the court below. The complaint upon which the case was tried alleged, among other things, that H. C. Perkins at the time in question was a locomotive engineer in the service of the defendant company, and on the 28th of March, 1908, was with the other members of a train crew ordered to take an engine from Spokane, Wash., and assist certain trains over Kendrick Mountain, between the towns of Kendrick and Howell in the state of Idaho; that the tender of the engine was not equipped in accordance with the Safety Appliance Act of Congress in that the power-driven brakes on the tender were connected im-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

properly and would not work; that to run the engine down the mountain it was necessary to have braking power on the tender in order to relieve the brakes on the driving-wheels of the engine so that the latter would not become heated and thereby incapacitated; that accordingly a hand brake was rigged up on the tender of the engine at Troy, Idaho, and that on the next day, March 29th, while taking the engine and tender down the mountain, the decedent, in performance of his duty, was compelled to leave his position of safety in the engine cab, and go to the tender for the purpose of operating the hand brake; that, after tightening the brake, decedent leaned out of the gangway in order to look out and down at the wheels as was his duty to do to ascertain whether the brakes were or were not acting properly; that while so doing his head was struck by an upright timber of bridge No. 182 of the railway company, resulting in his instant death; that the engine in question, which was No. 58, was an exceptionally large one, and that the bridge mentioned was too narrow for the proper operation of the road; that the defendant was a common carrier engaged in interstate commerce, and that the engine in question was so used by it in such commerce; that the death of Perkins was caused solely by the negligence of the defendant company in failing to provide necessary and proper machinery, appliances, etc., particularly in failing to provide brakes upon the tender and in maintaining such narrow bridge.

By its answer the defendant company admitted that it was a common carrier engaged in interstate commerce by means of its railroad, and admitted the employment and death of Perkins, and that the engine in question prior to the accident was used in interstate commerce, but denied that it was so used at the time of the accident because it was "running empty"; and the answer also interposed the defenses of assumption of risk and contributory negligence of decedent.

The trial, which was with a jury, resulted in a verdict in favor of the plaintiff for \$20,000, upon which verdict judgment was rendered on the 27th day of May, 1911, in favor of the plaintiff for that sum, with costs. Subsequently the defendant company moved the court for judgment in its favor notwithstanding the verdict, and for a new trial, and on November 1, 1911, the trial judge filed an opinion in the case, directing a judgment for the defendant company non obstante veredicto, in pursuance of which the judgment theretofore entered in favor of the plaintiff was vacated and judgment given for the defendant, which latter judgment is brought here by the plaintiff below upon writ of error.

W. H. Plummer and Henry Jackson Darby, both of Spokane, Wash., for plaintiff in error.

Edward J. Cannon, George M. Ferris, and Charles E. Swan, all of Spokane, Wash., for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

ROSS, Circuit Judge (after stating the facts as above). The record shows that upon the conclusion of the evidence for the plaintiff the defendant moved the court to take the case from the jury and dismiss it. In denying that motion the court said:

"I think there is testimony in this case tending to show the deceased met his death by coming in contact with the upright of that bridge. There is also testimony to show that the company was guilty of negligence in constructing and maintaining that upright so near to passing trains. I do not believe the doctrine of a presumption upon a presumption or speculation has application here. The testimony shows that, when last seen, he was tightening the hand brake within a very few yards of this bridge, and that his next duty would be to look down and see whether the brakes were tight, and within 10 seconds—10 or 15 seconds, at most—after he was last seen, he was struck by the bridge and killed."

The record further shows that upon the conclusion of the defendant's evidence counsel for the defendant said:

"The defendant having rested, and the plaintiff having rested, and the taking of the testimony having closed, the defendant again challenges the sufficiency of the evidence to sustain any verdict, and moves the court to direct a verdict in favor of the defendant."

After argument and in response to the motion last mentioned, the court said:

"I will deny the motion provisionally, with permission to the defendant to renew it after the case has been submitted."

And later:

"The Court: Then by agreement of counsel the motion for a judgment notwithstanding the verdict may be made later."

With its decision subsequently granting that motion, the court filed an opinion in which it said, among other things:

"For the purposes of this opinion, I will admit the sufficiency of the evidence to show that the air brakes on the tender were out of repair; that the bridge in question was too narrow; that the defendant was wanting in due care in both of these respects; and that the plaintiff is entitled to recover if either of these negligent acts was the direct or proximate cause of her husband's death. Nor do I deem it necessary at this time to discuss the question of proximate cause. It is tangible proof of the primary cause that is lacking here; for while the complaint is explicit as to the manner in which the deceased met his death, and as to the immediate cause of his death, there is no direct testimony tending to sustain these allegations. The brake wheel in question was located by the end of the tank, about the height of a man's head above the floor of the gangway. The deceased was last seen alive by his fireman at the brake wheel, tightening the hand brake. At that time the engine was 100 or 150 yards distant from the bridge, running at the rate of 10 miles per hour. After passing the bridge the engine gained in speed, and in looking to ascertain the cause the fireman discovered that the engineer was gone. The train was backed up to the bridge, and his dead body was found near the center of the bridge, outside of the rails, lying face downward, with the head turned under the left arm and the neck broken. When found there was a slight contusion on the right cheek. The tongue was out and blood was oozing from the mouth. A day or two later a witness for the plaintiff claims to have found 15 or 20 hairs on the upright of the bridge about six feet above the rails which resembled a lock of hair of the deceased submitted to him at the trial. This is all the direct testimony in the case."

After making a quotation from the testimony of one of the witnesses, the trial judge proceeded to say in his opinion:

"Before accepting the plaintiff's theory of the case, however, I must say that in my opinion her testimony shows that that theory is not only an improbable, but an impossible, one. According to the testimony offered on her behalf, the bridge in question is 14 feet 5 inches in the clear. The cab of the engine in passing through the bridge would come within less than a foot of the uprights. The tank is still wider than the engine, and the gangway is at least four or five feet above the rails. Making due allowance for the ordinary vibration or swaying of the engine while in motion, this would leave the cab and the tank at least twelve feet in width. The cab and the tank would therefore project almost four feet beyond the rails and the wheels, at a height of approximately three feet above the rails. This testimony demonstrates how utterly impossible it would be for a man to stand in the gangway of the engine and observe either the wheels or the brakes from the gangway. He could not even see the ends of the ties, much less the wheels or

the brake shoes. This is shown clearly and conclusively by the blue print offered in evidence by the defendant, the correctness of which is not challenged by the plaintiff. The view of the engine as there given is even more favorable to the plaintiff than her own testimony, for it shows the engine almost two feet narrower. A person standing in the gangway could not see either the wheels or the brakes without extending his person several feet beyond the cab. Indeed, such an undertaking would be utterly impossible. To observe the wheels or the brakes at all, the engineer would be compelled to descend to the bottom step shown on the exhibit, and even there he would have to peer under the tank. It is not claimed that he did this, nor is it conceivable that any prudent man would do so. Furthermore, it is strange, indeed, that a prudent and experienced railroad man would have to resort to such methods for the purpose of ascertaining whether his brakes were too tight or too loose. It would seem to the ordinary observer that he could and would determine that fact by the effect of the brakes on the momentum of his train. Again, if the upright of the bridge struck this man's head while his train was running at the rate of 10 miles per hour, we would expect to find some more convincing proof of the contact on his person. The contusion found on his head was far more likely to result from his face coming in contact with the floor of the bridge than from coming in contact with the upright of the bridge as claimed. Moreover, it is extremely improbable that his body would be found in the position in which it was found had he been struck as claimed. Of course, it is impossible to say what effect such a blow would have on his person, or in what position the body would be found after receiving the blow, but these matters are only referred to for the purpose of showing the inherent improbability that the theory of the case conceived by the plaintiff is the correct one. Giving to the plaintiff, however, the full benefit of all the testimony, there is no proof whatever that the deceased did in fact stand in the gangway or look out for the purpose of observing the condition of his brakes, or for any purpose whatsoever. The whole case rests upon conjecture, guesswork, and speculation, and the cause of death is a mystery which the verdict of the jury does not solve."

[1] As will be readily seen, the court below rendered its final decision upon the ground that the manner in which Perkins came to his death was purely conjectural, and reached that conclusion by contrasting and weighing the evidence on behalf of the respective parties. In passing upon the motion which gave rise to the judgment complained of, the court below had no right to weigh the evidence that had been given in the case and determine on which side it preponderated; on the contrary, it was bound to take the most favorable view for the plaintiff of the evidence introduced on her behalf, and of all inferences that could be reasonably drawn therefrom by reasonable men, to the exclusion of the evidence on behalf of the defendant. *Mt. Adams, etc., Railway Co. v. Lowery*, 74 Fed. 463, 20 C. C. A. 596; *Felton v. Spiro*, 78 Fed. 576, 24 C. C. A. 321; *Jenkins & Reynolds Co. v. Alpine Portland Cement Co.*, 147 Fed. 641, 77 C. C. A. 625, and numerous cases there cited. See, also, *McDermott v. Severe*, 202 U. S. 600, 604, 26 Sup. Ct. 709, 50 L. Ed. 1162; *Texas & Pacific Railway Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829; *Rochford v. Pennsylvania Co.*, 174 Fed. 81, 98 C. C. A. 105; *Winters v. Baltimore & O. R. R. Co.*, 177 Fed. 44, 100 C. C. A. 462.

[2] Turning to the record, we find that there was evidence given on the trial on the part of the plaintiff tending to show that the deceased at the time of his death was 26 years of age, in perfect health, was 6 feet in height, and weighed about 200 pounds; that he was a man of good moral habits, very careful and cautious, and attended

strictly to his business; that on the 27th of March, 1908, a train crew of which Perkins was the locomotive engineer—his engine at the time being No. 58—left Spokane, Wash., for Kendrick, Idaho, and remained there that night; that the next day they made three trips down the mountain with the engine preceding its tender, and made the same number of trips on the 29th of March in the same manner; that they then received orders to back down the mountain as far as Clyde's Spur and pick up an "outfit train" with engine No. 340; that engine No. 58 was larger than the other engines run on that part of the defendant company's system, and that bridge 182 was narrower than any of its other bridges, and was more than 2 feet narrower than bridges 180 and 181; that bridge 182, where the accident happened, was a one-truss bridge built of wood, the truss being 15 feet in length and standing about 5 feet above the rails; that one Hines was Perkins' fireman at the time, and that one Kenjoski was the head brakeman of the crew, and that a man named Oldham took Perkins' place as engineer upon his death. Hines testified that he had crossed bridge 182 hundreds of times, and that engine 58 cleared the truss by "less than a foot," and Kenjoski's testimony was that in backing down west at the time of the accident the engine was moving at the rate of about 10 miles an hour with a grade of about 2 per cent., and that in going through bridge 182 engine 58 cleared the uprights on the side from a foot to eight inches. The last-mentioned witness also testified that an engine while in motion would sway from three inches to a foot. There was also evidence given on the part of the plaintiff tending to show that the air brakes on the tender of engine 58 were connected improperly, in consequence of which there was no braking power so far as the tender was concerned, and that that was discovered after the crew left Spokane; that Perkins and Hines undertook to connect the brakes properly but were unable to do so, and that at Troy, Idaho, while waiting for further orders, Hines was instructed by Perkins to get a wheel and rig up a hand brake, which was done about an hour and a half before Perkins' death; that a hand brake is put on a tender as an auxiliary to the power brakes. Hines also testified in respect to the necessity for a brake on the tender as follows:

"There was too much strain on the drivers, the driving wheels of the engine—to hold the engine by the driving-brakes (while) running down the mountain. Q. You say there would have been too much strain on the driving-wheels? A. Too much strain on them; yes, sir."

Oldham, the engineer who took Perkins' place upon his death, also testified that braking power on a tender is necessary because otherwise the tires are liable to be heated and loosened, and that without the use of driver brakes it would be necessary to use a hand brake on the tender.

Hines, the fireman, further testified that he last saw Perkins alive when they were about 100 or 150 yards from bridge 182; that the engine was then backing down westerly towards it, moving at about 10 miles an hour, and that as the engine was backing going west the engineer was on the south side, and at the time was standing in the



gangway engaged in tightening the hand brake of the tender, which was located about one foot from the outer edge of the tank. Hines was also questioned and answered as follows:

"Q. What was the next duty (of the engineer) after tightening the brake? A. Why, it was to find out whether it had too much braking power or not enough.

"Q. And how was it necessary for the engineer to obtain this information? A. By looking at the tank brakes to see if the shoes were against the wheels.

"Q. In what position would he of necessity have to place himself in order to do that? A. He would have to lean out the gangway.

"Q. Go on. How is that? A. He would have to lean out the gangway to look down to see if they were holding.

"Q. Well, stand on the platform there and assume that you are backing down this way, or that way, that you are standing there in the gangway; just describe to the court and jury how he would have to place himself in order to look down at the air brake shoes or the hand brake shoes, to ascertain whether or not they were holding or were too tight or too loose? A. Well, we were backing down west, the tank was going west first and the cab was following, and he stood tightening the hand brake on the tank, and then, in order to see if they were holding, he would have to lean out of the gangway.

"Q. Well, just lean out and show the court and jury how? A. Well, he leaned out the gangway like this, in this way [illustrating].

"Q. Could he see those brake shoes to ascertain whether or not they were holding too tight, or were too loose, in any other way? A. Well, he could, but he would have to be entirely out of the gangway.

"Q. In other words, he would be clear out? A. He would be hanging clean out. \* \* \*

"Q. And, in order to observe these brake shoes as you have described, how far would Mr. Perkins have to lean out of the engine in order to do that, as compared with the distance between the engine and the bridge timbers? A. He would have to lean out between a foot and 18 inches. He could not help it."

Oldham was also questioned and answered, among other things, as follows:

"Q. Now, in tightening the hand brakes on going down that mountain near bridge 182, just describe how that is done, what the engineer does and what is his duty to do? A. Why, he will tighten and set up the brakes, and then he has got to look out and see whether it is too tight or too loose.

"Q. Just describe how he looks out, what position he puts his foot in, and how far he has to lean out to find that out. \* \* \* A. He leans out of the gangway, and that is about the only way he can see his tank brakes on those wide timbers. \* \* \* Any ordinary man would have to reach out, to the best of my judgment, about from 16 to 20 inches in order to see the brakes on those wide timbers."

There was also testimony given to the effect that there were hand-holds on the tank and cab to take hold of in leaning out, one being on the tank and the other on the cab.

Hines, the fireman, testified that just shortly after they got on the curve after passing bridge 182, the engine commenced to pick up speed, and that he then remarked to Kenjoski, "What is the matter with that fellow that he don't slacken that engine up—we are going to go into the ditch;" that the engine kept on increasing speed, and that he looked over the boiler, and Perkins was not there, whereupon he stopped the engine and went back and found Perkins on the bridge with his neck broken, and with his feet in the direction in which the

train had been running; that is to say, to the west. He also testified that after the engine was stopped he found that the hand brake on the tender was set.

There was also given on the trial this testimony in respect to the condition of the body of the deceased, when the plaintiff was questioned and answered as follows:

"Q. I wish to ask one question that I had forgotten. I believe you stated that you saw the body of your husband when he was brought to Spokane, did you? A. I did.

"Q. The right side of his face, just describe that, Mrs. Perkins, just as to what you saw in the wound and in the face, if anything? A. Well, I saw it looked as if it was crushed right in there, and there were slivers all along the right side of his face, clear up into his hair a way.

"Q. You mean slivers of wood, I presume? A. Yes, sir; slivers."

And the witness Dunn testified, among other things:

"Q. Describe the right side of his face as near as you can to the court and jury, what condition was it in? A. There was a deep mark down the side of his face commencing as high up as his hair on his head, down his face across the corner of his mouth to the edge of his jaw, right through there into the jaw [indicating]. It looked though [as if] something had scraped his face clear back and broke the hide loose in several places."

Oldham also testified that the day after the accident by which Perkins lost his life, in going through bridge 182, he stopped and found adhering to the inside edge of one of the upright pieces at the entrance to the bridge, about 6 or 7 feet above its deck, about 20 or 30 hairs which he testified were of the same color as Perkins' hair, a lock of which was shown to the witness.

Surely there was here testimony tending to show, not only negligence on the part of the defendant company in not having the tender to its engine properly equipped with air brakes, and in maintaining a bridge too narrow for the proper operation of its road, but also tending to show that Perkins lost his life in the discharge of his duty while operating the defendant's engine. He was, according to the testimony of the fireman, last seen alive almost immediately before the engine reached the bridge, being then engaged in tightening the hand brake of the tender, immediately after which, according to the testimony, it was his duty to look and see whether the brake was properly set, the performance of which duty required him to lean out from the gang plank by means of the handholds on the cab and tank, thereby necessarily lowering his head and bringing it in contact with any intervening obstruction. There was testimony to the effect that the brake on the tender was found set almost immediately after the accident, and the law presumes that the deceased also performed his duty in looking to see that it was properly set. *Texas & P. R. R. Co. v. Gentry*, 163 U. S. 353, 366, 16 Sup. Ct. 1104, 41 L. Ed. 186; *Baltimore, etc., R. R. Co. v. Landrigan*, 191 U. S. 461, 474, 24 Sup. Ct. 137, 48 L. Ed. 262; *Northern Pacific Railway Co. v. Spike*, 121 Fed. 44, 57 C. C. A. 384; *Adams v. Bunker Hill & S. Min. Co.*, 12 Idaho, 637, 89 Pac. 624, 11 L. R. A. (N. S.) 844; *Burns v. Chicago, M. & St. P. R. R. Co.*, 69 Iowa, 450, 30 N. W. 25, 28, 58 Am. Rep. 227; *Louisville & N. R. R. Co. v. Hahn's Adm'r*, 135 Ky. 251, 122 S. W. 142; 9 Encyc. of Evidence, pp. 917, 918, 919, and cases there cited.

That the cause of an accident may be inferred from circumstances does not admit of doubt; and, as the testimony that has been herein set out must be taken as true in view of the verdict of the jury is it not a circumstance tending to show that Perkins was performing the duty of looking to see that the brake was properly set, when within a few seconds, or minutes at the longest, his dead body was found on the bridge over which the engine had just passed, and on the same side of the track that he rode, with his feet in the direction the engine was moving, with slivers of wood (of which material the uprights of the bridge were composed) in his face "clear up into his hair a way," and with his face looking as if, according to the testimony of one of the witnesses, it had been crushed in, and, according to that of another, as if "something had scraped his face clear back and broke the hide loose in several places"? And is it not a further circumstance tending to the same conclusion that the next day, according to the testimony of one of the witnesses, strands of hair were found in the edge of one of the upright pieces at the entrance of the bridge, similar to the hair of the deceased? Undoubtedly so. The case in truth was peculiarly one for the jury to determine whether or not the death of the deceased was occasioned by the alleged causes.

"Twelve men," said the Supreme Court in *Railroad Company v. Stout*, 17 Wall. 657, 664 (21 L. Ed. 745), "of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer, these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that 12 men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts occurring than can a single judge. In no class of cases can this practical experience be more wisely applied than in that we are considering. We find, accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us, that although the facts are undisputed it is for the jury, and not for the judge, to determine whether proper care was given, or whether they establish negligence."

It results that the action of the court below in granting the motion for judgment notwithstanding the verdict was erroneous and must be and hereby is reversed, with costs to the plaintiff in error, leaving the judgment entered upon the verdict in full force.

## OFNER v. WEIGEL.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1912.)

No. 2,084.

## 1. CONTRACTS (§ 56\*)—CONSIDERATION—SUFFICIENCY.

Agreement upon a settlement of accounts between the two principal stockholders of a corporation on the retirement of one of them was sufficient consideration to sustain the other's agreement to account for any loss to the retiring stockholder that might be discovered within one year, resulting from the other party's misrepresentation concerning the financial condition of the corporation.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 344; Dec. Dig. § 56.\*]

## 2. CORPORATIONS (§ 121\*)—RETIREMENT OF STOCKHOLDER—CONTRACT WITH SUCCESSOR.

In an action on a contract whereby defendant agreed to account to plaintiff for any loss resulting to the latter from any misstatement by defendant as to the financial condition of a corporation, stock in which plaintiff sold to defendant, evidence *held* to sustain a finding as to the amount of loss so arising.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 504, 505; Dec. Dig. § 121.\*]

Appeal from the Circuit Court of the United States for the District of Montana.

Action by Samuel Ofner against Louis Weigel. From the judgment, plaintiff appeals. Affirmed.

Samuel R. Stern, of Spokane, Wash., for appellant.

H. S. Hepner, of Helena, Mont., for appellee.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge. Formerly the defendant, who is the appellee here, was in equal partnership in the mercantile business in Helena, Mont., with one Auerbach. Some negotiations were entered upon between Auerbach and defendant, looking to the purchase by Auerbach of defendant's interest. Before they were completed the plaintiff, Ofner, agreed to and did purchase Auerbach's interest for the sum of \$8,000, under an arrangement with defendant that a corporation should be formed and the business thereafter conducted by the corporation. The corporation was accordingly formed under the name of "The Hub," with a capital stock of 200 shares, at the par value of \$100 each share. Of these shares 100 were issued to plaintiff, 99 to defendant, and 1 to H. S. Hepner, the attorney and brother-in-law of defendant, to enable him to qualify as a director of the company. This was in the year 1902, and the business was thenceforth conducted in manner as agreed. Besides the \$8,000 which Ofner paid for Auerbach's interest in the business, he loaned to The Hub \$4,000 without interest for one year, to be used in the business. Ofner resided at Chicago, and by arrangement with defendant he was to pay the bills in Chicago for merchandise purchased from time to time, and did so

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pay such bills, discounting them as occasion admitted, and, when without funds from The Hub, borrowed at the bank or advanced his own means. There were consequently two accounts to be kept—one at The Hub's place of business in Helena, Mont., and one at Chicago by the plaintiff. In this way goods were purchased and on the shelves in Montana, and it was not known there when the bills were paid at Chicago until a statement could be had from plaintiff; and, as the testimony shows, statements were not always rendered promptly. The business continued to be conducted in this manner until the latter part of the year 1905 or the first of the year 1906, when a trial balance of the assets and liabilities of The Hub was rendered by Weigel to Ofner, covering the years 1903, 1904, and 1905. The statement shows a net gain for the three years of \$11,323.06, and bears the following indorsement:

"As previously explained, on each of the statements, in arriving at the net gain for 1903 and 1904, no account was taken of the then unpaid bills for stock taken in each inventory, as such bills were in the Chicago office, and not reported to Helena. This year such bills were in Helena, and are accounted for hereon, thus producing the apparent loss of \$2,277.15 for 1905, but which is actually an item for distribution over the three years involved in the final net gain of \$11,323.06."

Weigel went to Chicago with the statement, and Ofner, when he examined it, was much disappointed and not a little exasperated that the business had not earned a much larger profit. Weigel says of this report that it was not a correct statement of the then condition of the business; that it had been padded—that is, made to show a larger profit than had in reality been earned, which was done by taking no account of certain liabilities payable to parties outside of Chicago. He says, further, that Ofner was informed of the condition of the statement, and was agreeable to its being made up in that way with a view to sustaining the credit of The Hub. Ofner denies this statement of Weigel, and declares that he knew nothing about the padding, as it is termed, of The Hub balance. However, at this meeting in Chicago, the parties entered into a tentative agreement, which was reduced to writing, but not signed, whereby Ofner agreed to sell to Weigel his 100 shares of stock in The Hub for the sum of \$10,000, to be paid in cash, and to accept in payment for liabilities owing to him from The Hub notes of the corporation, indorsed by Weigel, to the amount of \$5,000, and the notes of Weigel and his wife for the balance, these latter to be secured by assignment of certain life insurance policies upon the life of Weigel. The unsigned agreement was dated January 23, 1906, and probably is evidentiary of the time when the parties had come to the understanding. The agreement was never carried into effect in any particular. Weigel claims that he did pay to Ofner on the contract \$4,000, but in this we believe him to be in error. He did raise, about that time, through Hackett, Carhart & Co., \$4,000; but the money was used in the main to pay other liabilities of The Hub, the balance going to Ofner and being applied on The Hub's liabilities to him. About this time the manner of transacting business by The Hub was changed, by discontinuing the Chicago office

and paying all the bills and accounts from the Helena office. Beginning with the first of the year 1906, Weigel rendered weekly statements of purchases, cash and credit sales, cash balance on hand, and other items of interest, the first bearing date January 6th. Beginning with March 17, 1906, these were supplemented by statements made by Crause, being weekly "account of sales." These statements were continued to be rendered to Ofner up to the very last of the year 1906. Crause was a brother-in-law of Ofner, and was his confidential employé in The Hub.

It is quite apparent from the testimony that the parties were endeavoring in the meanwhile to consummate the transaction whereby Ofner would dispose of his interest in The Hub to Weigel, and other negotiations were had tending to a modification of the original agreement. The negotiations were delayed undoubtedly by Weigel's inability to raise the ready money with which to make the cash payment to Ofner. Late in January, 1907, the parties did consummate an agreement whereby Ofner sold his stock in The Hub to Weigel, and agreed to step out of the business, upon condition that Weigel reimburse him for all the money he had put into the concern individually. Ten thousand dollars was payable at once in money, and the balance in merchandise to be taken from the store of The Hub. The \$10,000 was paid at the time of closing the arrangement, and the balance has been subsequently paid in merchandise as agreed. Ofner, being suspicious touching Weigel's representations to him respecting the condition of the business, insisted that Weigel give him a contract to reimburse him for any sum that might be due him on account of errors or misstatements of Weigel. Accordingly the following memoranda of agreement were made and signed by the parties:

"Helena, Montana, Feb. 5, 1907.

"Memorandum of Agreement between Samuel Ofner and Louis Weigel in re Respective Interests in The Hub, a Montana Corporation:

"Mr. Ofner cancels all his right, title, and interest in and to the said corporation, surrenders all shares of stock and collateral, and cancels all claims for moneys advanced by him to the said corporation or procured for it.

"In return he is to receive back all moneys so advanced (including original investment), with interest at the rate of 6 per cent. per annum, to be paid as follows: Ten thousand dollars cash, and balance in merchandise at its actual cost to the corporation; the nature and kind of stock to be selected by said Ofner.

[Signed] Louis Weigel.

"Samuel Ofner.

"The above is acceptable to The Hub, Corporation.

"[Signed] Louis Weigel, President.

"[Seal.] Attest: [Signed] H. S. Hepner, Secretary."

"Helena, Mont., Feb. 5, 1907.

"This agreement, made and entered into between Samuel Ofner and Louis Weigel, witnesseth:

"That whereas, the said parties hereto have this day effected a settlement whereby the said Samuel Ofner surrenders all of his rights and claims in and to and against the corporation known as The Hub; and whereas, said settlement was based upon certain statements presented to him by the said Louis Weigel, purporting to be statements containing a true and correct statement of all the business of the said corporation, together with the inventory of merchandise on hand, and that the said Samuel Ofner accepted the said statement to be true and correct:

"Now, therefore, it is agreed by and between the parties hereto that in

consideration of the said Samuel Ofner making the said settlement, that should said Samuel Ofner at any time within one year from the date hereof discover or ascertain any errors or misstatements to have been contained in the said statement as aforesaid, and upon which settlement was effected, then, and in that event, the said Weigel agrees to make good and reimburse the said Samuel Ofner with any and all amounts that may be due to said errors or misstatements.

"In witness whereof, the said parties have hereunto set their hands and affixed their seals the day and year herein first above written.

"[Signed] Samuel Ofner [Seal.]

"[Signed] Louis Weigel [Seal.]"

The present suit is based upon the latter agreement, and is for an accounting. The gist of the bill is that, plaintiff having furnished the greater part of the money for carrying on the business of The Hub, it was agreed that Weigel should keep a careful and true account of the business, and that in pursuance of such agreement the defendant did, from time to time, furnish to plaintiff statements of the sales, collections, purchases, and other matters pertaining to the business; that, being dissatisfied with the management and conduct of said business, the plaintiff exacted of defendant, at the time of the consummation of said agreement of sale of the stock of the company to defendant, the contract sued on. As a breach of the contract it is alleged:

"That among the items which were improperly charged by the said defendant, who had absolute control of all such matters, and which said items he has failed and refused to correct, are many showing an apparent payment for merchandise, which amounts, however, were not paid, and which, so far as at present discovered, amount to the sum of \$3,916.29; that there are other amounts paid out of said business of said corporation charged to the said corporation, and by reason of which this plaintiff was charged with one-half of the amount thereof, which were personal items for articles used personally by the defendant and his family, and which it was absolutely improper to charge to the expenses of said business, or to charge in whole or in part to this plaintiff as a stockholder thereof; and that there are still other items showing mistakes in addition, subtraction, and in entries in books, which will amount to several hundred dollars, and all of the aforesaid items are contained in the books of account, check books, and other books used by the defendant, and in his custody, and under his control, as part of the books of said corporation, 'The Hub.'"

The defendant denies liability, and alleges want of consideration to support the contract.

Aside from the trial balance and the weekly statements hereinbefore noticed, Weigel rendered to Ofner a trial balance, called "Annual Statement—Dec. 31st, 1902," showing net gain \$6,452.01, and another December 31, 1906, showing net loss \$17,059.65. The testimony was taken before a master, who rendered findings of fact, among others that the annual statement or trial balance, covering the years 1903, 1904, and 1905, contained errors and misstatements, as follows:

"1. Items purporting to have been paid to various creditors of said corporation, but which were not in fact paid as reported in such statements, to wit:

Goldsmith, Feiss & Co. (three items—\$624.35; \$411.50; \$316.50) ..	\$1,352.35
Levi Strauss & Co. ....	200.24
W. L. Douglass & Co. ....	493.80
A. B. Kirschman & Co. ....	317.65
Hackett, Carhart & Co. ....	313.64

\$2,677.68

"2. Items purporting to have been connected with the business of The Hub, but which were in fact items of personal use, paid, however, out of funds belonging to the said The Hub, to wit:

T. C. Power.....	\$108.50
F. Weigel.....	5.00
Holter Hardware Co.....	4.91
T. C. Power.....	2.40
A. M. Holter.....	27.15
Emil Weil.....	32.50
Holter Hardware Co.....	79.98
S. F. Myers & Co.....	83.70
Matt Siller.....	40.10
Holter Hardware Co.....	20.17
N. Y. Dry Goods Co.....	112.80
Mrs. Weigel.....	25.00

\$542.21

"3. Items entered twice upon the books of the said corporation The Hub, to wit:

Gantner, Mattern Co.....	\$118.81
Coal .....	25.00
Freight .....	25.00

\$238.81

"4. Error in statement of indebtedness of The Hub to Union Bank, to wit..... \$500.00

"That the total of all misstatements and errors contained in said statements and shown by the testimony is \$3,958.70."

The court rendered a decree on these findings in favor of plaintiff in the sum of \$390.51, covering items contained in subdivisions 2 and 3 of the master's findings. From this decree the plaintiff appeals.

[1] The plaintiff claims that, under the contract sued on, he is entitled to recover all sums of money of which he was unjustly deprived while he was a stockholder of The Hub. This is not a suit to annul the agreement whereby Ofner severed his relations with The Hub on account of the fraud of Weigel in rendering false statements touching the business of the concern from time to time, but is simply for an accounting and recovery under the contract of February 5, 1907. The contract itself is vague and indefinite, and it is difficult to say what the parties meant by it. It recites that a settlement had been effected, which settlement was predicated upon certain statements rendered to Ofner by Weigel, "purporting to be statements containing a true and correct statement of all of the business of the said corporation," and then it was agreed that, should Ofner "discover or ascertain any errors or misstatements to have been contained in the said statement as aforesaid, and upon which settlement was effected, then, and in that event, the said Weigel agrees to make good and reimburse the said Samuel Ofner with any and all amounts that may be due to said errors or misstatements."

It is difficult to perceive how Ofner could be affected by such errors and misstatements, in view of the manner in which he disposed of his interest in The Hub. He simply sold to Weigel on



the terms and conditions that Weigel reimburse him for all the money that he put into the business. If there were ever so many errors and misstatements in statements rendered to Ofner, it could not affect the amount of the consideration Ofner was to receive for his interest in the business. The errors and misstatements might afford reason for abrogating the contract of sale; but, if the sale stands, then there would seem to be little reason for recovery under the present contract. The only construction upon which the contract sued on can be upheld is that the statements referred to constituted the inducement for Ofner to sell at the figure agreed upon. If The Hub was entitled to larger profits than such as were represented to Ofner, then he would be entitled to his share of such larger profits. In this view, there was consideration to uphold the contract; the consideration being the settlement agreed upon.

[2] Much controversy and a good deal of speculation is indulged in with respect to what statement or statements the contract contemplates as forming the basis of the settlement. Appellee insists that reference was made to the one statement covering the years 1903, 1904, and 1905, while appellant claims that the agreement had in purview, not only this statement, but the statement for the year 1906, as well as the weekly reports made during the year 1906 by appellee and Crause to appellant, and the trial balance for the year 1902. There is some dispute as to whether Ofner had received the statement for 1906 when the final agreement was entered into for the disposal of his interest in The Hub. But, in the view we take of the controversy, it can make no material difference under the testimony whether it be one or all of these statements and reports that is within the contemplation of the agreement.

It will be noted that plaintiff has not endeavored, through expert testimony or otherwise, to obtain an accurate and reliable statement of the condition of the business of The Hub up to and at the time he disposed of his interest therein finally, with which to compare the statements and reports rendered by Weigel, and thereby to determine what errors and misstatements appear by such statements and reports; but the statements and reports are compared with themselves to ascertain discrepancies, and it is sought thereby to charge Weigel with such discrepancies. Such discrepancies, however, could do no injury to plaintiff, unless they deprived him of some right or property to which he was entitled.

Now, as to the items comprised by subdivision 1 of the master's findings, aggregating \$2,677.68, it satisfactorily appears that they embrace amounts for which certain checks were drawn against The Hub; but the checks were never used. They were destroyed, and checks of later dates, and perhaps different denominations, were drawn covering the previous amounts. These discrepancies were discovered by comparison of the weekly reports with the stubs of the check book. Now, since it appears that the checks reported as drawn and paid were in fact not paid, but destroyed,

the funds of The Hub were not reduced or depleted by the mere incident of drawing the checks, and consequently Ofner was not injured by the apparent misstatement. We quite agree with the trial court in its disposition of the question pertaining to those items. So of the item comprised by the fourth subdivision of the master's report. This item was mistakenly entered as payment on merchandise account, when it should have been entered as payment on an obligation due Union Bank. The money was in reality paid to the bank, and the error in posting could affect neither The Hub nor the plaintiff injuriously.

As to the items comprised by subdivisions 2 and 3 of the master's report, these are such as it may be said that Weigel profited by to the detriment of Ofner, but not to the full amount of such items. It may be assumed that Ofner was the owner of a one-half interest in The Hub by reason of his ownership of one-half of the capital stock. He could have no interest beyond that proportion. This would entitle him to be reimbursed in amount equal to one-half of these items, and the decree of the trial court respecting them was proper.

The plaintiff's entire claim for relief comprises these items:

Items of bills claimed to have been paid, but not paid.....	\$ 2,677 68
Items purported to have been connected with the business of The Hub, but in fact paid for personal use.....	542 21
Items entered twice on the books.....	238 81
Error in statement of indebtedness to the Union Bank.....	500 00
Net gain at close of the year 1902.....	6,452 01
Net gain for the years 1903 and 1904.....	13,621 00
Net gain for the year 1905.....	11,871 95
Net gain for the year 1906.....	11,199 11
	<hr/>
	\$47,102 77
One-half of which is.....	\$23,551 39

We have disposed of the first four items of the claim. The fifth is the amount shown as net gain by the trial balance or annual statement for 1902. In what way it is claimed that this is an error or misstatement does not appear. As has been previously indicated, no final, accurate, and reliable statement of the assets of The Hub was ever made, in comparison with which it was possible to determine the errors of previous statements, and the comparison is simply of one statement with another. Applying the test adopted, no error or misstatement has been shown relative to the net gain for the year's business for 1902.

The sixth item is the aggregate net gain for the years 1903 and 1904. The seventh does not appear from any report or statement rendered. It is near the amount, however, of the net gain given in the statement for the years 1903, 1904, and 1905. A net loss was reported in this statement for the year 1905 of \$2,277.15. This amount, deducted from the aggregate gain for the three years, gives as a net gain \$11,323.06. No figures or other statement, or evidentiary facts otherwise, are shown to support the sixth and seventh items as claimed. Nor does it appear, from any method of deduction, that the statement of net gain for the years 1903, 1904,

and 1905 is an error or misstatement in any degree, except as the items reported by the master to have been for the personal use of Weigel, and erroneously entered, and the items twice entered on the books, may have affected the final net results.

As it relates to the eighth item of plaintiff's claim, it does not appear wherein the item arises out of any error or misstatement of Weigel. The 1906 trial balance shows a net loss of \$17,059.65 for the year. No figures have been deduced showing that that is an error or misstatement in any way, while, on the other hand, Weigel has fairly well explained the cause of the apparent heavy falling off in profits for that year. A very large item consists in reports of interest charges by Ofner that had been previously withheld by him. Without going into the subject in detail, it is sufficient to say that it has in no way been shown that the net loss reported by the trial balance of 1906 is an error or misstatement to the injury of plaintiff.

The decree appealed from will be affirmed, with costs to the respondent.

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KELLOGG-MACKAY CO. v. HAVRE HOTEL CO. et al.†

(Circuit Court of Appeals, Ninth Circuit. October 7, 1912.)

No. 2,048.

1. GUARANTY (§ 30\*)—LIABILITY.

Where the president and secretary of a corporation signed a guaranty of a contractor's liability for supplies solely in their official and not in their individual capacity, they could not be made individually liable thereon.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 30-32; Dec. Dig. § 30.\*]

2. GUARANTY (§ 21\*)—ESTOPPEL.

A partnership and the members thereof were not estopped to deny liability on a guaranty for the payment of supplies furnished to a contractor by reason of a letter written to the seller of the supplies several months after they had been furnished to the contractor.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 23; Dec. Dig. § 21.\*]

3. CORPORATIONS (§ 484\*)—POWERS—GUARANTY.

Under Rev. Codes Mont. § 3889, providing that corporations organized thereunder shall have power to enter into any obligations or contracts essential to the transaction of their ordinary affairs, or for the purposes of the corporation, and section 3890, declaring that no corporation shall possess any corporate powers, except such as are necessary to the powers so enumerated, a mercantile corporation has no power to guarantee the obligations of others.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1815; Dec. Dig. § 484.\*]

4. CORPORATIONS (§ 388\*)—POWERS—ULTRA VIRES—APPLICATION OF DOCTRINE.

The doctrine of ultra vires may not be invoked to defeat justice or work a legal wrong.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1556-1567; Dec. Dig. § 388.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

†Rehearing denied November 1, 1912.

# 6. CORPORATIONS (§ 388\*)—GUARANTY—ULTRA VIRES—ESTOPPEL.

A private corporation engaged in constructing a hotel building, having contracted with B. to furnish and put in plumbing appliances, transmitted to plaintiff, to whom B. had applied for supplies, a letter, signed by the hotel company's president and secretary, informing plaintiff that B. had been awarded the contract for plumbing and heating the hotel, that he had placed his order for material with plaintiff on terms that he was to pay 60 per cent. of bills on delivery and balance in 60 days, and stating that the writers were prepared to meet such terms with B., so that plaintiff would be perfectly safe in shipping material to him. Plaintiff furnished the materials on the strength of the letter, and B. failed to make the payments as agreed. *Held* that, the hotel company having received the benefits of the materials furnished by plaintiff on the faith of the guaranty that the price should be paid by B., and being in a position to protect itself by withholding from B. sufficient to pay plaintiff's demand, it was estopped, when sued on the guaranty, to claim that it was ultra vires.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1556-1567; Dec. Dig. § 388.\*]

In Error to the Circuit Court of the United States for the District of Montana.

Action by the Kellogg-Mackay Company, a corporation, against the Havre Hotel Company and others. Judgment for defendants, and plaintiff brings error. Reversed as to Havre Hotel Company, and affirmed as to the other defendants.

The complaint contains the usual allegations of the incorporation of the Havre Hotel Company, of the Broadwater-Pepin Company, and of the copartnership of Simon Pepin and E. T. Broadwater; the defendants E. T. Broadwater and E. C. Carruth being sued in their individual capacity. It is further alleged that prior to November 7, 1904, the Havre Hotel Company entered into a contract with one P. H. Brader, whereby Brader agreed to furnish the labor and materials for the installment of a heating plant and necessary plumbing and other pipe fitting in a certain building then in course of construction, known as the Havre Hotel; that shortly afterwards Brader placed an order with the plaintiff, at Minneapolis, Minn., for the necessary materials, supplies, and fixtures to be used by him in carrying out his contract with the Hotel Company; that on the 7th day of November, 1904, the defendants, Havre Hotel Company, a corporation, Broadwater-Pepin Company, a corporation, Broadwater-Pepin Company, a copartnership, E. T. Broadwater, and E. C. Carruth, for a valuable consideration, made, executed, and delivered to the plaintiff a certain writing offering or proposing to guarantee the payment by Brader for the materials so ordered when furnished, as follows:

"Havre, Montana, Nov. 7th, 1904.

"Kellogg-Mackay-Cameron Co., Minneapolis, Minn.—Gentlemen: Mr. P. H. Brader, of this place, was awarded the contract for plumbing and heating the new Hotel Havre, which is under construction here now, and informs us that he has placed the order for material for this work with your firm, on terms that he is to pay you 60% of your bills when material is on the ground here (less freight) and balance in 60 days. We are prepared to meet these terms with Mr. Brader, so that you will be perfectly safe in shipping him this material."

It is then further alleged that on the 9th of November, 1904, the plaintiff duly accepted said offer in writing, as follows: "Your communication of the 7th instant guaranteeing the account of P. H. Brader for the material which we are to ship him for the new Hotel Havre, and stating terms of payment on same, received. The same is satisfactory to us"—said acceptance being delivered to the defendants at Havre, Mont., about November 11th; that after the receipt of such acceptance by the defendants, they, and each of them,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

remained silent, and intentionally refused to notify plaintiff of the receipt of such acceptance; that, by such silence and failure to notify the plaintiff, defendants, and each of them, are estopped to deny that the proposal of November 7, 1904, and the acceptance thereof of November 9, 1904, did not create between the said defendants and plaintiff a contract of guaranty of the account of the said Brader; that the plaintiff, being deceived and misled by the silence of the defendants, furnished the material to Brader; and that the defendants by their silence and failure to notify, misled and deceived plaintiff into providing said materials, and are thereby estopped to now deny that the said proposal of guaranty and the said acceptance thereof did not create between them, the defendants and the plaintiff, a contract of guaranty. Other matter is shown, but is not material here.

The answer states, in effect, that on or about the 7th day of November, 1904, E. T. Broadwater, as president, and E. C. Carruth, as secretary and treasurer, wrote and signed the letter to plaintiff, as set forth in the complaint; that said Broadwater and Carruth were president and secretary and treasurer, respectively, of the Havre Hotel Company, but that they had no authority from the board of trustees or stockholders of the Havre Hotel Company in any way or manner to bind the said Hotel Company as guarantor of the account of P. H. Brader, by proposing to guarantee the same, or otherwise; that none of the defendants signed said letter, or ratified it, in any way or manner, or made any proposal or guaranty of said account of said Brader, or guaranteed the same.

By an amended reply the plaintiff alleges that the supposed guaranty of November 7, 1904, was written upon the letter head of Broadwater-Pepin Company and in the handwriting of E. T. Broadwater, one of the signers of the letter; that E. T. Broadwater was then, and for a long time prior thereto had been, the manager for said Broadwater-Pepin Company, and one of its officers; that the plaintiff believed in good faith that the letter was that of the Broadwater-Pepin Company, and acting upon that belief wrote the letter of November 9th, as set forth in the third amended complaint, and then reiterates the allegation that the defendant Broadwater-Pepin Company remained silent after the receipt of the letter of November 7th, for which reason it became estopped from denying that the guaranty was binding upon it.

It was shown at the trial that the plaintiff, Kellogg-Mackay Company, is the successor to the Kellogg-Mackay-Cameron Company. John H. Finnegan, the traveling agent of Kellogg-Mackay-Cameron Company, solicited from Brader the order for the materials in question. He says, among other things, that Broadwater had the care of the business of the Broadwater-Pepin Company, that he (Finnegan) had business dealings with both Mr. Broadwater and Mr. Carruth in connection with the order placed for the materials for the hotel, and that he received a letter in an envelope from Carruth, which he took to be a guaranty for the payment of the goods. This letter he forwarded to Kellogg-Mackay-Cameron Company at Minneapolis, together with the order for the material. The letter is as follows:

"Broadwater-Pepin Co., General Merchants.

"Havre, Montana, Nov. 7th, 1904.

"Kellogg, Mackay-Cameron Co., Minneapolis, Minn.—Gentlemen: Mr. P. H. Brader, of this place, was awarded the contract for plumbing and heating the new Hotel Havre, which is under construction here now, and informs us that he has placed the order for material for this work with your firm, on terms that he is to pay you 60% of your bills when material is on the ground here (less freight) and balance in 60 days. We are prepared to meet these terms with Mr. Brader, so that you will be perfectly safe in shipping him this material.

"Respy.,

E. T. Broadwater, Pres.

"E. C. Carruth, Secty. & Treas."

He later states that he believed the financial standing of Brader was not good, but that the Broadwater-Pepin Company was responsible.

Dan Donovan, the manager of the business at Minneapolis, testified that he received the order for the material in question, together with the supposed

guaranty, and that he wrote Broadwater-Pepin Company, Havre, Mont., on November 9, 1904, as follows:

"Gentlemen: Your communication of the 7th inst., guaranteeing the account of P. H. Brader for the material which we are to ship him for the new Hotel Havre, and stating terms of payment on same received. The same is satisfactory to us. We would also state to you that we have already shipped to Mr. Brader on open account material to even considerable more value than this. We appreciate the guaranty, but would not have insisted upon it from Mr. Brader, as we know that Brader is honest, although poor. Hoping that the material which we delivered to Mr. Brader for you will be satisfactory, and that he will do you a first-class job, we are,

"Yours truly,

Kellogg-Mackay-Cameron Co.,

"Dan Donovan, Mgr."

He also testified, among other things, that he knew of Broadwater-Pepin Company through mercantile reports, and also knew they were the owners of the Hotel Havre, in which the material was to be installed by Brader; that the material consigned to Brader was all used in the hotel; and that no payments had been made upon the account. Other correspondence between the parties is also shown by this witness, to wit:

A letter written by Kellogg-Mackay-Cameron Company to Broadwater-Pepin Company on March 30, 1905, which reads as follows:

"Gentlemen: On November 7th, 1904, you wrote us giving us the terms of payment you had made with P. H. Brader for heating and plumbing your hotel, and guaranteeing payment to us for all the material we were to deliver to Mr. Brader for that hotel according to the terms mentioned in your letter of the 7th. Although we have repeatedly requested Mr. Brader to forward us the 60% of the amount of our invoices, and have recently asked him to pay the bill in full, as it is all past due according to our arrangement with you and Mr. Brader previous to the time of delivery of the material, still up to the present writing we have not received one cent from Mr. Brader on account of all that material. We would therefore ask that you make your guaranty good and send us your check for the amount Mr. Brader owes us for our material used in your hotel.

"Yours truly,

Kellogg-Mackay-Cameron Co.,

"Dan Donovan, Mgr."

And a letter in reply, of date April 3, 1905, reading as follows:

"Carnal & Carruth, Real Estate, Loans, Collections.

"Havre, Montana, April 3rd, 1905.

"Kellogg-Mackay-Cameron Co., Minneapolis, Minn.—Gentlemen: Your favor of the 30th ult. to hand. In reply will say that we are very much surprised that Mr. Brader has not paid you for material which he ordered from you last fall and which you wrote our firm about on Nov. 9th. We notice you write as though you had received a guaranty from us for Brader's goods, which is an error. We wrote you on Nov. 7th, stating that Mr. Brader had received the contract for plumbing and steam fixtures for the new Hotel Havre, and that he had informed us that he placed the order with your house on terms that he was to pay 60% of the bills when the material arrived here at Havre, and your recent letter is the first notification that he had not done so. We stated that we were prepared to meet the terms as above stated with Mr. Brader, and felt that you would be safe in shipping the goods to him. We do not remember of making any other arrangements with you, but for your information will state that we have not paid Mr. Brader up in full for his work on the hotel and will not do so until we hear from you. Aside from this, will state that Mr. Brader is honest and will pay his accounts. He appears to be willing to settle up the material account, but states that there are several matters needing adjustment with you before he can do so. We hope the matter will be settled in a satisfactory manner, and can assure you that we will do all in our power to assist in straightening out the affair.

"Very truly yours,

Broadwater-Pepin Co.,

"By E. T. Broadwater, Sect'y & Treas."

Plaintiff further adduced the testimony of C. V. Kellogg. Whereupon, plaintiff having rested its case, the defendants moved the court for a nonsuit and dismissal, on the ground that no proof had been adduced establishing or tending to establish the contract of guaranty pleaded in the complaint. The court, however, permitted the plaintiff to offer additional testimony, and Brader, being called, testified in effect that he was acquainted with the corporation, Broadwater-Pepin Company, and that Broadwater had done business for the company, which was all he knew of the relation of Broadwater to the company; that Broadwater was in the mercantile business in Havre, and had been for several years; and that Broadwater represented the company in the ordinary mercantile transactions. R. E. Hammond testified that according to common repute Broadwater transacted the business for the Broadwater-Pepin Company, which has always been his understanding. E. T. Broadwater testified that on April 3, 1905, he was the secretary and treasurer of the Broadwater-Pepin Company, and that he wrote the letter of that date.

The motion for a nonsuit being renewed, it was granted as to all of the defendants except the Broadwater-Pepin Company. E. T. Broadwater was again called for the defendants, and testified that he wrote the letter of November 7th, addressed to Kellogg-Mackay-Cameron Company, for Brader; that Carruth was the secretary and treasurer of the Havre Hotel Company, and that witness was the president thereof; that Brader came to him and asked him if he would give him a letter from the Broadwater-Pepin Company; that witness told him he could not write any letter from the corporation; that the Hotel Company would write it; that he thereupon wrote the letter, and signed it, and Carruth signed it with him; that he signed the same on behalf of the Havre Hotel Company; that Carruth took the letter and signed it, and witness did not know what Carruth had done with it; that he received the letter of November 9th, which was misplaced; that no further correspondence was had until he received the letter of the 30th of March, 1905; that he wrote the letter of April 3, 1905, in reply to the March letter; that he was a small stockholder in the Havre Hotel Company, which stock he subscribed for after the fire occurred in Havre; and that his firm, corporation, the Broadwater-Pepin Company, had no stock in the Havre Hotel Company. Brader and Carruth both corroborate Broadwater in his statement that the letter of November 7th was written in behalf of the Havre Hotel Company, that Carruth took some stock in the Hotel Company, and that the account on the part of the Hotel Company with Brader was settled by arbitration.

The defendant, having rested, moved the court to instruct the jury to return a verdict in its favor, and the plaintiff, at the same time, moved for a directed verdict in its favor and against the defendant Broadwater-Pepin Company, on the ground that there was no evidence in the case establishing or tending to establish a defense to plaintiff's cause of action, and that the evidence established a cause against the defendant Broadwater-Pepin Company. The court denied the motion of plaintiff, and sustained the motion of defendant Broadwater-Pepin Company, and granted judgment accordingly.

Galen & Mettler, of Helena, Mont., for plaintiff in error.

Clayberg & Horsky, of Helena, Mont., for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge (after stating the facts as above). The question for consideration is whether the trial court erred, first, in granting a nonsuit in favor of all the defendants except the Broadwater-Pepin Company, the corporation; and, second, in directing a verdict for the said Broadwater-Pepin Company. There can scarcely be a question that as to all the defendants, except the Havre Hotel Company, the nonsuit was properly granted. No evidence was adduced to show that either the Broadwater-Pepin Company, a copart-

nership, or E. T. Broadwater or E. C. Carruth, individually, signed the letter of November 7, 1904. Hence they, or either of them, cannot be held liable upon such alleged guaranty.

[1] The testimony of Broadwater, Carruth, and Brader tends very strongly to establish the fact, if there can be a question about it, that the letter of November 7th was written in behalf of the Havre Hotel Company, and was signed by Broadwater, president, and Carruth, secretary and treasurer, they acting in their official and not in their individual capacity; and whatever liability or obligation was entered into or incurred by the writing was the liability or obligation of the Havre Hotel Company, and not that of Broadwater or Carruth individually. This is, in effect, alleged in the answer; but it is further averred as a defense that the Havre Hotel Company was not authorized to bind itself by contract of guaranty.

There is evidence tending to show that Broadwater-Pepin Company, the corporation, was the active agent in the construction of the Havre Hotel, and that company concedes, as plainly as can be, writing the letter of November 7th, as witness its letter of April 3d, signed "Broadwater-Pepin Co., by E. T. Broadwater, Sect'y & Treas.," although the fact appears that it did not sign such letter. The letter of April 3d states, "We have not paid Mr. Brader up in full for his work on the hotel, and will not do so until we hear from you," which would seem to confirm its agency in the affair, while denying liability. It appears further, however, that Broadwater-Pepin Company had no interest—"not one cent," as expressed by Broadwater on the witness stand—in the Havre Hotel Company. What Donovan said as to the ownership of the hotel by Broadwater-Pepin Company is merely his own opinion or conclusion, without the statement of any facts to support it. Broadwater could not have signed the letter of November 7th for the Broadwater-Pepin Company, as he was not president, but secretary and treasurer, of that company, but was president of the Havre Hotel Company.

[2] But it is urged, notwithstanding, that the Broadwater-Pepin Company is bound by the alleged warranty, as evidenced by the letter of November 7th, through estoppel in remaining silent and thereby inducing plaintiff to act upon it, which is the real issue here. It will be noted that the letter of April 3d was written subsequent to the time that plaintiff had acted in filling the order of Brader for the materials, hence the letter could not have induced plaintiff in any way to extend credit to Brader.

The legal question involved is whether the Havre Hotel Company and the Broadwater-Pepin Company, or either of them, are bound or may be held liable upon a contract of guaranty. This is the second time the case has been here; the first coming up on the sufficiency of the complaint, which was held good.

The corporations here represented were organized under the general laws of the state of Montana, and a corporation so organized has the power "to enter into any obligations or contracts essential to the transaction of its ordinary affairs, or for the purposes of the corporation."



Section 3889, Rev. Codes of Montana. Section 3890 provides that "no corporation shall possess any corporate powers except such as are necessary to the exercise of the powers so enumerated," having reference to the previous section.

[3] As to the Havre Hotel Company, it may be assumed, as we have reached the conclusion that the trial court is in error in granting a nonsuit as to it, that it was not empowered by its articles of incorporation to enter into contracts or obligations of guaranty. And as to the Broadwater-Pepin Company, it appears, at least inferentially, that it also was not so empowered, by reason of the fact that it was a mercantile concern, and the authority to guarantee the obligations of others is not usual or common to the business. It is a well-settled principle of law that:

"A contract of a corporation, which is ultra vires, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

It is unnecessary to state the reason upon which the principle is founded. *Central Transp. Co. v. Pullman Car Co.*, 139 U. S. 24, 59. 11 Sup. Ct. 478, 35 L. Ed. 55; *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950; *Penn. Co. v. St. Louis, Alton, etc., R. R.*, 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83; *Humboldt Min. Co. v. American Manuf'g, Mining & Milling Co.*, 62 Fed. 356, 10 C. C. A. 415.

This is clear logic, and it has been held that a contract of guaranty, which is beyond the express or implied authority to execute, is void and unenforceable. *M., W. & M. Plank Road Co. v. W. & P. Plank Road Co.*, 7 Wis. 59. The rule has application to railroad companies. They have no power to guarantee the bonds of another company, unless authorized by the act of incorporation or by other statutes to do so. *Louisville, etc., Ry. Co. v. Louisville Trust Co.*, 174 U. S. 552, 567, 19 Sup. Ct. 817, 43 L. Ed. 1081.

[4] But this doctrine, which is referred to by Mr. Thompson in his work on Corporations as the strict doctrine of ultra vires, may not be invoked to defeat justice or work a legal wrong. 3 Thompson on Corporations (2d Ed.) § 2778. In *Railway Co. v. McCarthy*, 96 U. S. 258, 267, 24 L. Ed. 693, Mr. Justice Swayne says:

"The doctrine of ultra vires, when invoked for or against a corporation, should not be allowed to prevail, where it would defeat the ends of justice or work a legal wrong."

In *San Antonio v. Mehaffy*, 96 U. S. 312, 315, 24 L. Ed. 816, the distinguished jurist gave expression to the same principle in this wise:

"The doctrine of ultra vires, whether invoked for or against a corporation, is not favored in the law. It should never be applied where it will defeat the ends of justice, if such a result can be avoided."

Perhaps the doctrine as announced by Mr. Justice Swayne, which is one really of estoppel, is not strictly applicable, unless in exceptional cases, where the corporations involved are of a public or quasi public character; but it would seem to be suited with strong reason and emphasis to the operation of merely private corporations, when such corporations have received the benefits of the obligations which they are seeking to repudiate, and has been so applied in a variety of cases. *Butler v. Cockrill*, 73 Fed. 945, 953, 20 C. C. A. 122; *In re Waterloo Organ Co.* (D. C.) 128 Fed. 517; *Quinby v. Consumers' Gas Trust Co.* (C. C.) 140 Fed. 362; *Wayte v. Red Cross Protective Society* (C. C.) 166 Fed. 372; *Burke Land & Live Stock Co. v. Wells Fargo & Co.*, 7 Idaho, 42, 60 Pac. 87; *Meholin v. Carlson*, 17 Idaho, 742, 107 Pac. 755, 134 Am. St. Rep. 286; *Carson City Sav. Bank v. Carson City Elevator Co.*, 90 Mich. 550, 51 N. W. 641, 30 Am. St. Rep. 454; *Whitney Arms Co. v. Barlow et al.*, 63 N. Y. 62, 20 Am. Rep. 504; *Timm v. Grand Rapids Brewing Co.*, 160 Mich. 371, 125 N. W. 357, 27 L. R. A. (N. S.) 186; *Iowa Drug Co. v. Souers*, 139 Iowa, 72, 117 N. W. 300, 19 L. R. A. (N. S.) 115; *Marshalltown Stone Co. v. Des Moines Brick Mfg. Co.*, 149 Iowa, 141, 126 N. W. 190; *First National Bank of Kansas City v. Guardian Trust Co.*, 187 Mo. 494, 86 S. W. 109, 70 L. R. A. 79; *Whitehead v. American Lamp & Brass Co.*, 70 N. J. Eq. 581, 62 Atl. 554; *Earle v. American Sugar Refining Co.*, 74 N. J. Eq. 751, 71 Atl. 391; *First Nat. Bank of Lineville v. Alexander*, 152 Ala. 585, 44 South. 866.

[5] To apply the principle here, the Havre Hotel Company, a corporation merely private in its organization and business relations, was engaged in the construction of a hotel building. Brader was a contractor for putting in the plumbing appliances, and ordered his materials and supplies from the plaintiff company. Along with the order was transmitted to the plaintiff the letter of November 7th. The plaintiff company furnished the materials on the strength of the letter. The Havre Hotel Company got the benefit of the materials, and, while the Hotel Company may have paid Brader in full of his contract, it was in a position at all times to protect itself against its guaranty by withholding from Brader sufficient to pay plaintiff its demand. It did not do this, and, having received the benefit of the materials furnished by the plaintiff upon its guaranty that the price thereof should be paid by Brader, it would work a palpable injustice to the plaintiff if the Hotel Company was not required to pay the demand. In other words, it would defeat justice and work a legal wrong to permit the Hotel Company to escape on the plea that its contract of guaranty was beyond its power to make. We are of the opinion that under the conditions attending the transaction the Hotel Company is estopped to deny its liability under the guaranty.

It is quite different with the Broadwater-Pepin Company. It did not sign the guaranty, although it might have inferentially, by the letter of April 3d, admitted responsibility under it. The materials were not furnished on the Broadwater-Pepin Company's

responsibility, for they were furnished on the guaranty of November 7th, which was the contract of the Havre Hotel Company. The former company has no interest in the latter, and received no benefit from the materials furnished by plaintiff for the construction of the hotel building. With it, the elements of estoppel against insisting that the contract of guaranty is ultra vires and void are entirely wanting. It was engaged in mercantile business, and the power of guaranteeing the obligations of others would appear, as previously indicated, to be foreign to the usual purposes of such a business.

We are of the opinion, therefore, that the Broadwater-Pepin Company is not estopped to deny liability under the alleged guaranty, and the trial court was not in error in directing a verdict in its behalf. But for the error in granting the nonsuit as to the Havre Hotel Company, the judgment rendered must be reversed, and the cause remanded, for such other proceedings as may seem proper not inconsistent with this opinion.

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NORTHERN PAC. RY. CO. v. ALDERSON et ux.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1912.)

No. 2,062.

1. EVIDENCE (§ 116\*)—CHANGED CONDITIONS SUBSEQUENT TO ACCIDENT—LIMITATION.

Where, in an action for injuries at a railroad crossing, both parties introduced photographs of the location, it was not error for the court to admit evidence that the alleged obstruction to a view of the track from the public road had been cut away by the railroad company subsequent to the accident; it being limited by an instruction that the jury should consider it only to explain the photographs.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 134, 135; Dec. Dig. § 116.\*]

2. RAILROADS (§ 327\*)—CROSSING ACCIDENT—CARE REQUIRED.

Travelers on a public highway, approaching a railroad crossing, are required to use their senses of sight and hearing to detect the approach of trains, and, when the track is obscured to the sight, greater care is devolved on them in the use of the sense of hearing, and in listening they must be so disposed as probably to listen effectively; otherwise, still greater care should be observed by not venturing on the track until it is ascertained that it will be clear, especially if trains are frequently passing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.\*]

3. RAILROADS (§ 350\*)—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE.

In an action for injuries in a railroad crossing accident, whether plaintiffs were negligent in approaching the crossing *held* for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.\*]

4. RAILROADS (§ 350\*)—CROSSING ACCIDENT—QUESTION FOR JURY—PHOTOGRAPHS.

In an action for injuries at a railroad crossing, photographs taken at various points along the highway approaching the crossing, showing the view of the track in the direction from which the train approached, were

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

not conclusive evidence that the situation was one of unobstructed view, since, without proof showing the viewpoint of the photographer, his distance from the scene, and the direction in which the camera was pointed the photographs were valueless for evidential purposes, and, such proof having been given, its weight was for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.\*]

Photographs as evidence in civil actions, see note to *Porter v. Buckley*, 78 C. C. A. 145.]

In Error to the Circuit Court of the United States for the Eastern Division of the Eastern District of Washington.

Action by George Alderson and wife against the Northern Pacific Railway Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

This is an action to recover damages for personal injuries sustained by Mrs. Cora C. Alderson, one of the defendants in error, and a child, through the alleged negligence of the plaintiff in error, and also damages for the loss of a team and the wrecking of a wagon. For convenience, the parties will be referred to as they were entitled in the trial court.

At the time of the accident complained of, the plaintiffs, Alderson and wife, with two children, were riding in a wagon drawn by a span of horses, and traveling east on a public highway which crossed the track of the railroad; the track running somewhat in a northeasterly and southwesterly direction. In approaching the track from the west, a view of it could be had from a hill or small elevation some 100 yards distant. From the hill the road descends to a bridge, the eastern end of which is in the neighborhood of 180 feet from the track. George Alderson, the husband, was driving. The seat was on springs above the bed of the wagon, and the occupants rested their feet on the dashboard in front. Alderson was sitting on the right; his wife on the left, with a babe in her arms. The other child was riding in the wagon bed. As they attempted to drive across the railroad track, an engine drawing a train of passenger coaches, coming from the north, collided with the team, killing the horses, overturning the wagon, and injuring Mrs. Alderson and the child riding in the wagon bed. There were brush and high weeds growing along the roadway on the north side, extending from the east end of the bridge toward the railroad track; also along the railroad track from the roadway northward.

Alderson describes the manner in which the accident came about in substance as follows: That, in driving east, he came to the top of the raise west of the bridge; that from there they were in plain view of the track, and he looked both ways, and saw no indication of any train; that he came to the bridge, and at a point just as they were leaving it, but without stopping, he looked both ways and listened, and saw no train in either direction, nor did he hear any; that he drove on to within 20 to 30 feet, from where he was sitting in the wagon, of the railroad track, and stopped, and, not being able to see through the brush that had been allowed to grow up on the right of way, listened, and looked both ways; neither hearing nor seeing any train, he drove on, and just as his horses' fore feet stepped over the track, the first rail, he saw the train coming into the gap, 50 feet from the crossing; that he pulled back on his lines, but the engine struck the horses, doing the damage complained of; that no whistles were blown nor alarm given, except that the engine gave two little squeaks—an attempt to whistle—just as it struck the team. The team is described as moving at a smooth walk at the time. Alderson further testifies that just as one passes off the bridge there is an open space through which a plain view could be had for miles either way, but that the brush extended from there up to within 10 feet of the railroad track, completely obstructing the view to the north, the direction from which the train came; that he knew the schedule time of the train, and it was late in passing.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

Mrs. Alderson describes the experience thus: "After we crossed the bridge—when we came to the bridge, we could see through the bushes there. There is a little space there, and we could see through the bushes there; but we couldn't see no train, and we listened and looked both ways, and couldn't see no train. We went on about 20 to 25 feet, when we stopped there and looked both ways and listened; and we didn't see no train nor hear any, and we ventured on. We got the horses right to the track, and the fore feet over the track, when I noticed the train. I kept looking all the time, and I said: 'There's the train.' I didn't say that, excuse me; I said, 'Back'—that's the words—I said, 'Back,' and I went as high as the car. I seen the top of the car, and that's the last I remember." She further states that she kept looking along there, but did not see the train until it came to the cattle guards, which was the first time she could see it; that the trees and bushes and things extended up to within 10 to 12 feet of the railroad track, and up the track a quarter of a mile, and that these obscured their vision until they drove on the track. On cross-examination, she says they stopped within 20 to 30 feet of the track, and looked both ways and listened, and that she kept looking all the time, and saw nothing of the train until the horses' feet were on the track, and could hear nothing.

Dwinnell, a witness who was at the time in a field to the south of the public road, and a little east of the railroad track, testifies that he saw Alderson come down the road, and saw the train coming; that he was in plain view of both; that when Alderson came down and crossed the bridge, and had proceeded, according to witness' judgment, halfway to the railroad track, he halted his horses; that witness then turned east, and when he had gone two or three steps his attention was attracted by three short whistles of the engine, and, looking about, he saw Mrs. Alderson fall away from the wagon; that he heard no signal or warning whatever from the train until the three whistles were given as the collision took place; that at the time of the accident trees and brush were growing along the road and along the railroad right of way, and that "from where Mr. Alderson was he couldn't see anything; if he had been right at the track he could"; and that the brush came up within less than a rod of the track, in his estimation. On cross-examination, witness further states that, according to his judgment, Alderson was about halfway between the bridge and the railroad track when he stopped. Witness is sure that from where they stopped they could not see anything of the train—they could not see it through the brush; that they could see the train, if they were right up near the track, but they would have to get "right almost on the crossing" to do it.

Other witnesses corroborate these as to the trees and brush growing along the roadway and the railroad right of way, and as to the inability of persons traveling upon the public road at the time to see an approaching train coming from the north until very near the railroad track. Other testimony was also adduced tending to show that the engine gave no signal or warning of its approach to the road crossing, except the whistles given right at the time of the collision.

For the defense there was offered a series of five photographs, taken with the camera at the height of about 4 feet 6 inches from the ground. The first of the series was taken from a point in the center of the wagon road, 30 feet from the railroad track, looking towards the track. Two men can be seen on the track 720 feet north of the crossing. The second was also taken in the center of the wagon road, but 40 feet from the track, looking towards the east. The two men can be seen on the track to the north 900 feet distant. The third was taken 50 feet distant, looking back across the track. It shows the track back as far as the cattle guard north, which would be perhaps 50 feet from the road. The fourth presents a view with the camera a little farther away, and looking northeasterly. In this picture, also, are shown two men on the track, 900 feet north of the crossing. The fifth was taken from a position down the track 80 feet from the crossing, looking northward along the track. Such is, in effect, the testimony respecting the taking of these photographs. From a scrutiny of the photographs, it would appear that, from the wagon road as one approached the

track, for more than 30 feet westward, there was a clear view of the track looking northward.

George Howe, the locomotive engineer on the train, testified: "I whistled for the crossing at about the regular place, perhaps a little bit below, because our crossing whistling post is in a little close to the crossing, and when about, I should judge, halfway between that distance, I saw the team that came through a little gap that there is in the willows there, and that would perhaps leave me off 600 or 700 feet from the crossing, and I couldn't tell whether there was anybody in the wagon or not. I could see the team and wagon traveling through this little open space, and for fear that they didn't hear me I reached up and gave just a little crossing whistle, to simply call their attention before they would come out from behind the second clump of bushes. It wasn't a loud whistle; it was just an ordinary crossing whistle, which would consist of four low whistles; and at about the time I had blown that whistle I saw the horses' heads come out around the second clump of bushes, which would leave them, I should judge, about 40 feet from the track. Well, I was sure that they didn't see me, or else it was somebody that was going to be kind of smart, and drive up close to the track; but in order to warn them thoroughly, I reach up to open the bell ringer, but whether it rung I could not swear, because it happened so quick; but I took, and instead of letting go of the whistle, I commenced to whistle short successive blasts of the whistle, and when the team got within about 10 feet of the track I saw him, and I guess it was his wife, both looked up at me in this manner (illustrating), when the horses' heads were within I should judge about 10 feet from the track, and, instead of stopping, he reached over with the lines, they were slack, and commenced to whip his horses up. I commenced to whistle louder then, and at that time put on the emergency air to stop as quick as I could. I was perhaps 50 feet from them when I applied the air brakes—the full emergency. When he seen he couldn't get across, he stopped his horses and tried to back, as I judge, and swing them around to the right, and I struck the left horse on the shoulder. That's the last I seen, because I dodged back behind the boiler head, because I didn't know what would hit—because there is danger of things coming in through my window. I stopped as soon as I could, and went back and helped them." The train, in the judgment of witness, was going about 35 miles an hour. The whistling post is about 80 rods from the crossing, a little beyond which the track curves to the right looking northward. On cross-examination, witness states that he had always whistled for the crossing since he had been on the run, but that he forgot it sometimes. He was positive that he did not forget to whistle at this time. He testifies that he whistled again, a low crossing whistle, within 100 to 150 feet from the crossing, and then commenced to blow the successive whistles, which continued up to the collision. When he saw the team and gave the crossing whistle, they were 60 feet or more from the track, and the next time he saw them the horses' heads were "just coming from behind this second clump of bushes," and, according to his judgment, the bushes were at least 40 or 50 feet from the track. It was then that he began sounding the danger signal.

The conductor, W. E. Preston, heard only the alarm signal, and, looking out, first on one side of the train and then on the other, saw the wreck.

The brakeman, James L. Bates, was sitting in the smoking car, and heard the short blasts of the whistle sounded at intervals and a light application of the brakes, that being about three or four telegraph posts from the crossing, in his estimation 600 feet, from the crossing. He then walked to the rear of the car, got down on the step, and by that time the train had passed the crossing. When he opened the door and looked back, he saw the team, which had been struck by the engine. On cross-examination the witness says: "When he blew the first blast of the whistle, I sat at the window like this (illustrating) and looked out, expecting to see some stock; but he kept it up, so I went to the vestibule and opened the door and looked out."

The fireman, Dave White, was not sure that the engineer blew a whistle at the whistling post, but heard a whistle before they got to the crossing. He next heard a short alarm, and, seeing the engineer apply the emergency air, he looked out, but by that time they had hit the team.

H. L. Rogers, the express messenger on the train, says: "I heard only the sharp blasts of the whistle, the cattle alarm signal, the stock signal, and I didn't pay very much attention to it until he continued with it, and I ran to the door, the side door, of the express car, \* \* \* and as I got to the door I saw the team and wagon rolling away from the locomotive."

Louis C. Greenwood testified that he saw the place on the day of the accident, and then again on July 4th, two days thereafter, and that no change had taken place in the meanwhile. He further states that he had examined the place before that, and that the way was clear from the track to the telephone post westward, and some distance beyond—in his estimation, from 30 to 40 feet from the track. He saw the situation again in October, or some time after the accident, and the brush had been cut away.

Louis De Clark, the section foreman, testified that he was present on July 6th, when the photographs introduced by defendant were taken, and that there had been no change in the situation—no brush cut, or anything else, previous to that. He further testified that, in running down the track on a hand car, one could see a team for 40 or 45 feet before it got to the track.

A great deal of other testimony is to be found in the record; but this suffices to show its tendency, as bearing upon the questions of fact submitted to the jury for its consideration.

Edward J. Cannon, G. M. Ferris, and C. E. Swan, all of Spokane, Wash., for plaintiff in error.

W. H. Plummer and Henry Jackson Darby, both of Spokane, Wash., for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge (after stating the facts as above).  
[1] The first question insisted upon by counsel for defendant is that the court erred in permitting the plaintiffs to show that the alleged obstruction to the view of the railroad track from the public road had long subsequent to the accident been cut away by the railroad company. There was some evidence to that effect allowed to go to the jury, but it was neither offered nor received as an implied admission of the defendant's negligence in relation to the injury sustained by the plaintiffs. The first evidence of the kind was in relation to a photograph of the location offered by plaintiff, and it was to explain the photograph as compared with the condition at the time of the accident. And again, De Clark was cross-examined as to whether he had not cut the brush away in October—after he had said as much in his examination in chief. The trial court carefully charged the jury at the time that the fact that the railroad company may have cut the brush away after the accident was not material, and could have no bearing, directly or indirectly, except to explain in some manner the photographs taken. So that the court very carefully guarded the point at issue, and committed no error in the respect complained of.

[2] It is next contended that the trial court should have instructed the jury, as a matter of law, that the plaintiffs were not entitled to recover. The contention seems to be based upon two theories. One is, assuming that the obstruction to the vision existed, as plaintiffs claim, preventing them from seeing an approaching train from the north until within a few feet of the track, then that plaintiffs were guilty of contributory negligence in not observing ordinary care and

precaution in approaching the crossing. The track being obscured, it is urged that greater care would be required of the plaintiffs than if it were in plain view; in other words, that the care required to be observed is in proportion to the danger to be anticipated.

It is undoubtedly true that travelers upon the public highway, approaching a railroad crossing where passing trains are to be expected, are required to use their senses, of both seeing and hearing, to detect the approach of such trains, and that, when the track is obscured to the sight, greater care is devolved upon them in the use of their sense of hearing, because the capacity for detecting the danger has been diminished. In listening, they must be so disposed as probably to listen effectively; otherwise, still greater care should be observed by not venturing upon the track until it is ascertained that it will be clear—especially if trains are passing frequently. *Chicago & N. W. Ry. Co. v. Andrews*, 130 Fed. 65, 73, 64 C. C. A. 399; *Chicago, M. & St. P. Ry. Co. v. Bennett*, 181 Fed. 799, 104 C. C. A. 309.

[3] Alderson and wife say that the railroad track was obscured, by trees, brush, and weeds, from near the east end of the bridge in the roadway to within 10 or 12 feet of the track. That imposed upon them the precaution of stopping within a short distance of the track and listening for an approaching train. They say, also, that they could see the track from the little hill beyond the bridge, and again as they came off the bridge, and that at each of such points they looked both ways to ascertain if a train was approaching the crossing. Alderson knew the train passing south was late on its schedule time, which enjoined upon him special care, because anticipating that it might be along at any moment. Having passed beyond the range of view from near the bridge, both Alderson and Mrs. Alderson say they stopped within 20 to 25 or 30 feet of the track and listened for a train; hearing none, they drove upon the track. Dwinnell testifies that they stopped, he thinks, about halfway between the bridge and the track; that he turned to walk in a different direction, and that almost immediately he heard the short whistles, and then came the collision.

Stopping from 20 to 30 feet from the track would seem to be not too great a distance to listen effectively for the train; the noise of the wagon and clatter of the horses' feet having ceased. It does not appear that there were any other noises to drown the rumbling of the train. Alderson and wife having sworn that they stopped within that distance from the track, although in a measure contradicted by Dwinnell, it was for the jury to determine as to their credibility, and, furthermore, to determine, under proper instructions, about which there is no controversy, whether they used ordinary care, such as a person of ordinary prudence would exercise, in approaching and attempting to cross the railroad track at the time. We think, under the testimony, the care and prudence with which Alderson and wife approached the track before driving upon it was clearly a question for the jury, and it was not error for the court to leave it to them. This as it respects counsel's theory of an obstructed vision.

[4] Counsel's other theory is that plaintiffs' view of the railroad



track looking northward, from whence the train was approaching, was not obstructed at all for a distance of from 30 to 45 feet from the track, and that it was sheer negligence for them to drive on the track when they could readily have seen the moving train. It is argued with much earnestness that the series of photographs introduced by the defendant proves beyond controversy the situation of an unobstructed view, and therefore that a verdict for defendant should have been directed by the court. A scrutiny of these photographs would seem to indicate that there was an unobstructed view of the track, as claimed. Pictures, however, in themselves, like maps and diagrams, prove nothing without the human equation behind them. Says Mr. Wigmore:

"We are to remember, then, that a document purporting to be a map, picture, or diagram is, for evidential purposes, simply nothing, except so far as it has a human being's credit to support it. It is mere waste paper—a testimonial nonentity. It speaks to us no more than a stock or a stone. It can, of itself, tell us no more as to the existence of the thing portrayed upon it than can a tree or an ox. We must somehow put a testimonial human being behind it (as it were) before it can be treated as having any testimonial standing in court. It is somebody's testimony or it is nothing." 1 Wigmore on Evidence, § 790, p. 893.

And likewise the court, in *Baustian v. Young*, 152 Mo. 317, 323, 53 S. W. 921, 922 (75 Am. St. Rep. 462), in speaking of the probative effect of photographs, says:

"They are of the same character of evidence as diagrams and pictures drawn by hand; not necessarily carrying the same degree of probative force, but still of the same character; not in themselves evidence at all, but representing to the eye what the witness declares was the real appearance of the thing at the times he saw it. Diagrams, drawings, and photographs are resorted to only because the witness cannot, with language, as clearly convey to the minds of the court and jury the scene as the light printed it on the retina of his own eye at the time of which he is testifying."

In order to understand the photographs perfectly, it is necessary to get the viewpoint of the photographer, his distance from the scene, and the direction in which the instrument was looking; and it is here that the "human being's credit" supplements the picture. So we have, as a factor for the jury's consideration, the credibility of the witnesses who took or assisted in taking the pictures. And there is yet to be considered, along with these pictures and the human testimony that qualifies them as evidence, the testimony of other persons on the ground at the time, who observed as well the physical facts and their credibility. The plaintiffs, and several others corroborating them, say that the track was obscured up to within 10 or 12 feet of it. The witnesses behind the photographs say that it was not obscured for a distance of some 30 to 45 feet from it as one approached on the public road; and thus is presented a direct and irreconcilable conflict in the testimony. Such a case is generally, if not always, a proper one for the jury. It is not an unreasonable inference, deducible from some of the defendant's witnesses, that but one whistle was sounded by the engineer, which was the alarm signal, and that the collision came very soon thereafter. If the team had been sighted by the engineer, as he testifies, it would seem that he would have sounded a warning much

sooner. In this there is some corroboration of the plaintiffs' testimony upon the subject.

Upon the whole testimony, we are of the opinion that the case was properly submitted to the jury.

Affirmed.

POTLATCH LUMBER CO. v. ANDERSON.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1912.)

No. 2,124.

1. MASTER AND SERVANT (§ 270\*)—EVIDENCE—SIMILAR FACTS—DIFFERENCE IN TIME.

Plaintiff, who was employed by the superintendent of defendant lumber company while engaged in clearing roads in the woods, was struck and injured by a tree felled by other employes. He and another employe working near by testified that no warning was given by the choppers that the tree was about to fall, nor, when employed, were they notified of any rule requiring such warning, although there was testimony that such rule was customary in lumber camps, and that employes were usually instructed in respect to it. *Held*, that it was not error to admit the testimony of another employe to the same effect, although he was not working for defendant at the time, but had worked for it both before and afterward in different camps; such testimony being competent, as tending to show that defendant did not have or enforce such a rule.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.\*]

2. MASTER AND SERVANT (§ 286\*)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.

Where an employe of a lumber company, while engaged with others in clearing and making roads in the woods, was injured by a falling tree, cut by other employes, the questions whether the work was of such a hazardous character as to make it the duty of the company to promulgate and enforce rules requiring those cutting trees to give warning to the others when a tree was about to fall, and whether it performed such duty, were properly submitted to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

In Error to the District Court of the United States for the Northern Division of the Eastern District of Washington.

Action at law by John Anderson against the Potlatch Lumber Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Edward J. Cannon, G. M. Ferris, and C. E. Swan, all of Spokane, Wash., for plaintiff in error.

Nuzum, Clark & Nuzum, W. H. Plummer, and Henry Jackson Darby, all of Spokane, Wash., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. John Anderson, as plaintiff in the court below, defendant in error here, brought this action in the superior court of the state of Washington against the Potlatch Lumber Company, plaintiff in error herein, a corporation doing a logging and lum-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ber business in the state of Idaho, to recover damages by reason of personal injuries sustained by him while working for the lumber company. The complaint alleged that on April 11, 1910, Anderson was directed by the foreman of the lumber company to work on the road used for taking out logs cut by the company in its woods near Bovill, Idaho; that it was the duty of the lumber company to use ordinary care in furnishing plaintiff with a reasonably safe place to work, and to notify him of the proximity of any choppers cutting timber in and about the work, to the end that plaintiff might protect himself from dangers, and watch the trees and the choppers near him, and avoid injury by the falling of trees; that when he had arrived at the point where he was ordered to work by the lumber company, without any warning whatsoever, and without his knowledge of the proximity of any choppers or any danger, a tree, cut by one of the employes of the lumber company, fell and struck plaintiff on his shoulder. It was charged that the lumber company was negligent in failing to notify plaintiff of the proximity of the choppers, and in failing and neglecting to promulgate or enforce rules and regulations whereby their business might be safely conducted, so that plaintiff and other employes would be protected from danger.

On motion of the lumber company, which is a corporation organized under the laws of Maine, the action was removed to the then Circuit Court of the United States for the Eastern District of Washington. After removal to the federal court, the corporation answered, denying negligence on its part, and setting up contributory negligence on the part of Anderson in failing to keep out of the way of trees which he knew were about to fall, and which he had been warned were likely to fall at any moment. Assumption of risk and negligence of Anderson's fellow servants were also pleaded.

Replication was made, denying all the affirmative defenses. There was a trial before a jury, verdict in favor of Anderson, and judgment duly entered in his favor.

Anderson had been a miner for many years, but on or about the 9th of April, just before he was hurt, he engaged to work for the Potlatch Lumber Company. In the lumber camp, where he went, there were about 200 men at work. Some were cutting trees and brush, and some were clearing roads. Anderson was directed to brush and clean and make roads. He says that when he went to work no instructions were given to him about how to protect himself in any way, nor was he warned concerning dangers; that just before he was hurt he was working cutting brush on a side hill about 1,500 or 2,000 feet from the place where he was injured; that he was sent down the hill by the man who ran the gang; that he was sent there to fix up the road, which at that point was swampy and wet, but that within a minute or so after he reached there a tree fell on him, striking him on the shoulder and arm, knocking him senseless; that he did not see anybody cutting the tree; that there was a great deal of high brush about him; and that he could not see through the brush to where the men stood who were cutting down the tree which fell

upon him. Plaintiff was in the hospital for a long time, suffered greatly, and was paralyzed.

On cross-examination, it was developed that, many years before he was injured, plaintiff had worked in sawmills, but that his principal business had been mining; that, when he went to work for the Potlatch Lumber Company, he saw men sawing trees and doing things that are always done in lumber camps; that on the morning when he went to work on the hillside he was cutting brush to make a road by which lumber could be hauled out; that men about him were cutting trees, and that teams were hauling logs; that in the afternoon, just before he was hurt, he had come down to a point where he met a teamster; that he (referring evidently to the teamster) told him he wanted him to fix the road, and that he showed him and pointed to the road; that at that time he heard a crack in the brush, looked up, and felt "the breath of the tree," and ran, but knew nothing more about the accident.

Felix Anderson, a fellow employé of John Anderson, an experienced woodsman, testified that he saw the tree fall on Anderson; that two men, foreigners, were chopping it; that he was on the hillside only 30 or 40 feet away, but heard no warning given to anybody that the tree was about to fall; that the tree was about 12 inches at the stump; that, when he and John Anderson went to work, they were never told anything of the dangers of the particular situation about the camp, nor was any information given to them about rules with reference to giving warning by people who were chopping trees to others who might be injured. This witness testified that he had worked in many of the lumber camps in Idaho, and that it was customary for warning to be given when a tree is about to fall, but that no instructions had been given by the Potlatch Lumber Company; that he himself always gave a warning whenever he felled a tree, by shouting "Timber! Timber!"

Another witness for Anderson testified that he had had much experience in lumber camps, and that the general custom is for the foreman to tell the men who are about to fall timber to be careful about teams and men who are working around, and that when they fall a tree to be sure and give a warning, the customary word being "Timber!" and that anybody who is a woodsman, and works in the woods, and hears that word, is supposed to know that a tree is going to fall.

Robert Chapman, a practical "lumber jack," who worked in the woods for many years, testified that he worked for the Potlatch Lumber Company in March, 1911, for a few days, and later in August or September, and in October, all apparently after Anderson was hurt, and in September, 1909, which was before Anderson was hurt. He said that there were no rules or regulations in the Potlatch camp; that sometimes warning would be given, and sometimes not; that some of the foreigners—Montenegreins and "Bohunks" or Bohemians—would give no warning; that when he went to work for the lumber company he was not given any instruction, and knew of no rules; that the custom of lumber camps was for any foreman to notify the men,

when they were about to fall a tree, to watch out for men and their teams.

On behalf of the defendant, Thomas P. Jones, the superintendent of the woods department of the Potlatch Company, testified that he had employed Anderson, but did not remember whether he ever talked with him of the danger of being hurt, but that Anderson had said that he had worked in the woods more or less for 26 years; that it was the custom of the camp to instruct foremen to warn the men when cutting timber, in order to give everybody opportunity to get out of the way before a tree falls, and to shout "Timber!" or "Under!" that the sawyers cut the trees; that after Anderson was injured, witness had had a talk with him, and that Anderson then made the statement of his experience as a woodsman; and that at the interview a representative of the counsel for the lumber company wrote a statement, which Anderson signed after reading it over.

Robert A. Jones, the foreman in charge of the gang at camp No. 4, where Anderson was hurt, testified that he told Anderson to go to work "swamping," after Anderson had told him that he had "swamped," and could "swamp" better than he could do anything else in the woods; that the custom was to tell sawyers to hollow and warn men when a tree was about to fall; that he gave such instructions to sawyers and "swampers"; that the two men who were felling trees when Anderson was hurt were foreigners; that the sawyers were working toward the men who were fixing the road.

The teamster referred to by the injured man testified that he was driving a team and saw the tree fall; that he hollowed to Anderson to watch out; that Anderson started, but that the tree hit him before he got out of its way; that there was nothing to prevent Anderson's seeing the tree from where he stood; that there was nothing except a little brush to interfere with Anderson's seeing the men who felled the tree which hurt him.

On rebuttal, John Anderson said that he could not read English.

[1] The lumber company assigns that the court erred in permitting the witness Robert Chapman to testify, over defendant's objection, that there were no rules or regulations adopted or enforced with reference to warning when trees were about to fall in camp No. 7 of the defendant, six months prior to the accident, for the reason that camp No. 7 was not the camp in which plaintiff was working at the time of the accident, being several miles distant therefrom, and under the charge of another and different foreman; also that the court erred in permitting the witness Chapman to testify, over defendant's objection, that there were no rules or regulations adopted or enforced with reference to warning when trees were about to fall in camp No. 4, during the month of March, 1911, for the reason that this was nearly one year after the accident, and was not competent or admissible.

The point can only be made clear by recalling these things: Anderson was injured April 11, 1910; but his case was not tried until November, 1911, or 19 months after his injury. Now at the trial, in

November, 1911, Chapman was asked to state what times he worked for the Potlatch Company. He answered:

"I worked for them last March a few days under Mr. Jones, at camp No. 4, and I worked there this summer a few days in August or the month of September, and a few days in October."

When asked whether he was working "there" when Anderson got hurt, he said he was not. Then came this testimony:

"Q. How long before that had you been working there? A. I worked there two years ago this last September. Q. How close up to the time that he got hurt did you quit there? A. Well, that was in the fall. I think it was in October I quit, and he did not get hurt until September [April]. Q. Did you work there in March, 1910? A. No; I didn't, then. Q. But you worked there after he got hurt, I believe? A. Yes, sir; I worked there last summer. Q. Now, Mr. Chapman, just describe how, when you worked there, was the work carried on down there in this camp, with reference to cutting timber and felling trees."

Objection was made, upon the ground of irrelevancy, immateriality, and incompetency, in that it did not appear that Chapman worked in the camp in question prior to the accident, nor until a long time afterwards. The court sustained the objection, saying that negligence could not be proved by some acts at some other time or place, even though by the same party. Thereupon counsel for Anderson said that he was not trying to prove negligence in respect to the particular act by proving some particular time, but was only trying to show the custom "down there," and the system used in camps; "in other words, to show there wasn't any system." Thereupon plaintiff offered to prove by the witness Chapman that during the fall of 1909,

"during the time the plaintiff was injured, he worked in the same camp among the men in the same class of work, and that at that time there was no system of rules there adopted or enforced to protect the men from being injured by the falling of trees, and that he worked there after the time during the same year that plaintiff was injured, when like conditions existed."

The offer was rejected. Plaintiff rested. Defendant moved for a verdict. The judge denied the motion for a directed verdict, and then stated that he believed the testimony of Robert Chapman with reference to the custom prevailing in the different camps, and which he had refused to admit, was relevant, and could be presented. Thereupon Chapman was recalled, and his testimony was received over the objections which had theretofore been made to the testimony, which were deemed applicable without restatement of such objections. Chapman was then asked this question:

"State how the work was carried on at this camp that you speak of, of the Potlatch Lumber Company, during the time that you worked there for them, before the injury to the plaintiff and afterwards, with reference to giving warning to men who might be injured by the falling trees. Just state how the work was carried on among the men."

Chapman replied that there were no rules or regulations at all. Witness was then asked whether "in this camp" it was ordinarily customary to give a warning. He testified:

"Sometimes those fellows would give you a warning, but more times they wouldn't. A certain class of people they wouldn't do it. Q. What class do

you mean? A. Those Bohunks, Montenegrins. \* \* \* Q. And when these men would be falling these trees that you speak of, and wouldn't give any warning, or sometimes they would and sometimes they wouldn't, state whether or not Jones was around there with the men and see that. A. Most generally he was around all the time."

Witness also said that when he went to work there he was not given any instructions with reference to rules of the camp, and did not know of any rules. On cross-examination, Chapman said that he worked as a "swamper" last March, meaning March, 1911, under Robert Jones, and that, when he worked for the Potlatch Lumber Company before, he worked for Paul Gill, in camp 7, in charge of Gill. Counsel for the lumber company then carried on the examination:

"Q. Then you did not work in camp 4 until this summer? A. This last March. Q. And this man who was hurt was hurt more than a year before that; you know that, don't you? A. Yes, sir. Q. So that a little over a year after the man was hurt you worked for Robert Jones in his camp? A. Yes, sir. Q. And that's the only time you worked for Jones? A. That's the only time I worked for the man; yes, sir. Q. And that's the only time you ever worked at camp 4? A. Yes, sir. Q. How far was camp 7 from camp 4? A. I should judge about three miles. Q. About three miles away? A. Two or three miles. Q. How long did you work in March for Jones? A. I should think seven or eight days is all. I couldn't say whether it was seven or eight days. It was not any more."

We gather from the whole testimony of Chapman that the only time he worked in camp No. 4, where Anderson was injured, was in March, 1911, which, of course, was nearly a year after the accident. The confusion in his evidence arose because of the use of the adverb "there" in the questions put, which do not seem to have clearly specified camp 4. But counsel for the defendant company (plaintiff in error here) evidently drew the correct inference from the testimony, and the ruling of the court was based upon the understanding that Chapman had not worked in camp 4, at least recently, before Anderson was hurt. As we read the record, Chapman before the accident had worked at camp 7, which belonged to the Potlatch Lumber Company, but which was two or three miles away from camp No. 4. As we look upon the matter, however, it is not of special importance to determine just what particular time Chapman worked for the defendant company, because, conceding that he had never worked in camp 4 until nearly a year after the injury, it was not error for the court to permit him to testify that at that time there were no rules in force there; nor was it error to permit him to say that there were no rules or regulations concerning the conduct of men in felling trees in camp 7, although he only worked in that camp before the accident under investigation. Both camps were operated by the defendant in its system of lumber and logging camps. Camps 4 and 7 were only two or three miles apart, and Thomas P. Jones, who was called by the defendant, stated that he had been the superintendent of the woods department, and of the logging operations and camps of the corporation, and had employed the injured man. Plaintiff had testified that when he went to work he had never been given

any instructions about looking out for warnings of men who were felling timber, and Felix Anderson had testified that he had never had any information or instructions of such a kind. This constituted evidence which tended to prove that no rules upon that point had been promulgated by the lumber company, and we believe that it was competent for the plaintiff to show lack of system with respect to the giving of any such warnings, both before and after the accident, as circumstances bearing upon the probability of the truth of the proposition that there were no rules in existence at the time of the injury to Anderson. What weight was to be attached to such testimony became a question for the jury; but that it was competent, upon the principle that, when the existence of a condition at a given time is in issue, the prior existence of it, and the subsequent existence of it, afford some indication of its existence at the time in issue, seems quite clear. The remoteness of the times did not necessarily make the evidence inadmissible.

In referring to considerations which affect the use of subsequent existence as evidence of existence at the time in issue, Professor Wigmore, in section 437 of his work on Evidence, says:

"Here the disturbing contingency is that some circumstance operating in the interval may have been the source of the subsequent existence, and the propriety of the inference will depend on the likelihood of such intervening circumstances having occurred and been the true origin."

He then says that no fixed rule can be prescribed as to the time or the conditions within which a prior or subsequent existence is evidential, and that the matter should be left entirely to the trial court's discretion.

In *Kennon v. Gilmer*, 131 U. S. 22, 9 Sup. Ct. 696, 33 L. Ed. 110, the plaintiff, who had been injured in a stagecoach accident, introduced evidence tending to show that one of the leading horses in the defendant's stagecoach had been fractious and vicious on different occasions before the accident, and that on one occasion, 20 months after the accident, this same horse, when being driven in a buggy, kicked and broke the pole, and tried to run away. In discussing the objection to such evidence, Justice Gray, for the court, said:

"But evidence of subsequent misbehavior of the horse might properly be admitted, in connection with evidence of his misbehavior at and before the time of the accident, as tending to prove a vicious disposition and fixed habit, and to support the plaintiff's allegation that the horse was not safe and well broken. The length of time afterwards to which such evidence may extend is largely within the discretion of the judge presiding at the trial."

We find no error in the exercise of the discretion of the court.

[2] Error is assigned because the court held that it was for the jury to say whether or not the work in which Anderson was engaged was of such a hazardous character as to require the promulgation and enforcement of rules and regulations for carrying it on. The argument is that the work was not complex, in that it was but one crew, all of the men working in the same immediate vicinity, and all engaged in the cutting down of "small" trees and the



building of a corduroy road. We are of the opinion, however, that, when the situation as developed by the evidence is considered, it is clear the court in no way erred, at least against the lumber company, in deciding that the case stood upon "middle ground," where the question of necessity for rules and their enforcement became one of fact. The company had from 150 to 200 men working in the camp near to and about the place of the accident. Some were sawing, some were cutting brush, others were making roads, and others driving teams. A reading of the evidence justifies the view that the business was of a kind and extent where customarily there are rules for the protection of men whose safety may be endangered by the act of felling trees. The lumber company itself introduced witnesses to show that it followed a practice of instructing sawyers and "swampers" to warn men to look out for falling timber. This evidently was upon the theory that the work was of sufficiently hazardous a character to make such rules proper. It is but a fair observation that it would be unreasonable to expect a man in a crew of "swampers" to do his work of cutting down brush, and at the same time to protect himself against the danger of trees cut by men in another crew very near by falling upon him, unless the men cutting the trees, or some one knowing the danger, would give him warning.

There was no dispute over the general rule of law that, where a master is engaged in a complex or hazardous business, he must promulgate and adopt such rules and regulations for the conduct of his business and the government of his servants in the discharge of their duties as will afford reasonable protection to them, and that it is the duty of the master to use reasonable care to see that the rules adopted by him for the safety of his servants are complied with, and that if he fails to do so he will be responsible for injury resulting from failure of compliance. Nor was it disputed that the duties just specified are positive obligations imposed upon the master by law, and that he is liable for the negligent performance of such duties, whether he undertakes their performance personally, or delegates them to another.

It was a question of fact for the jury to determine whether or not the company adopted such rules, provided, of course, they found that the business was a hazardous one, which required the adoption and promulgation of rules. Furthermore, it was for the jury to say whether, if the rules were adopted, the lumber company exercised reasonable care to see that they were enforced. *Nelson v. Southern Ry. Co.*, 158 Fed. 92, 85 C. C. A. 560. *Olsen v. North Pacific Lumber Co.*, 100 Fed. 384, 40 C. C. A. 427, decided by this court, is not like the present case, for the reason that the facts are very different, and there was no evidence there that it was customary in sawmills to direct employ  s by special rules.

Finding no error prejudicial to the rights of the lumber company, and holding that the court properly refused to direct a verdict in its behalf, the judgment of the lower court will be affirmed.

So ordered.

## UNITED STATES v. TSUJI SUEKICHI.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1912.)

No. 2,044.

**1. HABEAS CORPUS (§ 23\*)—EXCLUSION OF ALIENS—RIGHT TO WRIT.**

Habeas corpus affords an efficient remedy against the action of immigration officers, where they exceed their power or authority, although their decisions on questions of fact is final and not reviewable.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 17; Dec. Dig. § 23.\*]

**2. ALIENS (§ 53\*)—IMMIGRATION ACT—CONSTRUCTION.**

The term "aliens," as used in Immigration Act Feb. 20, 1907, c. 1134, 34 Stat. 898 (U. S. Comp. St. Supp. 1911, p. 499), applies only to alien immigrants, and not to alien residents.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 53.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 299-301; vol. 8, p. 7571.]

**3. ALIENS (§ 40\*)—EXCLUSION—CONSTRUCTION OF IMMIGRATION ACT.**

The provision of Immigration Act Feb. 20, 1907, c. 1134, § 3, 34 Stat. 899, as amended by Act March 26, 1910, c. 128, § 2, 36 Stat. 264 (U. S. Comp. St. Supp. 1911, p. 502), for the deportation of any alien who shall be convicted of importing any alien woman for purposes of prostitution, etc., and prohibiting his return, is not retroactive, and does not apply to an alien convicted of such offense under the statute before its amendment.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 100; Dec. Dig. § 40.\*]

Appeal from the District Court of the United States for the Territory of Hawaii.

Habeas corpus by Tsuji Suekichi. From an order discharging petitioner, the United States appeals. Affirmed.

This is a proceeding by writ of habeas corpus, on the petition of Tsuji Suekichi, the appellee, a subject of the Emperor of Japan. The petitioner migrated, and was admitted to the territory of Hawaii July 27, 1906. He took up his domicile in Honolulu, and so continued until September 26, 1910, when he departed for Japan on a short visit, with intention of returning to Honolulu and continuing his domicile there. Petitioner was lawfully married in Japan to Masa Tsuji, a Japanese woman. Masa Tsuji arrived in Honolulu about August 28, 1906, and took up her domicile there also; the husband and wife residing together. The wife did not accompany Suekichi to Japan. Petitioner returned to Honolulu about June 17, 1911, but on his arrival he was refused landing by the United States immigration inspector. A Board of Special Inquiry was called, to determine the question of his right to land, and, after a hearing, it was ordered that he be rejected and sent back to Japan as a person convicted of a crime involving moral turpitude. Being held for deportation, Suekichi invokes the writ of habeas corpus for his discharge, having waived his right of appeal from the findings of the Board of Inquiry. It appears from a supplemental return of the inspector in charge that Suekichi was, on April 18, 1909, indicted in the District Court of the United States for the Territory and District of Hawaii, for the offense of importing and harboring for the purposes of prostitution an alien woman, to wit, the wife of Suekichi, that on the same day he pleaded guilty thereto, and was sentenced to imprisonment for the term of three months, and has since duly served his sentence. This the petitioner admits. The District Court discharged the petitioner, and the United States appeals.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

Robert W. Breckons, U. S. Atty., of Honolulu, Hawaii, Robert T. Devlin, U. S. Atty., and Benjamin L. McKinley, Asst. U. S. Atty., both of San Francisco, Cal.

J. Lightfoot, of Honolulu, Hawaii, for appellee.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge (after stating the facts as above). [1] It is first insisted by the government that the finding and judgment of the Board of Special Inquiry is final and conclusive, and that habeas corpus will not lie for the relief of the petitioner. While it is true that habeas corpus will not lie to correct the errors of tribunals intrusted with special matters of inquiry, it has always been held to afford an efficient remedy against the action of such tribunals, where they exceed their power or authority, or proceed upon an erroneous interpretation of the law. As to questions of fact, their findings are final, and preclude further inquiry. *United States v. Jung Ah Lung*, 124 U. S. 621, 8 Sup. Ct. 663, 31 L. Ed. 591; *Nishimura Ekiu v. United States*, 142 U. S. 651, 660, 12 Sup. Ct. 336, 35 L. Ed. 1146; *Gonzales v. Williams*, 192 U. S. 1, 24 Sup. Ct. 177, 48 L. Ed. 317. In the *Ekiu* Case the court makes use of this specific language:

"An alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful."

And in the *Gonzales* Case the court says:

"If she [*Gonzales*] was not an alien immigrant, within the intent and meaning of the act of Congress, \* \* \* the commissioner had no power to detain or deport her; \* \* \* and in the present case, as *Gonzales* did not come within the act of 1891, the commissioner had no jurisdiction to detain and deport her by deciding the mere question of law to the contrary."

[2] The next question presented is, the petitioner having once been regularly admitted to the territory of Hawaii, and having acquired a domicile there and lived there for several years, and having gone on a short visit to his native country, with an intention of returning to Hawaii, whether he can lawfully be excluded from the territory on application for admission on his return, although he committed an offense in the territory involving moral turpitude prior to his visit to his native country. The question involves a construction of Act Feb. 20, 1907, c. 1134, 34 Stat. 898 (U. S. Comp. St. Supp. 1911, p. 499), as it respects the signification of the term "aliens" as employed therein, and also a construction of Act March 26, 1910, c. 128, 36 Stat. 263 (U. S. Comp. St. Supp. 1911, p. 501), as it may affect the present subject of inquiry.

The act of 1907, *supra*, is amendatory of Act March 3, 1903, c. 1012, 32 Stat. 1213, and this latter was likewise amendatory of Act March 3, 1891, c. 551, 26 Stat. 1084 (U. S. Comp. St. 1901, p. 1294), all treating of the same subject-matter. "The act of 1891," as is said by this court in *United States v. Nakashima*, 160 Fed. 842, 844,

87 C. C. A. 646, 648, Gilbert, Circuit Judge, speaking for the court, "had uniformly been held to apply solely to alien immigrants, and not to affect the rights of alien residents." Such being the interpretation of the term "aliens," as used in the act of 1891, the question presented in the Nakashima Case was whether a different signification should be given to the same term as employed in the amendatory act of 1903. After a careful review of the amendatory act, the court held that it was not the intent of Congress to change the signification of the term, and that it retained the same meaning as had been formerly accorded it by interpretation of the courts. In that sense it pertained to alien immigrants, not alien residents.

A like question is presented here, which is whether the same term as used in the act of 1907 retains the same signification. From a careful reading of the two acts one with another, there appears to be no greater reason for giving to the term any different meaning than is accorded to it in the acts of 1891 and 1903. The Nakashima Case is therefore controlling, in that phase of the controversy.

[3] But it is further insisted that, inasmuch as the act of 1910 (section 3) denounces the act of any alien who shall be found an inmate or connected with the management of a house of prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of a prostitute, and declares that such alien shall be deemed to be unlawfully within the United States, and shall be deported in the manner provided by sections 20 and 21 of the act, and further declares that any alien who shall, after he has been debarred or deported in pursuance of the provisions of said section 3, attempt thereafter to return or to enter the United States, shall be deemed guilty of a misdemeanor, and that any alien who shall be convicted under any of the provisions of the section shall, at the expiration of his sentence, be taken into custody and returned to the country whence he came, in the manner provided by sections 20 and 21 of the act, Suekichi was lawfully rejected, because he had been convicted of the offense of importing and harboring an alien woman for the purposes of prostitution.

Said section 3 denounces the importation into the United States of any alien for the purpose of prostitution; but it does not denounce the harboring of any alien for like purpose, except it be in pursuance of such importation. The act of 1907 made it an offense to harbor for the purpose of prostitution any alien woman or girl; but this part of the act was declared unconstitutional, as inimical to the police powers of the state, in *Keller v. United States*, 213 U. S. 138, 29 Sup. Ct. 470, 53 L. Ed. 737, 16 Ann. Cas. 1066, and the amendatory act (section 3) purged the old statute of this objection. The petitioner was convicted under the old act, and not under section 3 of the act of 1910, because conviction was had before the latter act became a law. Now the question is whether he should be denied admission, on his return to Hawaii, because of

the commission and conviction of the offense with which he was then charged. It will be noted that, while the present statute maintains the same penalty for importing an alien into the United States for immoral purposes, it has added to the ignominy of the offender. It deems him unlawfully within the United States, and subjects him to deportation; and this applies to an alien attempting to re-enter the United States after being absent temporarily. No such consequences followed under the old law.

It is perfectly manifest, from a careful reading of the amendatory act, that it is not intended to be retroactive. It prescribes that any alien who shall do the things therein denounced shall be deemed to be unlawfully within the United States, looking to the future. Then it provides that any alien who shall, after he has been debarred or deported in pursuance of the provisions of this section (section 3 of the act of 1910), attempt to return or to enter the United States, shall be deemed guilty of a misdemeanor, and any alien who shall be convicted under any of the provisions of this section shall at the expiration of his sentence be taken into custody and returned to the country whence he came, etc., all providing with reference to future conduct, and not in any way relating to what has been done in the past.

"Words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied." *United States v. Heth*, 3 Cranch, 399, 2 L. Ed. 479; *United States v. North German Lloyd S. S. Co.* (C. C.) 185 Fed. 158, 162.

Applying the rule here, there can be no doubt that it was not the intendment of Congress to make section 3 of the act of 1910 retroactive in its operation. It therefore cannot affect the petitioner in the present controversy, and he was entitled to re-enter the territory, being an alien resident, not an alien immigrant, notwithstanding he had been convicted of the offense of importing into and harboring within the United States an alien woman for immoral purposes; the conviction having been had prior to the adoption of the amendatory act.

The judgment of the District Court will be affirmed; and it is so ordered.

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WARREN v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. October 7, 1912.)

No. 2,244.

**BANKRUPTCY (§ 485\*)—OFFENSES—CONCEALMENT OF ASSETS—LIMITATIONS.**

Where all of a bankrupt's acts in reference to property alleged to have been concealed from his trustee occurred at a time more than 12 months prior to the finding of the indictment, the offense of concealment could not be regarded as a continuing one; and, the bankrupt having done nothing during the 12 months period except to remain passive and silent,

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 199 F.—48

a prosecution was barred by Bankr. Act July 1, 1898, c. 541, § 29d, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), providing that a person shall not be prosecuted for any offense arising under the act, unless the indictment is found or information filed within a year after the commission of the offense.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 906, 908; Dec. Dig. § 485.\*]

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

John Ira Warren was convicted of willfully concealing certain property from his trustee in bankruptcy, and he brings error. Reversed and remanded.

W. B. Grant and Chandler C. Luzenberg, both of New Orleans, La., for plaintiff in error.

W. J. Waguespack, Asst. U. S. Atty. (Charlton R. Beattie, U. S. Atty., and Louis H. Burns, Asst. U. S. Atty., on the brief), for the United States.

Before McCORMICK and SHELBY, Circuit Judges, and MAXEY, District Judge.

SHELBY, Circuit Judge. On November 18, 1908, the plaintiff in error—hereafter called the defendant—filed his voluntary petition in bankruptcy and his sworn schedule of assets and liabilities, and was adjudged a bankrupt. On December 9, 1908, William C. Lovejoy was qualified as trustee of his estate. The indictment was found on December 18, 1909, more than 12 months after the filing of the petition and schedules and the adjudication, and more than 12 months after the appointment of the trustee. The indictment in due form charges a violation of section 29b (1) of the Bankruptcy Act of 1898—that the defendant, “on or about the 10th day of January, 1909, and continuously thereafter \* \* \* knowingly, willfully, and fraudulently concealed” from the trustee 50 tons of commercial fertilizer, wire fencing, and other described assets of the bankrupt’s estate.

The evidence as to the defendant’s acts in reference to the property all relate to a period prior to his filing his petition in bankruptcy, and, therefore, to a period more than 12 months before the finding of the indictment. It was in September or October, 1908, that the defendant disposed of the fertilizer and barbed wire under circumstances that the government contends constituted concealment. After selling the property—fairly, as he claims; fraudulently, as the government contends—he did nothing else whatever in reference to it. More than 12 months before the indictment was found he did the things relied on as constituting concealment. Within the 12 months before the indictment he did nothing but remain passive and silent. He did not schedule the alleged concealed property, but the schedules omitting it were filed more than 12 months before the indictment.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep’r Indexes

On these undisputed facts the defendant claims that the charge is barred by the provision of the statute that—

“a person shall not be prosecuted for any offense arising under this act unless the indictment is found or the information is filed in court within one year after the commission of the offense.” Bankruptcy Act of 1908, § 29d.

The contention of the defendant is that the record, without dispute, shows that the date of the indictment—December 18, 1909—was more than 12 months “after the commission of the offense,” if any offense was committed, because all of the acts of the defendant in reference to the property were performed more than 12 months before the indictment. The United States attorneys, in the forcible argument presented for the government, contend that the offense charged is a continuing offense, and that the statute of limitations does not begin to run until the termination of the concealment “or until the bankrupt has abandoned his effort to conceal the property”; that as long as he “fails to notify the trustee of the whereabouts of the property, the concealment continues, and there is no statute of limitations to prevent the prosecution.” The correctness of this contention must be judged in connection with the facts disclosed by the record. The defendant made no “efforts”—that is, did nothing—to conceal the property within 12 months before the indictment. The acts proved, relied on as concealment, were all of date more than 12 months before the indictment. The government’s contention, therefore, must fall, unless the mere silence and passivity of the defendant after the alleged concealment makes the crime a continuing one, so that, to quote the brief, “there is no statute of limitations to prevent the prosecution.” We cannot concede that such is the case. The government, to avoid the statute, should have begun the prosecution within 12 months after the commission of the acts constituting the offense.

If the contention of the government were correct, the statute of one year, while in terms it is made to apply to cases of concealing assets, would in practice seldom have any application. Twenty years after the appointment of the trustee the bankrupt could be prosecuted for concealing assets, and the government could prove that he had purchased certain goods shortly before bankruptcy, that such goods were not surrendered, and then, by proof of some circumstances from which the jury might determine that there had been concealment, have a case sufficient to go to the jury. Twenty years having elapsed, the defendant’s witnesses might be gone or dead, and even his own memory might fail him in making a satisfactory explanation. When the trustee is appointed, he has title to the assets and should take possession. The creditors are interested that he should do so. The schedules show what property is surrendered by the bankrupt. If it is to be claimed that he has fraudulently and knowingly concealed a part of his estate, in fairness to the bankrupt the charge should be brought within 12 months after the unlawful act. The statute plainly so reads. Ordinarily, and in this case, there is no reason why the prosecution could not have been begun within the year.

It is true that there may in some cases be difficulty in showing when

the act or series of acts occurred which made the crime complete; but when the property is knowingly and fraudulently concealed from the trustee—a fact that may be proved like any other fact—the bankrupt is liable to prosecution and the statute of limitations begins to run. In other words, it runs from the time of the commission of the offense.

There are certain conspiracies where the statute would not begin to run when the conspiracy is completely formed, because the plot contemplates the bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators. In such case the crime contemplates something to be done in the future to forward the criminal purpose. *United States v. Kissel*, 218 U. S. 601, 607, 31 Sup. Ct. 124, 54 L. Ed. 1168. Even in conspiracy cases, the time the statute begins to run depends on the character of the conspiracy. The conspiracy accomplished, or having a distinct period of accomplishment, is unlike one that is continuous. *Hyde, et al. v. United States*, 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114.

If the indictment here were for a conspiracy to conceal property of the bankrupt from the trustee, and contemplated continuous acts in which the conspirators were to co-operate to carry out the criminal intention, the statute of limitations would not begin to run at the completion of the conspiracy; for the offense charged would be continuous, contemplating continuous future action to complete the crime. But here we have no such charge and no such proof. The defendant is charged with the act of fraudulently concealing certain property. The fact that concealed property remains concealed does not continue the offense of concealing it, for "continuance of the result of a crime does not continue the crime." The murdered man continues to be dead, but that does not make his murder a continuing offense.

The case at bar, we think, is controlled in principle by *United States v. Irvine*, 98 U. S. 450, 25 L. Ed. 193. That case was an indictment against an attorney for withholding pension money. He pleaded the statute of limitations of two years. The government replied:

"You received the money. You have continued to withhold it these 20 years; every year, every month, every day, was a withholding, within the meaning of the statute."

But the court held:

"We do not so construe the act. Whenever the act or series of acts necessary to constitute a criminal withholding of the money have transpired, the crime is complete, and from that day the statute of limitations begins to run against the prosecution."

The court said:

"A refusal to pay on demand without just excuse would constitute a withholding at once."

If the defendant before bankruptcy concealed property, and kept it concealed till after bankruptcy and the appointment of a trustee, and failed to surrender it, he would violate the statute, although the



initial concealment was before he was a bankrupt. *Alkon v. United States*, 163 Fed. 810, 90 C. C. A. 116; *Cohen v. United States*, 157 Fed. 651, 85 C. C. A. 113. And the statute limiting the prosecution would run "from the commission of the offense." Each case must depend on the facts showing the act or series of acts constituting the alleged offense. But, manifestly, the offense was completed, if the property was concealed knowingly and fraudulently before bankruptcy, and, on the appointment of a trustee, the bankrupt failed to surrender it or to disclose the disposition he had made of it. It is suggested that the record does not show that the trustee demanded the concealed property. But the statute vested the trustee with title, and made it his duty to take possession and to seek to get possession of the bankrupt's estate. It has been held that the court may presume that a demand was made when the situation of the parties is such as to render it improbable that it would be neglected. *Wood on Limitation of Actions*, § 118. In civil actions on contract the statute of limitations ordinarily begins to run from the time the right of action accrues and there is a party in existence to sue; in actions of tort the statute runs from the date of the tort; and, as a general rule, in criminal cases, the statute of limitations begins to run when the crime has been committed.

We find nothing in the record, or in the nature of the offense charged, to take this case out of the general rule. If it be conceded, therefore, that there was evidence tending to show that the defendant concealed the property within the meaning of the statute, there is no evidence that such concealment was within 12 months before the finding of the indictment.

The rulings of the trial court do not conform to this view, and it follows that the judgment must be reversed, and the cause remanded for further proceedings conforming to this opinion.

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CITY OF KANKAKEE v. AMERICAN WATER SUPPLY CO.

(Circuit Court of Appeals, Seventh Circuit. April 23, 1912.)

No. 1,862.

**1. COURTS (§ 489\*)—JURISDICTION OF FEDERAL COURTS—REMEDY IN STATE COURT.**

*Hurd's Rev. St. Ill.* 1909, c. 24, § 267f, after authorizing city councils, by ordinance, to fix maximum water rates, provides that, in case the corporate authorities fix unjust and unreasonable charges, the same may be reviewed and determined by the circuit court of the county in which the city is located. *Held* that such section, in so far as it attempted to confer powers on the courts to review the reasonableness of rates so fixed, was in violation of *Const. Ill.* art. 3, relative to the distribution of powers of government, that the legislative function of rate-making ended in the city council; and hence, alleged confiscatory rates having been adopted by a city ordinance, the water company, subject thereto, was not bound to apply to the local court for review before instituting injunction

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\*For other cases see same topic & § NUMBER in *Dec. & Am. Digs.* 1907 to date, & *Rep'r Indexes*

proceedings in a federal court of concurrent jurisdiction to restrain the enforcement of the ordinance, on the ground that it amounted to a taking of its property without due process of law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324-1341, 1372-1375; Dec. Dig. § 489.\*]

Conflict of jurisdiction of federal courts with state courts, see note to Louisville Trust Co. v. City of Cincinnati, 22 C. C. A. 356.]

2. **WATERS AND WATER COURSES (§ 203\*)—WATER RATES—RIGHT TO RELIEF—REVIEW BY COURTS.**

Where complainant water company claimed that a city ordinance fixing water rates was confiscatory, and, if enforced, would constitute a taking of complainants' property without due process of law, it was not bound to delay injunction proceedings until the ordinance had been in fact carried into effect and its confiscatory character demonstrated by actual operation, but was entitled to sue at once, assuming the burden of proving that the operation of the ordinance would necessarily be so confiscatory as to violate the federal Constitution.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 290-299; Dec. Dig. § 203.\*]

3. **INJUNCTION (§ 151\*)—TEMPORARY INJUNCTION—TRIAL.**

A full trial on the merits is not required on the hearing of an application for a temporary injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 336; Dec. Dig. § 151.\*]

4. **APPEAL AND ERROR (§ 954\*)—INJUNCTION (§ 135\*)—REVIEW—MATTERS OF DISCRETION—ISSUANCE OF TEMPORARY INJUNCTION.**

Issuance of a temporary injunction is largely within the discretion of the trial court, the exercise of which will not be reversed unless a clear abuse of discretion appears.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3818-3821; Dec. Dig. § 954; Injunction, Cent. Dig. § 303; Dec. Dig. § 135.\*]

5. **INJUNCTION (§ 144\*)—ISSUANCE—VERIFIED BILL.**

Where a water company filed a verified bill for an injunction restraining the enforcement of an alleged confiscatory ordinance fixing water rates, and there was no claim that the bill did not state facts sufficient to constitute a cause of action, the city having made no countershowning, it was not an abuse of the trial court's discretion to issue a temporary injunction on the verified bill without supporting affidavits.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 316, 317, 321; Dec. Dig. § 144.\*]

Appeal from the Circuit Court of the United States for the Eastern District of Illinois.

Suit by the American Water Supply Company against the City of Kankakee. From an order granting an injunction pendente lite, defendant appeals. Affirmed.

W. H. Dyer, Frank Lindley, and Walter C. Lindley, for appellant.

W. R. Hunter, for appellee.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

BAKER, Circuit Judge. Three reasons are advanced why the pendente lite injunctive order in this suit by the Water Company to restrain the city from enforcing its water rates ordinance of March 20, 1911, is erroneous.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

[1] 1. Because a judicial inquiry could not be entertained until the Water Company had first exhausted its remedy of legislative review in the circuit court of the county.

Section 267f, c. 24, Hurd's Ill. R. S., after authorizing city councils to fix by ordinance maximum water rates, provides:

"And in case the corporate authorities of any such city, town or village shall fix unjust and unreasonable charges, the same may be reviewed and determined by the circuit court of the county in which such city, town or village may be."

No decision of the Illinois Supreme Court has been called to our attention, or been found by us, that holds that the Legislature by the foregoing provision intended, or had the power if it had the intent, to delegate to the circuit courts of the counties the legislative function of fixing rates. In *Freeport Water Co. v. Freeport City*, 180 U. S. 587, 601, 21 Sup. Ct. 493, 499, 45 L. Ed. 679, the Supreme Court of the United States, noting that the Illinois Supreme Court had referred to this provision, "but not in such a way that it can be confidently said that the power given to the circuit court was only to review the rates fixed by the city council and to determine them to be reasonable or unreasonable, or whether the court could go farther and fix rates," observed that "the former seems a natural construction."

Though what powers a State may choose to vest in its courts is not a federal question, and though the federal courts are bound in that respect to accept the State Supreme Court's interpretations of the State Constitution and statutes, we will not assume that the Illinois Supreme Court, in view of article 3 of the Illinois Constitution relative to the "distribution of powers," would uphold the provision in question as conferring legislative powers upon courts.

Our own judgment is that the legislative function of rate-making ended in the city council, and that appellee, a citizen of Maine, had the right to seek in the local court or in the federal court of concurrent jurisdiction a judicial investigation of the question whether its property was being taken without due process.

[2] 2. Because this suit was prematurely brought. Before the ordinance went into effect, the bill was filed and the injunctive order issued. Would the ordinance, if obeyed, prove to be confiscatory, is the question presented by the bill; and the city's contention is that no affirmative answer can be given unless actual operations under the ordinance shall furnish a demonstration. *Knoxville v. Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371, is cited as a precedent for the contention and as requiring a dismissal of the bill without prejudice. But the *Knoxville Case* was decided on issues joined and on a full consideration of the evidence adduced. Neither it nor any other precedent with which we are familiar rules that an owner is bound to stand by and see his property consumed in an experiment; that his only remedy is an action for damages; that he has no standing in advance of the taking to ask a court of equity for protection from confiscation. But, as pointed out in the *Knoxville Case*, in so asking he assumes a very heavy

burden. "If a company of this kind chooses to decline to observe an ordinance of this nature and prefers rather to go into court with the claim that the ordinance is unconstitutional, it must be prepared to show to the satisfaction of the court that the ordinance would necessarily be so confiscatory in its effect as to violate the Constitution of the United States."

[3-5] 3. Because the facts did not warrant the issuance of the temporary injunction. No affidavits were offered by either side. Each was content to rest the application on the averments of the verified bill. It is not pretended that the bill fails to state facts sufficient to constitute a cause of action. Assaults go rather to the point that general allegations of fact, proper in a pleading, were not supported by specific facts which would be proper in evidence. But a full trial of the merits is not required on a hearing of an application for a preliminary injunction. Issuance of such a writ is largely within the discretion of the trial court. On review a reversal is not permissible unless a clear abuse of discretion appears. Here, if an unconstitutional ordinance were allowed to go into effect, the Water Company might have grave difficulty in recovering its confiscated earnings from numerous and perhaps irresponsible consumers. On the other hand, if a constitutional ordinance is being wrongfully suspended, the Water Company could be made to restore its excessive charges; and, if there is any doubt of it, certainty can be had at any time by the court's requiring a bond or a deposit from the Water Company. In this situation, and considering that the city offered no countershowing whatever, we cannot say that the court abused its discretion in accepting the verified allegations of a good bill as a sufficient foundation for the preliminary injunction.

The order is affirmed.

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### MOREY v. THYBO.

(Circuit Court of Appeals, Seventh Circuit. April 23, 1912.)

No. 1,849.

#### 1. PHYSICIANS AND SURGEONS (§ 16\*)—MALPRACTICE—SURGEONS JOINTLY ENGAGED—DIVISION OF WORK.

Where two surgeons are independently engaged by a patient, and serve together by mutual consent, they are entitled, in the absence of instructions to the contrary, to make such division of service as in their honest judgment the circumstances may require; each being required, not only to bring to the case the ordinary knowledge and skill of the profession, but also to give his best personal attention and care thereto.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 31; Dec. Dig. § 16.\*]

#### 2. PHYSICIANS AND SURGEONS (§ 16\*)—JOINT SERVICE—LIABILITY.

Where two surgeons, independently engaged by a patient, serve together by mutual consent, each, in serving with the other, is answerable for his own conduct and for all the wrongful acts or omissions of the other, which he observes and lets go on without objection, or which in

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the exercise of reasonable diligence under the circumstances he should have observed.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 31; Dec. Dig. § 16.\*]

3. PHYSICIANS AND SURGEONS (§ 16\*)—JOINT SERVICE—SCOPE OF LIABILITY.

Plaintiff independently employed defendant and R. as surgeons to attend her in child birth. Before removing the child with instruments, it was agreed between them that defendant should administer the anæsthetic and that R. should do the operating. Thereafter plaintiff charged defendant with malpractice, in that the instruments used were unsterilized, that all of the afterbirth was not removed, and that R. left plaintiff so badly lacerated that sewing was necessary, and that the lacerations were not sewed. *Held*, that defendant was not liable for such acts, unless he, in the exercise of reasonable diligence under the circumstances, should have known of them, or that anything occurred to lead him to believe that R., a skillful surgeon, would have so performed the operation.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 31; Dec. Dig. § 16.\*]

In Error to the Circuit Court of the United States for the Eastern District of Illinois.

Action by Rhoda Thybo against L. L. Morey. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions.

Chris P. Ellerbe, Linn R. Brokaw, and Dan McGlynn, for plaintiff in error.

Frank F. Noleman, June C. Smith, and William F. Bundy, for defendant in error.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

BAKER, Circuit Judge. Morey, plaintiff in error, a physician and surgeon, seeks to reverse a judgment against him for malpractice.

Three counts were in the declaration. Two were broad enough to cover every act of Morey's throughout the case. In the third, Mrs. Thybo alleged that Morey, "together with one Rice, another physician and surgeon whom the defendant then and there called in to assist him and for consultation," negligently tore and lacerated her vagina and uterus in delivering her of a child, failed to remove all of the afterbirth, and used unsterilized instruments, in consequence of which blood poisoning developed.

At the close of the evidence Morey asked for a directed verdict and separately moved that the third count be withdrawn from the jury.

Undisputed facts are that Morey alone was first employed; that from June 5th, when the amniotic sac broke, until 10 p. m. of June 11th Morey was in sole charge; that Morey had no business relation, or even acquaintance, with Rice; that Mrs. Thybo and Rice were oldtime friends; that in the afternoon of the 11th Mr. Thybo, the husband, telephoned to Rice to come from St. Louis to the Thybo home at Vandalia, Ill.; that after Rice's arrival at 10 p. m. he concluded from his examination that delivery was impossible without the use of instruments; that, by agreement of Rice and Morey, Rice was to use the instruments and Morey to administer the anæsthetic; that this

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

division of service was known to Mrs. Thybo and her husband, and not objected to; that deliveries of the child and of the placenta, Morey and Rice each doing his part, were effected during the early hours of the 12th; that Morey left at 2 a. m., and Rice returned to St. Louis at 4 a. m.; and that subsequent treatment was by Morey.

Throughout the giving of testimony it clearly appears that Morey was contending, first, that his own conduct, both before Rice came in, and after Rice had left, and also while Rice was present, was without fault; and, second, that he was in no wise responsible for any of Rice's malpractices. Inasmuch as every act of Morey's for which he would be immediately responsible was within the first two counts, the question presented by the motion to ignore the third count was whether, under all the evidence, there was any legal basis for charging Morey with Rice's acts or omissions.

If the pleader meant to hold Morey on the principle of respondeat superior, the above-recited facts show that the attempt was vain. Rice's only contractual relation was with the Thybos.

[1, 2] Two physicians, independently engaged by the patient and serving together by mutual consent, necessarily have the right, in the absence of instructions to the contrary, to make such a division of service as in their honest judgment the circumstances may require. Each must not only bring to the case the ordinary knowledge and skill of the profession, but also give his best personal attention and care. *Harris v. Fall*, 177 Fed. 79, 100 C. C. A. 497, 27 L. R. A. (N. S.) 1174. Each, in serving with the other, is rightly held answerable for his own conduct, and as well for all the wrongful acts or omissions of the other which he observes and lets go on without objection, or which in the exercise of reasonable diligence under the circumstances he should have observed. Beyond this, his liability does not extend. *Harris v. Fall*, supra; *Keller v. Lewis*, 65 Ark. 578, 47 S. W. 755; *Hitchcock v. Burgett*, 38 Mich. 501; *Brown v. Bennett*, 157 Mich. 654, 122 N. W. 305.

By the court's charge to the jury the somewhat vague allegations of the third count respecting the theory on which Morey was sought to be held for Rice's malpractice were construed in accordance with the foregoing principles. Is there any evidence to sustain that theory of liability?

Using unsterilized forceps, not removing all of the afterbirth, and leaving the patient so badly torn that sewing was necessary, without performing the operation himself or giving notice of the condition, were the alleged wrongful acts and omissions on the part of Rice.

[3] Whether the forceps were sterilized or not was a matter of sharp dispute; but, of course, the jury's finding that they were not must be accepted. We have carefully read the entire bill of exceptions, and we find the following situation established without conflict: Rice brought his own instruments. After his examination and decision to use forceps, Morey went into the bedroom and got ready to administer the anæsthetic. Mrs. Thybo was lying crosswise on the bed. Morey was at her head. After Morey was in that position, he did not see Rice until he came into the bedroom attired in surgeon's

garb and with the instruments in his hands. There was no testimony, disregarding the testimony that the instruments were sterilized with boiling water in the kitchen, that Morey saw the instruments before Rice brought them into the bedroom. Their location prior to that was given by one witness. They were in their case on a table against the wall in the sitting room at a point beyond the range of vision of any one in the bedroom. Consequently no basis was afforded by the evidence for a finding that Morey knew of and acquiesced in the use of unsterilized forceps. By the exercise of reasonable diligence, under the circumstances, should he have known? Not unless, while attentively engaged in his own part of the service, he ought gratuitously to have entertained a suspicion that an apparently learned and skillful surgeon was about to commit a gross medical offense, and to have followed up the suspicion by inquiring whether his brother had forgotten to sterilize his hands and his instruments. No such unreasonable burden is imposed by the law.

When the afterbirth was delivered, Rice examined it, found it to be entire, and at once had it disposed of. Morey, from across the bed, looked at it, and to him it appeared to be intact. Nothing in the record warrants a finding that Morey knew that Rice had not removed all of the afterbirth. And here, too, Morey was not bound to assume, in the absence of observable indicia, that Rice was incompetent.

Similarly, with respect to lacerations, Morey, from his position, could not know of them for himself; and from Rice's silence he was not negligent in inferring that no lacerations requiring repair operations had been inflicted. If Morey in his subsequent visits negligently failed to discover promptly and to treat properly the lacerations and the blood poisoning, those were matters of his own direct responsibility.

For the error in submitting the third count to the jury, the judgment is reversed, and the cause is remanded, with the direction to grant a new trial.

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HARTFORD v. SMITH et al.

(Circuit Court of Appeals, Third Circuit. October 30, 1912.)

No. 1,609.

1. ACTION (§ 32\*)—FORM OF ACTION—ABOLITION—STATUTES—ACTIONS EX CONTRACTU AND EX DELICTO.

Act Pa. May 25, 1887 (P. L. 271; Pepper & Lewis' Dig. pp. 5819, 5825), abolishing the distinctions theretofore existing between actions ex contractu and ex delicto, so far as relates to procedure, did not affect the distinction existing between such actions as to the legal rights of the parties; and hence a money demand, recoverable in assumpsit, could not be recovered in trespass for conversion.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 257-261, 316; Dec. Dig. § 32.\*]

Forms of action in federal courts, following state practice, see note to O'Connell v. Reed, 5 C. C. A. 598.]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**2. ACTION (§ 27\*)—FORM OF ACTION—ASSUMPSIT—TRESPASS.**

Plaintiff alleged that defendants were brokers, and as such had sold certain stocks for plaintiff, and received \$5,527.71, which it was defendants' duty to immediately pay over to plaintiff on or without demand, that defendants wholly disregarded their duties to plaintiff, as previously mentioned, to keep the proceeds of such stock solely and entirely applicable to carry out plaintiff's particular transactions, but, with intent to defraud plaintiff, converted the fund to their own use on November 12, 1909, and continued, from that time until the present, refusing and neglecting to deliver or pay over to plaintiff such balance so illegally misappropriated. *Held*, that plaintiff's cause of action was in assumpsit, and that the declaration in trespass was unsustainable.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 160–195; Dec. Dig. § 27.\*]

In Error to the District Court of the United States for the Western District of Pennsylvania; James S. Young, Judge.

Action by P. C. Hartford against Roland H. Smith and another, doing business as A. J. Davis & Co. Judgment for defendants, and plaintiff brings error. Affirmed on condition.

D. B. Hartford and E. J. Kent, of Pittsburgh, Pa., for plaintiff in error.

W. W. Stoner, John S. Robb, Jr., and E. W. Arthur, all of Pittsburgh, Pa., for defendants in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. [1] The Pennsylvania act of 1887 (P. L. 271; 3 Pepp. & Lew. Dig. Laws, 5819, 5825) undertakes to abolish the distinctions theretofore existing between actions ex contractu and actions ex delicto, but only so far as relates to procedure. Sections 1 and 2 put this restriction affirmatively—"so far as relates to procedure"—while section 8 with greater emphasis puts it negatively as well as affirmatively:

"The true intent and meaning of this act is that \* \* \* as to the action [evidently, actions] herein recited, it applies to the procedure only, and the legal rights of the party are not in any way to be affected thereby."

As a contribution to the history of the act, the writer of this opinion may state of his own knowledge that a draft of the statute was submitted to the late Judge Simonton, of Dauphin county, for consideration and criticism, and that the sentence just quoted from section 8 was inserted at his suggestion, in order that no doubt might exist about the limited scope of the legislation. And the appellate courts of Pennsylvania have taken this view in several cases. *Fritz v. Hathaway*, 135 Pa. 280, 19 Atl. 1011; *Winkleblake v. Van Dyke*, 161 Pa. 7, 28 Atl. 937 (a decision concurred in by Justice Williams of Tioga county, who has always been understood to be the draftsman of the act); and *Busch v. Calhoun*, 14 Pa. Super. Ct. 582. The mere label of the action is not decisive. As was said by Justice Mitchell in *Fritz v. Hathaway*:

"Accuracy and technical precision have no terrors, except for the careless and the incompetent; and the act of 1887 was not intended to do away with

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



them. As to all matters of substance, completeness, accuracy, and precision are as necessary now to a statement as they were before to a declaration in the settled and time-honored forms."

See, also, *Osborn v. Bank*, 154 Pa. 137, 26 Atl. 289, *Corry v. Railroad*, 194 Pa. 519, 45 Atl. 341, and *Brandmeier v. Pond Creek Co.*, 229 Pa. 284, 78 Atl. 273.

[2] It is clear, therefore, that, although the name of the action now before us is "trespass," the legal rights of the parties are to be determined as if it were the old action of trover and conversion. Indeed, this is conceded, and we may turn at once to the statement of claim in order to discover what particular wrong is complained of. The statement is not ambiguous. It recites that the defendants were stockbrokers; that the plaintiff gave them certain orders to buy stocks on a margin; that he put up whatever margin was demanded, this being always sufficient to protect them; that he was not notified that the shares would be sold, and gave no order to sell; and that the sale produced a balance in his favor of \$5,527.71, "which it was the duty of defendants, as plaintiff's brokers, so as aforesaid to immediately pay over to plaintiff upon or without demand." The statement continues:

"Plaintiff further says that defendants wholly disregarded their duties to him, as hereinbefore mentioned, to keep and maintain the proceeds of the sale of said stocks and the margins deposited with them by plaintiff as a fund solely and entirely applicable for the purpose of carrying out these particular transactions, but did, with intent to defraud plaintiff, convert and appropriate said fund to their own use, or the use of some other person or persons, and that on November 12, 1909, and continuing from that time until the present, defendants, with intent to defraud plaintiff, neglected, failed, and refused to deliver or pay over to plaintiff the balance of said fund amounting as above mentioned, to wit, \$5,527.71, which sum defendants have illegally, unlawfully, and fraudulently misappropriated and converted to their own use, or to the use of some other person or persons."

The action is trover for the conversion of money, although the plaintiff in error desires to treat it as an action for the conversion of the stocks. The learned judge held that in its present form it could not be maintained, and we agree with this conclusion. It should have been *assumpsit*, and if the suit had been dismissed for this reason, without prejudice to the plaintiff's right to bring the proper action, we might affirm the judgment at once. It is easy to understand why the action was brought in tort. Under the Pennsylvania practice some kinds of tort may still be redressed in a suit begun by a *capias ad respondendum*, which requires the entry of bail to the action. This suit was so begun, and, as a judgment for the plaintiff would also have supported a *capias ad satisfaciendum*, the defendants might have been committed to prison, until discharged according to law. But no such result would follow a recovery in *assumpsit*, and, as already stated, the suit should have been in that form of action. So far as appears from the uncontradicted evidence, the defendants were under no obligation to return specific money to the plaintiff, but owed him a duty that might be discharged by the payment of money generally. See *Little v. Gibbs*, 4 N. J. Law, 211; *Davis v. Thompson*, 10 Sad. (Pa.) 563, 14

Atl. 169; *Aurentz v. Porter*, 56 Pa. 115; *Life Ass'n v. Catlin*, 2 Walk. (Pa.) 338; 38 Cyc. 2014, H, note 53; 28 A. & E. Ency. (2d Ed.) 652, § 5, note 7.

The practical reason against affirming the judgment as it stands is this: It is not a mere dismissal of the suit without prejudice, but a judgment in favor of the defendants, and with the present record the doctrine of *res judicata* might give the plaintiff trouble if he brought another suit. This would be unjust, for the defendants concede that they owe the money, and are only defending against the drastic remedy that has been invoked. Indeed, they offered the plaintiff a note for the full amount of his claim, although the note was afterwards returned. In order, therefore, that the litigation may perhaps end here, we shall enter no judgment for the present; but we direct the clerk of this court to notify counsel that, if the defendants shall confess judgment to the plaintiff on or before November 30, 1912, in an action *ex contractu* for \$5,527.71, with interest from November 12, 1909, and if the District Court shall certify us that this has been done, we will then affirm the judgment. Otherwise, we shall be obliged to reverse it formally, with leave to the plaintiff to apply to the District Court for permission to change the form of action under the Pennsylvania statute of 1871 (P. L. 265; 3 *Pepper & Lewis' Digest Laws*, col. 5894). The act reads as follows:

"In all actions pending or hereafter to be brought in the several courts of this commonwealth, said courts shall have power at any stage of the proceedings to permit an amendment or change in the form of action if the same shall be necessary for a proper decision of the cause upon its merits," etc.,

—and seems to provide a remedy for the existing situation.

#### VILTER MFG. CO. v. QUIRK.

(Circuit Court of Appeals, Seventh Circuit. April 23, 1912.)

No. 1,804.

##### 1. MASTER AND SERVANT (§ 106\*)—INJURIES TO SERVANT—WORKING PLACE.

Where defendant contracted to install a refrigerating plant for a packing company, defendant, while doing the work, necessarily made the packing company's plant its own working place to the extent necessary to install the apparatus.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 193-198; Dec. Dig. § 106.\*]

##### 2. MASTER AND SERVANT (§ 97\*)—INJURIES TO SERVANT—NEGLIGENCE.

Defendant, having contracted to install a refrigerating apparatus in a packing plant, sent H. to do the work, and he employed plaintiff, a steam fitter's helper, to assist. It being necessary to lift certain piping to a second-story window, H. determined to rig a block and tackle from the window in the third story, and for this purpose sent plaintiff for rope with which to tie cross-timbers. As plaintiff started to untangle the rope, he straightened up, raising one hand above his head, and, without looking, thrust his fingers into an electric fan installed in the upper part of the window, the bottom edge of the fan being higher from the floor than plaintiff's height, resulting in three of his fingers being am-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

puted. *Held*, that danger of such an injury was not one reasonably to have been anticipated, and that defendant was not negligent in failing to provide against it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 163; Dec. Dig. § 97.\*]

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

Action by John J. Quirk against the Vilter Manufacturing Company. Judgment for plaintiff, and defendant brings error. Reversed, with directions.

Joseph B. Doe, for plaintiff in error.

Jackson B. Kemper, for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge. Defendant in error, plaintiff below, recovered a judgment on account of personal injuries. Error is mainly predicated on the court's refusal to direct a verdict in favor of defendant. Conflicts in testimony must, of course, be resolved against defendant, and the evidence viewed in the strongest aspect in favor of plaintiff.

So taken, the case is briefly this: Defendant is a corporation having a factory at Milwaukee, Wis., for making refrigerating plants, which it installs in its customers' places. North Packing Company contracted with defendant for the installation of a refrigerating plant in its sausage factory at Somerville, Mass. Hartman, defendant's superintendent, was sent to do the work. At Somerville, Hartman employed plaintiff and Ryan to assist. Plaintiff, 22 years old, had worked about 3 years as a steam fitter's helper, part of the time for North Packing Company. He was generally familiar with the factory, but not with the room in which he was hurt. To lift some heavy piping and take it into the building through a second-story window, Hartman decided to rig a block and tackle from a window immediately above in the third story. In the third-floor room were several cooking vats. Two of these were near the window, about 2 feet from the wall, with a passageway of about 2½ feet between them leading to the window. To support the block and tackle Hartman had determined to place a timber across the window inside and one outside, and to tie the timbers together with rope. To do this work the lower sash of the window was moved. When the timbers were placed, Hartman and Ryan holding the window open and the timbers in position, plaintiff found that the rope at hand was not sufficient. Hartman asked where more rope could be had. Plaintiff said he would go to the machine shop of the factory and try to get some. He returned where Hartman and Ryan were still holding the window and the timbers in place, and threw a piece of rope on the floor. It was tangled. In untangling it he straightened up and raised one hand above his head, without looking where his hand was go-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing. Three fingers were cut off by an electric fan, which was installed in the upper part of the window; the bottom edge of the fan being higher from the floor than plaintiff's height. This fan, even when steam and vapor were in the room, could readily be seen by one approaching the window, when several feet away, if his gaze was directed upon it. There was evidence from which the jury might, and presumptively did, find that plaintiff did not know of the fan; that steam and vapor in the room might prevent a person of ordinary prudence, while engaged in carrying timbers and ropes, from noticing the fan, unless he were looking for it or had his attention called to it; that the noises from the boiling vats would drown the whirring sound of the fan; and that Hartman had actual knowledge of the fan and its location.

[1, 2] Granting that plaintiff may not be legally blamed for failing to observe the fan and for throwing his hand above his head without looking, we are unable nevertheless to sustain the judgment. As a foundation for his case it was first necessary for plaintiff to show that defendant was guilty of a breach of duty owed to him. Defendant was not an insurer. It owed only the duty of using reasonable care in the conduct of its business. No want of care in employing Hartman is suggested; but, of course, defendant was answerable for Hartman's wrongful acts and omissions within the scope of his employment. North Packing Company's plant was not defendant's; but, of course, defendant made the plant its own working place to the extent necessary to the installation of the refrigerating apparatus. What did Hartman do or omit that indicated a want of ordinary foresight? No dangerous machines or tools were given plaintiff to use. Plaintiff and Ryan had been intrusted with the work of getting the timbers and rope ready. When Hartman and Ryan were holding the window open and the timbers in place, and plaintiff was tying one end of the timbers with the rope that had been brought to the place before the work was commenced, the place in which the work was to be done was safe. To stand on a solid floor and tie a rope around timbers at the knee-high window sill involved no obvious and imminent peril. When plaintiff discovered that he needed more rope and brought it, Hartman was still engaged with Ryan in holding the window and timbers in place for plaintiff to complete the tying. Hartman did not furnish plaintiff the tangled piece of rope; did not direct him when or where or how to untangle it; did not even know, so far as any evidence goes, that the rope was tangled. How was Hartman, under these circumstances, bound in reason to foresee that plaintiff might bring tangled rope to the place where the timbers were to be tied, and in untangling it raise his hand above his head, and without looking thrust his hand into the fan? In our judgment, the evidence afforded no basis for finding that defendant, through Hartman, failed to exercise reasonable care in guarding plaintiff against dangers fairly to be anticipated. Fact of injury is not enough. To recover, a plaintiff must prove that

his injury was caused by a danger which the defendant might reasonably have anticipated. *Commonwealth Steel Co. v. McCash*, 184 Fed. 882, 107 C. C. A. 206.

The judgment is reversed, with the direction to grant a new trial.

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THE COLUMBIA.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1912.)

No. 2,058.

SEAMEN (§ 27\*)—LIEN FOR WAGES—PRIORITY OVER MORTGAGE.

The fact that officers employed to navigate a vessel were also stockholders and officers of the corporation owner, which purchased it subject to a mortgage, which it assumed and agreed to pay, does not deprive them of the right to enforce a maritime lien for their wages as against the mortgagee.

[Ed. Note.—For other cases, see *Seamen*, Cent. Dig. §§ 4, 157-169; Dec. Dig. § 27.\*]

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington.

Suit in admiralty by Alex Zueghoer and others against the steamship *Columbia*; James Barron, claimant. Decree for libelants, and claimant appeals. Affirmed.

Robert McMurchie, of Everett, Wash., for appellant  
Million & Houser and George Friend, all of Seattle, Wash., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The record shows that the *Columbia* was a steamship duly registered under the laws of the United States, plying in the waters of Puget Sound, and that her then owner, one Good, mortgaged the steamer to the appellant, Barron, to secure to him the payment of \$10,500. With that mortgage existing, Good, in March, 1910, sold the boat to a corporation, called Sound Motor Company, which assumed and agreed to pay the mortgage. During the months of April, May, June, and until about the middle of July of the year mentioned, the Motor Company operated the vessel on the Sound through certain of the stockholders of the corporation—its president, one Munck, first having charge of the ship, at which time the libellant K. J. Johansson was mate of it, and the libellant Zueghoer the purser. Subsequently K. J. Johansson succeeded Munck in command of the boat, and the libellant Julius Johansson became mate. All of these parties, to wit, Munck, Zueghoer, and the two Johannsons, as has been said, were stockholders of the Motor Company. Their operation of the boat was not successful, and under it the ship became indebted in a considerable sum, which Barron was compelled to pay in order to protect his mortgage. The mortgage not having been paid, Barron,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 199 F.—49

pursuant to its provisions, took possession of the boat on the 15th day of July, 1910.

The record shows that there was then due Zueghoer, on his wages for the months of April, May, June, and July, the aggregate amount of \$229, that there was likewise due K. J. Johannson, for the months of April and May, the aggregate sum of \$155, and to Julius Johannson, for the month of June, the sum of \$65, no part of either of which sums was paid, and for which respective sums the present libel was brought by them.

In addition to the denials contained in the answer of the claimant, Barron, who filed a bond for the release of the vessel, he set up three affirmative defenses, in the first of which he alleged the execution of the mortgage by Good, his subsequent sale of it to the Motor Company, subject to the mortgage, the agreement of the Motor Company to pay it, that the libelants were officers and trustees of that company, and the operation of the boat by the company, through those officers, during which time the indebtedness was incurred which he was compelled to pay.

After the claimant took possession of the boat, he, at the solicitation of the libelants, continued its operation in the hope and expectation that they would be able to buy or effect a sale of it to the benefit of the respective parties to that arrangement, Barron paying their wages during such time; but their effort was without success, and the arrangement soon came to an end. At the inception of it, Barron knew that the libelants claimed a lien on the ship for their back wages, and the evidence shows that there was some talk between the parties concerning a waiver thereof; but neither the findings of the court below, nor the evidence, show any such waiver.

It is urged, however, on behalf of the appellant, that, inasmuch as the libelants were stockholders in the Motor Company at the time the back wages claimed were earned, they should not be allowed a lien therefor; that to do so will in some way operate as a "gross fraud" on the claimant. We are unable to see in what way. *Alaska & P. S. S. Co. v. C. W. Chamberlin & Co.*, 116 Fed. 600, 54 C. C. A. 56, and other like authorities cited by the appellant, are inapplicable to the present case.

The judgment is affirmed.

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#### WASSON v. O'GARA COAL CO.

(Circuit Court of Appeals, Seventh Circuit. May 29, 1912.)

No. 1,885.

#### CONTRACTS (§ 348\*)—ASSUMPTION OF CONTRACT—PRESUMPTION.

Where defendant purchased the mine of the Morris Coal Company which had a contract for the sale of coal to plaintiff, the fact that such contract with a written assignment indorsed thereon by the coal company was left by it, together with the deed, abstracts, and other con-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tracts, in the office of defendant's attorney at the time the sale was closed, raised a presumption that defendant assumed the contract, which, however, was rebuttable by proof to the contrary.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1754-1780; Dec. Dig. § 348.\*]

In Error to the Circuit Court of the United States for the Eastern District of Illinois.

Action by C. M. Wasson against the O'Gara Coal Company. Judgment for defendant, and plaintiff brings error. Affirmed.

L. O. Whitnel and W. V. Choisser, for plaintiff in error.

M. S. Whitley, for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

PER CURIAM. Wasson had a contract with the Morris Coal Company for the sale and delivery to him of certain amounts of coal. O'Gara obtained from the Morris Company an option to purchase its mine. In the option there was a provision that existing contracts between the Morris Company and its customers should be filled by O'Gara or his assigns. O'Gara elected to purchase for the O'Gara Coal Company. The deed to the O'Gara Company contained no assumption of the Wasson contract, nor did the O'Gara Company execute any separate instrument of assumption.

Wasson's action being for damages on account of the O'Gara Company's refusal to carry out the Morris Company's contract, the burden of proving the assumption was on him. The option was purely executory, and any terms not embodied in the final transaction must be deemed waived. To show that his contract was included Wasson proved that his contract, with a written assignment indorsed thereon by the Morris Company to the O'Gara Company, was left by the Morris Company together with the deed, abstracts, and other contracts in the office of the attorney who acted for the O'Gara Company at the time the transaction was closed. The trial court treated this as prima facie evidence of an assumption. Wasson contends that it was irrebuttable. Inasmuch as the Wasson contract may have been among the other papers by oversight or fraud, the court properly permitted the O'Gara Company to prove that it explicitly rejected the Wasson contract and notified the Morris Company that the purchase would not be made if the Wasson contract was included. On Wasson's behalf evidence in rebuttal of the O'Gara Company's position was introduced; and the dispute of fact was submitted to the jury under instructions to which no exceptions were taken.

We find no error in the record, and the judgment is accordingly affirmed.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

## LASSLEY v. BROWNELL

(Circuit Court of Appeals, Ninth Circuit. October 28, 1912.)

No. 1,995.

MINES AND MINERALS (§ 38\*)—LANDS IN ALASKA—CONTEST BETWEEN HOMESTEAD SETTLER AND MINERAL LOCATOR—SUIT TO QUIET TITLE.

In Act May 14, 1898, c. 299, § 10, 30 Stat. 413 (U. S. Comp. St. 1901, p. 1469), authorizing persons, associations, or corporations occupying public lands in Alaska for purposes of trade, etc., to purchase the same, not exceeding 80 acres, the provision for the bringing of a suit to quiet title by an adverse claimant does not apply to contests arising between homestead settlers and locators of mineral claims concerning the mineral or nonmineral character of the land claimed by both, which is a matter within the jurisdiction of the Land Department; nor is such provision extended by the amendment of March 3, 1903 (32 Stat. 1028, c. 1002 [U. S. Comp. St. Supp. 1911, p. 606]).

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½-113; Dec. Dig. § 38.\*]

In Error to the District Court of the United States for the Third Division of the Territory of Alaska; Edward E. Cushman, Judge.

Action at law by H. L. Lassley against Don Carlos Brownell. Judgment for defendant, and plaintiff brings error. Affirmed.

S. O. Morford, of Seward, Alaska, and Jas. Alva Watt, of San Francisco, Cal., for plaintiff in error.

L. V. Ray, of Seward, Alaska, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The questions presented in this case are identical with those which were involved in the case of John A. Nelson v. Don Carlos Brownell, 193 Fed. 641, 113 C. C. A. 509, decided at a recent term of this court.

Upon the considerations and authorities which led to the decision in that case, the judgment of the court below in the present case is affirmed.

MARSHALL &amp; STEARNS CO. et al. v. MURPHY MFG. CO. et al.

(Circuit Court of Appeals, Ninth Circuit. October 28, 1912.)

No. 2,117.

1. PATENTS (§ 328\*)—INFRINGEMENT—APARTMENT WALL FURNITURE.

The Jordan patent, No. 892,668, for an improvement in apartment wall furniture, consisting of a door or panel centrally pivoted at the top and bottom in the wall of an apartment, so as to be turnable on a vertical axis, having on one side a bed hinged at the bottom, so that it may be folded to stand vertically when not in use, and on the other side an article of furniture, such as a wardrobe or book case, as limited by the prior art and the proceedings in the Patent Office, is not infringed by the device of the Murphy patent No. 1,007,596, for a disappearing bed, which consists of a door hinged at the side, upon the back of which there is mounted a bed.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



**2. PATENTS (§ 168\*)—CONSTRUCTION—EFFECT OF PROCEEDINGS IN PATENT OFFICE.**

The rule that a patentee, who has acquiesced in the rejection by the Patent Office of broad claims and limited the same, cannot claim the benefit of the rejected claim, is not affected by the fact that the rejection was upon an interference, and that the interfering application has been withdrawn or abandoned.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 243½, 244; Dec. Dig. § 168.\*]

Conclusiveness and effect of decisions of Patent Office in proceedings on application, see note to Novelty Glass Mfg. Co. v. Brookfield, 95 C. C. A. 530.]

Appeal from the District Court of the United States for the Second Division of the Northern District of California; William C. Van Fleet, Judge.

Suit in equity by the Marshall & Stearns Company and Charles R. Jordan against the Murphy Manufacturing Company and William L. Murphy. Decree for defendants, and complainants appeal. Affirmed.

Charles E. Townsend, of San Francisco, Cal., for appellants.

John H. Miller and Wm. K. White, both of San Francisco, Cal., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. From the decree of the court below, dismissing the appellant's bill, on the ground that the appellees had not infringed the letters patent sued upon, the present appeal is taken.

[1] The appellant's letters patent No. 892,668 were issued on July 7, 1908, to Charles R. Jordan, for an improvement in "apartment wall furniture," the object of which is to provide a means whereby an ornamental article of furniture or other fixture may appear within an apartment during the day, and which may be reversed to present a bed or couch to be occupied at night. The structure consists of a door or panel centrally pivoted at the top and bottom, in the wall of an apartment, so as to be turnable upon a vertical axis. It carries upon one side a bed hinged at the bottom, so that it may be folded to stand vertically against one side of the door when not in use. On the other side is attached an article of furniture or ornament, such as a wardrobe, a mirror, a bookcase, or a mantel with a gas grate below. Such furniture will appear in the apartment during the daytime; at night, upon reversing the panel, the furniture will disappear into a recess or small adjoining room, and the bed will appear in the room, there to be dropped into horizontal position for use. The peculiar features of the invention are the stops, which are described as follows:

"The door or carrying structure, 2, has a projecting stop, 15, which, when the door is turned in one direction, contacts with the corresponding edge, 16, of the opening in the wall, A. The opposite edge swings freely through the opening upon the other side to allow the device to be reversed: but, when in the position just described, the vertical joint may be concealed by a strip, 17, which is hinged as shown at 18, so as to be partially turned around, and

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

its outer face, when thus turned, forms a stop against which the part, 15, is arrested when the device has been reversed. This structure is locked in either position by means of a foot lever, 19, having an upturned end furnished, which engages an opening in the bottom of the door, 2, and which is made to normally engage such an opening by the action of a spring, 21."

The structure which is alleged to infringe is covered by letters patent 1,007,596, issued October 31, 1911, to W. L. Murphy, for "disappearing bed." This invention makes use of an ordinary door in the wall of an apartment, hinged at the side, upon the back of which there is mounted, upon a panel attached to the door and spaced away therefrom a sufficient distance to allow proper clearance, a full-sized bed. The panel and the bed necessarily extend beyond the inner or hinged edge of the door, for upon a door three feet wide there is mounted a folding bed four feet wide. When the door is closed, it appears an ordinary door, or it may carry a fixed mirror or a picture. Obviously it cannot carry a mantel, or a bookcase, or a gas grate, or any bulky article to prevent the door swinging around against the wall when opened. When the door is thus opened, the bed extends about two-thirds of the way across the door opening. To close the space thus left open, Murphy uses a small swinging door, which is mounted on the bed panel. When the bed is down, and the small door is closed against the door jamb, it is at an angle with the wall. It furnishes a door which may be opened to allow passage into the adjacent closet or recess.

The appellant contends that the court below erred in finding that the Murphy invention does not infringe claims 2 and 8 of the Jordan patent. Claim 2 is as follows:

"A wall attachment for apartments, consisting of a door or structure having central pivots at top and bottom, and turnable in an opening in the wall, stops by which a joint is formed with the edges of the door when turned in either position, and a latch by which the door is locked."

Jordan was not the first to invent a reversible door mounted on centrally located pivots; nor was he the first to attach a bed or other article of furniture to a door, reversible or otherwise. The patent to Elias Hines, of January 8, 1895, discloses a door turning upon pivots centrally located at the top and bottom, and furnished with stops. The patent to W. C. James, of July 10, 1906, describes a door pivotally mounted "to swing on a vertical axis midway of its width, so that it can be turned completely around, bringing the stove, which is supported on one side thereof, into either one of the apartments at will." In the patent to W. C. James, of May 20, 1902, there is described a mantel and bed attached to opposite sides of a horizontally pivoted door, and also a gas stove and combination table and chair attached to a door hinged at one side. The features in the Jordan invention, on which he obtained his patent, are the ingenious stops which he devised. These are stops, as described in claim 2, by which "a joint is formed with the edges of the door when turned in either position." These stops are so constructed that the reversible door can be completely reversed in the opening, so that in either position it occupies the same space and forms joints with the edges of the opening. This

could not be done, but for the use of the foldable stop used at one of the sides of the opening. Without this foldable stop, the door could not be completely reversed, but would stand at an angle to the face of the opening, making it impossible to form joints with the edges of the door when reversed.

Now, referring to the language of claim 2, we find that the Murphy invention has no pivots, central or otherwise, at top and bottom, is not turnable in an opening in the wall, and has no stops by which joints are formed with the edges of the door when turned in either position. A hinge, it is true, is in a certain sense a pivot, and in most cases of infringement it would be unimportant whether a hinge or a pivot were used, and the substitution of one for the other in a combination claim would not avoid infringement. But the difference between the hinge and the pivot is important in the present case, as marking the distinction between the two inventions. The appellees, indeed, might use pivots, instead of hinges; but it is obvious that the complete reversibility of the appellant's device could not be accomplished by the use of hinges. A hinge would not permit complete reversibility. Nor does the Murphy door or structure have central pivots at top and bottom. All of the door or structure which appears in the room in which the bed is intended to be used is hinged at the side of the door. It is only with reference to the door in connection with the bed structure attached to the opposite side thereof, and not to the door itself, that it may be said that the structure is not hinged at the side. But even then it cannot be said to be centrally pivoted, if regard be had to the ordinary use of words, for the hinges are at a substantial distance from the center. Nor is the Murphy structure turnable in an opening in the wall, in the sense in which the phrase is used in the claim. The structure turns through, rather than in, an opening in the wall.

But, whatever may be said of the other elements of the claim, it is clear that Murphy dispenses with the use of "stops by which a joint is formed with the edge of the door when turned in either position." When the Murphy door is opened, to bring the folding bed into the room where it is to be used, joints are not formed thereby with the edges of the door. Conceding that the small door, which is used to close the opening at one side of the structure, may be designated a stop, there is upon the opposite side no stop forming a joint, nor is there a joint. The door is swung back until it touches the wall, or a buffer attached to the wall, to protect it against injury from the door-knob.

Claim 8 is as follows:

"A wall attachment for apartments, consisting of a door or structure having central pivots at the top and bottom, and turnable in the wall opening, an article of furniture fixed to one side of the said structure, a bed hinged to the opposite side of the structure, turnable to stand in a vertical or horizontal position, and a latch by which it is engaged and held in its vertical position, to be revoluble with the door about its vertical axis."

This claim not only calls for a door or structure having central pivots, and turnable in a wall opening, elements which, as we have seen,

are not found in the Murphy invention, but it adds the element of a latch, which is not found in the Murphy invention, a latch by which the bed is engaged and held in its vertical position, in order to be revolvable with the door. Instead of using a latch to maintain the bed in its vertical position, Murphy accomplishes that result by mounting the bed on pivots, which are placed at such a distance from the door that, when the bed is raised to a vertical position, the force of gravity causes it to lean against the door and holds it in place.

[2] It is contended that claim 8 should receive a liberal construction, that it should be held to cover any means for holding the bed in a vertical position, and that the device by which Murphy holds the bed in its upright position should be deemed the equivalent of the latch which is used by the appellants. The contents of the Jordan file wrapper are such, however, as to leave no room for such a liberal construction of that element of the claim. During the pendency of Jordan's application for a patent, an interference was declared on account of three other applications then pending, one of which was that of John Cilek filed November 15, 1905. Cilek's invention is identical with that of Jordan, except that the door was operated by central pivots to swing in a horizontal plane, and hinged leaves were attached as stops to cover and conceal the clearance spaces at the sides of the structure. The bed was held in an upright position by gravity, as in the Murphy patent. Jordan's original claims had omitted the element of the latch. The interference was decided in Cilek's favor, and by reason thereof Jordan, on March 9, 1908, canceled certain claims of his original application, and substituted the more limited claim 8 for the combination, embodying therein, as one of the elements, the use of the latch. Cilek's application was subsequently abandoned, and no patent was ever issued thereon.

It is claimed that by reason of such abandonment there is in law no anticipation of Jordan's combination, and that, therefore, he is entitled to the liberal construction of his patent which would be applicable if his original claims had been allowed. This proposition cannot be sustained. Acquiescing in the rulings of the officers of the Patent Office, Jordan, in order to obtain his patent, limited his claims, and it can make no difference with the result that the interfering application was withdrawn or abandoned. The limitations so imposed cannot be disregarded. *Lapham-Dodge Co. v. Severin* (C. C.) 40 Fed. 763; *Thomas v. Rucker Spring Co.*, 77 Fed. 420, 23 C. C. A. 211; *Hale v. World Mfg. Co.*, 127 Fed. 964, 62 C. C. A. 596; *Plecker v. Poorman* (C. C.) 147 Fed. 530; *American Stove Co. v. Cleveland Foundry Co.*, 158 Fed. 978, 86 C. C. A. 182; *Johnson Furnace & Engineering Co. v. Western Furnace Co.*, 178 Fed. 819, 102 C. C. A. 267; *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 152 U. S. 425, 14 Sup. Ct. 627, 38 L. Ed. 500. In the case last cited, Mr. Justice Brown said:

"But the patentee having once presented his claim in that form, and the Patent Office having rejected it, and he having acquiesced in such rejection,

he is, under the repeated decisions of this court, now estopped to claim the benefit of his rejected claim, or such a construction of his present claim as would be equivalent thereto."

We find no error in the decree of the court below. The decree is affirmed.

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TOWNE STEERING WHEEL CO. v. LEE.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1912.)

No. 2,057.

1. PATENTS (§ 310\*)—SUIT FOR INFRINGEMENT—DEMURRER.

If there is obviously no patentable invention in a patented device, it is within the power and is the duty of the court to sustain a demurrer to a bill for infringement; but such power should be exercised with the utmost caution, and all doubts should be resolved against the defendant.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507-540; Dec. Dig. § 310.\*]

Pleading in infringement suits, demurrer for want of novelty and invention, see note to *Caldwell v. Powell*, 19 C. C. A. 595.]

2. PATENTS (§ 328\*)—INVENTION—STEERING WHEEL FOR AUTOVEHICLES.

The Towne patent, No. 848,144, for a steering wheel for autovehicles, having a rim with a smooth outer surface, and an inner surface with scallops or indentations, to prevent the fingers of the operator from slipping, is void on its face for lack of invention.

Appeal from the Circuit Court of the United States for the Southern Division of the Southern District of California; Olin Wellborn, Judge.

Suit in equity by the Towne Steering Wheel Company against Don Lee. Decree for defendant, and complainant appeals. Affirmed.

Frederick S. Lyon, of Los Angeles, Cal., for appellant.

Henry T. Hazard, of Los Angeles, Cal. (Cassell Severance, of Los Angeles, Cal., of counsel), for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. A demurrer was sustained in the court below to the appellant's bill, which was brought for the infringement of letters patent No. 848,144, issued March 26, 1907, for "a steering wheel for autovehicles." The wheel is described in the specifications as having a rim with a smooth outer surface, and an inner surface with scallops or indentations, so that the fingers of the operator may tightly grip the wheel and hold the same from slipping. Two forms of construction are suggested—one in which the rim of the wheel is integral, and one in which there is an inner metallic rim secured to an outer wooden rim. The first two claims are substantially the same, and cover a steering wheel having a rim with a smooth outer surface and an indented inner surface to form a continuous finger grip for turning the wheel. The third claim is for a steering wheel having a rim composed of inner and outer members, the outer member being

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

supported in and by the inner member and having a smooth outer surface, and the inner member having an indented inner surface. The question presented on the appeal is whether the court below erred in sustaining the demurrer to the bill for want of patentable novelty in the device described in the patent.

[1] It is well settled by a long line of decisions that, if there is obviously no patentable invention in the device patented, it is not only within the power of the court, but it is its duty, to sustain a demurrer to the bill for want of invention, and to save the parties from useless costs and litigation. *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200; *Richards v. Chase Elevator Co.*, 158 U. S. 299, 15 Sup. Ct. 831, 39 L. Ed. 991; *Thomas v. St. Louis S. F. R. Co.*, 149 Fed. 753, 79 C. C. A. 89; *Buckingham v. Springfield Iron Co. (C. C.)* 51 Fed. 236. It is equally well settled that, to justify the court in so disposing of the suit, the power of the court should be exercised with the utmost caution, and its judgment should be based upon certainty, and all doubts should be resolved against the defendant. *Eclipse Mfg. Co. v. Adkins (C. C.)* 36 Fed. 554; *Lalancé & Grosjean Mfg. Co. v. Mosheim (C. C.)* 48 Fed. 452; *Covert v. Travers Bros. Co. (C. C.)* 70 Fed. 788; *Strom Mfg. Co. v. Weir Frog Co.*, 83 Fed. 170, 27 C. C. A. 502; *American Fibre-Chamois Co. v. Buckskin Fibre Co.*, 72 Fed. 508, 18 C. C. A. 662; *Drake Castle Pressed Steel Lug Co. v. Brownell & Co.*, 123 Fed. 86, 59 C. C. A. 216.

The appellant argues that regard should be had to the allegations of the bill—which must be taken as true—averring that the trade and the public have generally accepted and acquiesced in the validity and scope of the patent, and that the invention has been extensively practiced and has gone into great and extensive use, and that those allegations made it incumbent upon the court below to allow the appellant the opportunity of proving those facts in aid of the presumption of novelty which arose from the issuance of the patent. That argument would be persuasive if there were room for doubt on the question of the novelty of the device. But we find no room for doubt. In *Dunbar v. Meyers*, 94 U. S. 187, 24 L. Ed. 34, it was said: "The Patent Act confers no right to obtain a patent except to a person who has invented or discovered some new and useful art, machine, manufacture, or composition of matter, or some new and useful improvement in one or the other of those described subject-matters." It is common knowledge that the expedient of roughening and corrugating the surfaces of handles of various implements is very old, and instances may be found in the handles of tennis rackets, fishing rods and baseball clubs, and that the handles of swords and knives from time immemorial have been indented on the inner side so as to render more firm the grasp of the fingers. In *Appleton's Encyclopedia of Applied Mechanics*, there appears a cut showing a round indented circular handle of a valve with an indented outer surface so made for the purpose of giving a firmer handhold upon the handle.

[2] It is urged that these objections do not apply to claim 3, for the reason that it calls for a built-up construction of the steering

wheel, which it is said is totally new. But we are unable to see how it can be asserted that a steering wheel in which the rim is integral, and which contains no invention, can be made patentable simply by dividing it into two parts. It remains as it was before, a rim with a smooth outer surface and an inner indented surface. *Victor T. Mach. Co. v. Hawthorne & Shelby Mfg. Co.*, 178 Fed. 455, 101 C. C. A. 439.

The decree is affirmed.

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FISCHER MFG. CO. v. LAWRENCE.

(District Court, E. D. Wisconsin. October 15, 1912.)

PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—BUNION PROTECTOR.

The Bronnenkant patent, No. 739,824, for a bunion protector, was not anticipated and discloses patentable invention; also *held* valid as against the claim of prior use and invention by others, and infringed.

In Equity. Suit by the Fischer Manufacturing Company against James Lawrence, doing business as the Williams-Lawrence Shoe Company. On final hearing. Decree for complainant.

Erwin & Wheeler, of Milwaukee, Wis., for complainant.

Hugo J. Trost and A. L. Morsell, both of Milwaukee, Wis., for defendant.

GEIGER, District Judge. The complainant, as owner of letters patent No. 739,824, issued September 29, 1903, to James Bronnenkant, filed its bill, charging infringement. The device embodied in the invention covered by the letters patent is a bunion protector. It may in a general way be described as a concave truss embracing the front and inner side of the foot; one part supporting the front of the arch of the foot, to prevent it from settling and spreading laterally under pressure applied in walking, while another part prevents the rear end of the phalanges from spreading, and still another encircles the bunion to relieve it from pressure. It has top and bottom retaining wings, which support the pad, retain it in position, and assist with diminishing pressure to support the parts of the foot toward and at the margin of the weakened zone in which the bunion is located. The material to be used in its construction is specified to be preferably leather. Further description of the device, as shown by the specifications, as well as exhibits produced, may be given as follows:

A nearly oval piece of stiff leather is concaved so as to conform to the forward inner side of the foot. A sort of pocket is formed, which will receive the projecting portion of the foot found at or near the great toe joint. The inventor has placed toward the forward middle portion of the device an opening about an inch in diameter, and which is at the bottom of the so-called pocket. The portion of the device which is at the front, and alongside the great toe, is referred to as the shoe toe support or filler, the portion at the rear is called the in-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

step support, while the intermediate portion is called the ball or joint pocket. The claims are stated as follows:

"1. A metatarsophalangeal great toe joint protecting device, provided with an opening for said joint, a support for the shank or instep and a shoe toe support.

"2. A metatarsophalangeal great toe joint protecting device, comprising an elongated shieldlike construction, adapted to rest against the side of the foot, and having at its medial portion a centrally located aperture for receiving the lateral projection of said joint and, encircling such projection of the joint, and a rearwardly extending shank, widening and thickening rearwardly, so that it is adapted to fit along its length against the side of the foot and to bear against and support the instep.

"3. A metatarsophalangeal great toe joint protecting device, provided with a shoe toe support and a shank or instep support, connected together by means of a reduced portion adapted to form a pocket for said joint."

The defenses are noninfringement; invalidity of the claims of the patent, as constituting mere aggregations of the devices of the prior art; invalidity, on account of two years' public use and sale; and invalidity of the claims in suit, in view of prior inventorship, knowledge, and use.

Except for differences in two particulars which will be noted later, the defendant's device is exactly like the complainant's. By this is meant that the complainant's exhibit of the patented device and its exhibit of the defendant's alleged infringing device are alike. Both are of identical material, of the same appearance, and the lineal measurements of the whole and the several parts—i. e., the front and rear parts, the aperture, and the degree of concavity of each—are so identical that one may be exactly superimposed upon the other. The defendant, to meet the situation (except as to the two particulars to be noted), strenuously insists that complainant's device fails radically to conform to the claims of the patented structure in one of the essential and fundamental elements; that the defendant's device, though conceded to be a duplication of the complainant's, likewise lacks the same essential and fundamental element; therefore it cannot infringe the patented structure. To be more specific, the contention is this: The first claim calls for "a support for the shank or instep"; the second, "a rearwardly extending shank, widening and thickening rearwardly, so that it is adapted to fit along its length against the side of the foot and to bear against and support the instep"; and the third, "a shank or instep support," etc. Further, the specification refers to the device as a means of filling the portion of the shoe in front of and behind the enlarged joint, "whereby a support will be afforded for the shank or instep," and the rear portion of the device is designated as the "instep" or "shank" support. Again, one of the drawings accompanying the specifications exhibits the device as it rests within a shoe, and therein it is indicated by dotted lines as extending rearwardly, on the lateral and lower side of the arch, nearly to the heel of the shoe. It is claimed that the complainant's exhibit of its patented structure and the complainant's exhibit of defendant's alleged infringing structure each lacks the element of the instep or shank support. Hence it is urged, as stated, though they are alike, if they are



wanting in the embodiment of this element, found in each of these claims, infringement is not established, because neither conforms to the patented structure.

It is conceded that the terms "instep" and "shank," as used in the claims and specifications, are inapt. What is intended to be referred to is the "arch," or that portion of the foot beneath the instep between the heel and the ball of the foot. The question is therefore presented whether either device meets the requirements of the patent and its claims respecting the supporting features referred to. The complainant at the outset contends that the claims must be given a fair construction, not as disclosing the arch support as a primary or principal feature, but as one of several elements combined into a metatarsophalangeal great toe joint protecting device.

It is pointed out that a bunion is a swollen or diseased condition found at the joint or point of articulation of the metatarsal and phalangeal bones of the foot; and the object of the device is to restore, or aid in restoring, the normal anatomical condition by straightening the joint through pressure applied fore and aft the points needed, viz., at the hollows of the phalanges and metatarsal bones, and, to do this, render support to the arch, or at least such part of it as tends to exert pressure forward through the metatarsal bone immediately articulating at the toe joint. The protection of the bunion from contact with the shoe, the conformation of the device so as to be self-retaining, and the tilting of the foot slightly outward, so as to relieve the inner side from pressure, are further features urged as contributing toward the accomplishment of the main purpose of protection at the joint. Therefore, claims the complainant, there being nothing in the claims or specifications requiring the device to extend rearwardly under the whole arch of the foot, as might be necessary were such device intended primarily to serve as an arch support, the circumstance that the drawing indicated the rearward extension as far as the heel may be ignored, provided the devices as made by either party substantially meet the calls of the claims, and give a reasonable amount of support, and relieve pressure at the desired point, viz., the great toe joint, where the bunion is found. In other words, it being possible to obtain the desired results through some support afforded to the metatarsal bones just behind the joint, the device need satisfy no other or larger hypothesis.

This construction given to the claims seems to be fair and reasonable, and is consistent with the inventor's declared object "to produce a device for protecting these swollen joints against irritating pressure, a device adapted to be placed against the inner side of the foot, and together with the foot to be inserted within the shoe or boot, whereby those portions of the boot or shoe in front of and behind the enlarged joint will be filled, and whereby a support will be afforded for the shank or instep of the foot." Throughout, the prime object to be attained was to relieve the situation as found at the joint by overcoming both the lateral and downward pressure at the joint and at the forward part of the arch. Nothing appears, in the claims, specifications,

or elsewhere, that support for the whole arch of the foot was necessary for its accomplishment.

The question then recurs, whether the device produced by complainant meets the call of the claims as thus construed. That it does is shown by an examination thereof, as well as by witnesses testifying to their experience in its use. The device in evidence extends rearwardly from the center of the aperture which encircles the bunion approximately three inches, and inwardly under the foot at a radius diminishing to about two inches; the latter, however, not indicating the extent actually covered on the under part, because the device is concaved to conform to the side of the foot. But, with an extension rearward of approximately three inches from the joint, a concave pad approximately four inches in width manifestly covers very considerable of the forward and lateral surface of the arch, and, being stiff and of a certain thickness, acts as a support and filler, tending to relieve or shift pressure. This view is amply corroborated by witnesses who have made use of the device, or who, as physicians or chiropodists, were able to speak authoritatively respecting the experience of others in its use. All such witnesses are in substantial accord respecting the performance by complainant's device of the function of giving support to the arch sufficient to relieve pressure and prevent spreading at, and to promote straightening of, the toe joint. Some of the testimony seems to have been given with a clear appreciation of complainant's contention respecting the claims in question, while some of it, given by laymen not familiar with such contention, in different language, but with equal clearness, reaches the same conclusion and apparently recounts similar experiences; and the testimony as a whole furnishes cogent corroboration of the complainant's contention. The conclusion is therefore reached that the claims in suit require in the patented structure such reasonable and substantial support of the arch as may be necessary to perform the functions last above indicated, but there is nothing in the patent or its claims imperatively requiring the supporting part of the structure or device to extend over the whole arch of the foot; that complainant's exhibit meets the requirements of the patent and its claims; that defendant's device, being identical (as to this feature), infringes.

Defendant claims, however, that its device embodies a radical departure from the patented structure, and from complainant's device, in this: In the construction of the former, the upper wing or flap is split or cut across from the circular aperture, and the two parts brought together overlapping, and on the lower wing beneath the aperture a flat steel spring about two inches long and one-quarter inch wide is imbedded. It is urged that this introduces an improvement not found in the patented structure, in that the device becomes self-conforming, and that it successfully overcomes a tendency of the complainant's device to buckle or wrinkle. The success which has attended the sale of complainant's device—about 150,000 per annum—rather negatives the idea that it is wanting in the particular claimed; and the witnesses who testified on this feature failed or refused to

grant defendant's device any especial merit on the strength of the variation. While it may not strictly be called a merely colorable change, made to evade the charge of infringement, there is much force in complainant's contention that the defendant fully recognized that slitting the upper wing resulted in a loss for which compensation is made in the imbedding of the steel strip beneath the aperture. No claim is made that a new function is introduced, or that, without this variation, the function claimed by the patented structure could not be reasonably well performed, and it seems to me to be an immaterial variation.

The claims of the patent are attacked as lacking invention, the differences over what the prior art discloses being in degree only, and, further, that the claims are invalid, being mere aggregations of devices disclosed in prior art patents. In support of this, reference is made to these patents: Dadisman, No. 434,979; Baird, No. 545,006; Georges, No. 663,224; Gunthorp, No. 730,366; Kennedy (British), No. 19,607. Concededly, Bronnenkant was not first to conceive the idea of a pad or protector for a bunion. But counsel for complainant is apparently right in his contention that the cardinal idea as disclosed in the prior art seems to have been to provide a structure to relieve against *shoe pressure* on the bunion. The notion doubtless prevailed that a bunion was caused by shoe pressure, and that a cure or relief was obtainable through the removal of such cause. Thus Dadisman states the object of his invention to be to "obtain a bunion protector of the character named, which shall protect the bunion from the pressure of the shoe and stocking, \* \* \* thereby giving the bunion a chance to heal." Baird's object was to "provide a padded insole, consisting of a double walled sole having one or more filling adjusting openings therein," with padded extensions upward over the instep. Georges claimed an "improvement on bunion and corn shields in which there is a recess to receive the pressure of the boot or shoe," and to provide as an additional feature "a cushion and fill out the otherwise empty space \* \* \* immediately on the side of the bunion." Gunthorp's device is expressly declared "specially intended" to relieve or cure "flat foot," requiring, necessarily, support for the whole arch.

An analysis of these various patents shows that no one contains either the conception of the patent in suit respecting the true anatomical malformation found in a bunion or Bronnenkant's method of mechanically relieving it. His basic idea seems to be that a bunion, disclosing a displaced, loose-jointed, and swollen condition at the point of articulation, must be treated by application of the proper degree of pressure to the zone containing the particular bones involved, so that each may be restored, or the tendency to further spread, checked. He claims to accomplish this by a device exerting pressure distant from the joint, upon the phalangeal bone of the great toe and upon the connecting metatarsal bone, and the device is so shaped that the pressure is not exerted upon the bunion. Naturally, in carrying out this idea, recourse was had to some sort of pad. But lack of invention in the patent in suit is not established because the prior art de-

vices disclose the use of pads which, in order to accomplish the cardinal purpose of relieving *shoe pressure*, incidentally cover a portion or more of the zone to be covered by the device in suit, unless the same functions and the same purpose are also substantially performed and accomplished. And I think the patent in suit is not only distinguishable from each of the prior art devices, but from all of them, and it is not a mere aggregation of their elements. The extension and conformation of the device to exert pressure upon the particular bones and their joint, as disclosed, embodies an idea and accomplishes a purpose not found in the prior art, and this meets the defendant's claim that the differences are in degree, that they consist of a selection of known means, a more extended application of the original thought, and the like.

It remains to consider the defendant's contention that the patent in suit, which was dated September 29, 1903, issued upon an application filed October 25, 1902, is void because of two years' use and sale; also the prior knowledge and invention of the device disclosed therein. This involves an examination of the evidence in the light of the presumption of validity, and the consequent burden upon the defendant, not only to overcome such presumption, but to establish the defense clearly, explicitly, and "beyond a reasonable doubt."

The proofs offered by the defendant are claimed to establish a sale and use of the infringing device in the year 1899. The applications for the various patents urged by defendant as showing lack of invention in the device in suit were filed in 1889, 1902, 1894, 1902, and 1900, before the date of the application for the patent in suit. The defendant has seriously, but unsuccessfully, contended that the device in suit lacked invention, because anticipated by, or as being an aggregation of features embodied in, the prior art as evidenced by these different patents. It ought not, therefore, to complain if its proofs, offered to establish lack of invention, anticipation by, and the sale and use of an unpatented infringing device in 1899, be required to satisfy to the utmost the rigorous rule respecting the exclusion of a reasonable doubt.

Three witnesses are produced to substantiate this defense. One, Schultz, testified to the manufacture and sale of the device at Buffalo in the year mentioned. He procured a patent eight years later, since when and under which patent he has manufactured protectors on a larger scale. At the time of testifying—1911—he first stated that he had manufactured protectors for 12 or 15 years. No sample of the structures made by him at the beginning is produced; but four different exhibits are identified as structures made at a much later period—probably subsequently to the issuance of the patent to him in 1907—and, excepting one, apparently well-finished, machine-made products.

These several exhibits, being presented to him, were in a general way referred to as "patterns," doubtless meaning that they were of styles similar to those first manufactured by him. With respect to the first of these, and which he characterizes as the "old pattern," his

initial statement was that he could not say exactly when he first began to manufacture it. He had testified generally that he began the manufacture at Buffalo in 1899, although he had made some protectors during previous three years' residence at Rochester. Later, his attention being again directed to fixing the date when he first manufactured this so-called pattern, he stated that it was 10 or 12 years; and then, the infirmity of the answer being apparent (the date of his first manufacture could not be later than October 25, 1900), to a leading question whether he was to be understood as meaning 1899, answered affirmatively.

The testimony respecting the other exhibits, so far as the time of original manufacture was concerned, is equally indefinite, though he aims usually to fix the year 1899 as the original date. Corroboration of his testimony is sought from two other witnesses, one of whom confines himself to the bare statement that he purchased a protector from Schultz in October, 1899. The other witness, however, after testifying to the purchase of a protector from Schultz in 1899, sought to corroborate his testimony by the circumstance of selling a piece of property, or trying to sell it, at or about the same time; but later, by way of further corroboration, and to more definitely fix the date, stated that it was at the time of the Pan-American Exposition, when President McKinley was assassinated—undeniably in 1901.

The principal witness, Schultz, was unable to give a single direct or indirect corroborating circumstance to fix with precision the date of manufacture in 1899, or to give the names of customers other than the two witnesses produced, to give definite or proximate dates of other occurrences connected with his patent, his business, or other matters connected with the subject of his examination. No books, memoranda, or written data of any description are produced, and the bare statement of original manufacture in 1899 is cast into grave doubt because of his own and the other witnesses' quite certain statements of other dates. If the question were merely whether there is a preponderance of testimony, or whether the testimony justifies the inference as to the year 1899, the showing thus made might suffice; but it does not meet the exactions of the rule requiring all reasonable doubt on the matter to be excluded. Counsel for defendant has referred to the testimony of these three witnesses as uncontradicted. This may be true, in the sense that it is not disputed by other witnesses. But a reasonable doubt arises as naturally out of self-contradiction, as disclosed in this record, as it may arise out of direct negation by other witnesses.

A further fatal weakness of the testimony, as establishing the defense of prior use, is found in the failure of these witnesses, or any of them, to establish, as required, that the devices manufactured more than two years prior to the date of application for the patent in suit embodied the elements of the patented structure. The situation being as described, a general statement of a witness, examining in 1911 an exhibit which is a well-finished, machine-made product of recent manufacture, that a hand-made device made by him 12 years before "was like" the exhibit, can in no fair sense be regarded as direct and ex-

plicit proof. In this connection it must be borne in mind that the witness Schultz testified respecting the method of manufacture pursued by him originally, that he cut out a piece of leather by hand, moistened it, and nailed it to a last, putting padding into it, and in some cases inserting it in the shoe; doubtless in other cases the pad was thus made and intended to be placed on the foot. It was not attempted to make reasonable and careful comparisons of the alleged device manufactured in 1899 with the later exhibits or the patented structure, by producing measurements, disclosures of conformation, contour, and the like. Where, as hereinbefore intimated, the patent in suit, the patented devices of the prior art, have all been subjected to the closest analysis by the parties, with a view of proving invention, or a lack of invention, it seems to me that proof of lack of invention, by reason of anticipation by a prior unpatented device, ought to approach the same degree of directness and explicitness. This to my mind is the fatal weakness of the defendant's proof; and the case strongly illustrates the infirmities of oral evidence to support the issue that has been tendered.

Counsel for defendant calls attention to what is evident in the record, that the witnesses upon this issue, particularly Schultz, were lacking in intelligence and power of expression. This may explain the infirmity of the testimony, but can neither add to its probative force nor call for resolving the doubts arising thereon, in favor of, rather than against, the defendant. The latter course is required. I think the defendant has failed to establish this defense.

The general conclusion is that the patent in suit is valid, that infringement has been established, and the complainant is entitled to a decree accordingly.

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#### WINCHESTER REPEATING ARMS CO. v. BUENGAR et al.

(District Court, E. D. Wisconsin. October 30, 1912.)

##### 1. PATENTS (§ 257\*)—INFRINGEMENT—RIGHT TO ATTACH CONDITIONS TO LICENSE—PRICE RESTRICTIONS.

The owner of a patent, who manufactures and sells the patented article, may reserve to himself, as an ungranted part of his monopoly, the right to fix and control the prices at which jobbers or dealers buying from him may sell to the public; and a dealer who, with knowledge of such reservation, violates the conditions of the contract under which he bought the article, is an infringer of the patent.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 257.\*]

##### 2. PATENTS (§ 296\*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

In a case disclosing long acquiescence in a patent and clear infringement, a preliminary injunction may issue without a prior adjudication, unless the validity of the patent is challenged in some affirmative or equally specific manner, raising a fair doubt.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 476, 477; Dec. Dig. § 296.\*]

##### 3. PATENTS (§ 283\*)—INFRINGEMENT—VIOLATION OF LICENSE AGREEMENT.

The fact that the owner of a patent, who makes and sells the patented article under a license system fixing prices at which it may be resold by

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

jobbers and dealers, does not uniformly enforce the conditions so imposed, is not available as a defense to one who has violated them.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 448-450, 452; Dec. Dig. § 283.\*]

In Equity. Suit by the Winchester Repeating Arms Company against H. Buengar and Leon A. Olmsted. On motion for preliminary injunction. Motion granted.

The complainant has moved for a preliminary injunction upon a bill, supported by affidavits, charging defendants with infringing five letters patent, owned by the complainant, relating to gun improvements capable of conjoint use, and embodied in the gun known as "Winchester Repeating Shotgun 1897," made by the complainant. It is charged that on January 1, 1909, the complainant adopted a license system, prescribing conditions under which the gun embodying the patented improvements may be sold. Such license is printed on a tag attached to each gun, and is as follows:

"To the Trade of the United States of America:

"Mechanism in these guns is covered by United States letters patent. The guns are licensed and sold under and subject to the following conditions, accepted and assented to by the act of purchase, and controlling all sales and uses of these guns. Any violation of the conditions of this license revokes and terminates all rights and license as to these guns, and any patented article of the Winchester Repeating Arms Company in the violator's possession, and subjects the violator to suit for infringement, and also transfers to and reverts in the company the title to all of its patented products in the possession of the violator, and, upon demand and tender of purchase price thereof, entitles the company to immediate possession of all such patented products.

"License Conditions.

"(1) Jobbers may sell at wholesale only to retail dealers regularly handling these goods; may not sell to any one designated by the company as a violator of license conditions; may not mutilate or remove this license notice; may not expose for sale or sell without this license notice; and may sell only at prices established by the company and printed in its schedules.

"Retailers may not remove this license notice, or expose for sale or sell without this license notice, and may not sell at less than the current retail price established for the gun to which this license notice is attached, and printed in the schedules of the company.

"All sales must be made with the article and its serial number (if any), and accompanying instructions, directions, and indemnifying marks unchanged and un mutilated.

"Winchester Repeating Arms Co., Makers,  
"New Haven, Connecticut, U. S. A."

The bill and supporting proofs show clearly that the defendants, copartners, who conduct a hardware store in Milwaukee, were notified of the adoption, terms, and conditions of the system, but that they deliberately offered for sale and sold "Winchester shotguns, Model 1897," at less than the selling price established by the license system. The price established as to the guns sold by the defendants was \$21.60. They advertised and offered to sell at \$19.95. Purchases were proven to have been made for \$19.98 and \$19.24, and the circumstances attending such sales show clearly that at the time of sale defendants not only knew of the license system and the prices to be adhered to on the sales of the particular guns, but that in their dealings with the purchasers they disclosed a purpose to ignore such license system and schedule. The proofs are detailed and specific, clearly identifying the alleged sales as being of guns having attached the tag and other physical evidences of the license restrictions.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Frank F. Reed and Edward S. Rogers, both of Chicago, Ill., and George D. Seymour, of New Haven, Conn., for complainant.  
Fred Gerlach, of Chicago, Ill., for defendants.

GEIGER, District Judge (after stating the facts as above). [1] Complainant's case appears so clearly to be ruled by *Henry v. Dick*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, and *Victor Talking Machine Co. v. The Fair*, 123 Fed. 424, 61 C. C. A. 58, that consideration of the license contract and system, with a view of determining its validity and scope, is unnecessary. The controlling authority of these adjudications forecloses any question respecting the infringing character of defendants' acts.

[2] The complainant's patents, though their validity has never been adjudicated, are shown to have received recognition through long and extended public acquiescence and use. Neither upon the argument nor in defendants' answer, since filed, is this called in question. Such answer cannot, by mere formal denial or averment, avail to overcome or cast in doubt the specific and detailed averments of the bill and supporting affidavits. In a case disclosing long acquiescence, public use, utility of the patented device, as well as clear infringement, a temporary injunction may be issued, without prior adjudication, unless the validity of the patent is challenged in some affirmative or equally specific manner, giving rise to a fair doubt.

It was contended upon the argument, and it is now averred in the defendants' answer, that complainant's license system is a mere scheme or pretense for keeping alive expired patents, the improvements covered by which are embodied in its guns; that the essential features of guns manufactured by it are set forth in certain expired letters patent, but that the letters patent in suit "are for trivial, frivolous, and ordinary shop expedients"; and, "in view of the state of the art as it existed at the time of said alleged dates of invention, the said letters patent and each of them do not, and did not at the time set forth, cover any patentable invention." It is also charged, in substance, that the complainant has not enforced the so-called license system uniformly and in good faith, but has, in its dealings with certain wholesalers, disregarded it by allowing rebates, and that such system is used "simply for unlawful purposes."

The first of these contentions, involving, as it does, the general claim of invalidity, should be supported, it would seem, by a disclosure of particulars wherein each of the five patents was fully anticipated by an expired patent. The issue tendered by the bill and affidavits, asserting a right founded upon five patents, is not fairly met by the general allegation that such patents are all anticipated by a specified expired patent, which allegation at the same time acknowledges additional features, summarily characterized as trivial and frivolous; and, in view of the public acquiescence, established by complainant, I do not think that doubt is raised or suggested by such allegation.

[3] With respect to the claim that the complainant, since the adoption of its license system, has not enforced it uniformly, or in good faith, that it has granted rebates to wholesalers, it seems to me that,



even if such is admitted to be the fact, it does not constitute a defense available to any particular infringer. This contention is doubtless based upon the assumption that a patentee, having adopted, as between himself and the trade, a license system, is bound to its literal maintenance. He cannot thereafter discriminate, except under penalty of surrendering his reserved rights or discharging all the restrictions. Whether, as an abstract proposition, this is or ought to be sound, need not be determined. It would seem, however, that, having the right to adopt the system, including a schedule of prices, he can at any time, as an incidental feature and as a part of the whole, make concessions based, for example, upon the volume of patronage. And it is difficult to see why, if he can adopt any system he sees fit, he cannot, in making concessions as indicated, at the same time require that such concessions shall not impair the integrity of the system in other respects. In other words, he may make concessions to wholesalers on condition that the retail price prescribed by the schedule shall not thereby be disturbed. Of course, if an alleged infringer can show the patentee's course of dealing with or conduct toward him to be such as disclosed a purpose to surrender the reserved right, or to discharge the restriction, a different question might be presented. But here the defendants merely allege that complainant had not exacted literal compliance with the license agreement on the part of certain patrons, or had granted concessions. There is no suggestion of anything having the element of estoppel, no course of dealing on the part of complainant with defendants, or anybody, upon which defendants justifiably relied in making sales violative of the license schedule. On the contrary, the advertisements published by them, and their conduct and statements attending the alleged infringing sales, disclose a deliberate purpose to violate or evade the license, notwithstanding complainant's protests.

The claim is made in defendants' answer that the complainant's license system is a "part and parcel of an unlawful scheme to maintain and fix the selling prices" of all its products, whether patented or not. If defendants, instead of selling a patented product which they well knew to be subject to the restrictive terms of a license, had sold an unpatented product, they might be in a position to urge the merit, if any, of this claim. But they can hardly insist that they should be relieved from compliance with the lawful stipulations because complainant may have endeavored to comprehend within the system situations not involving defendants, but alleged to be beyond its lawful scope.

It is urged that because, in an action pending against the defendant Olmsted, in the District Court for the Northern District of Illinois, an injunction was refused, none should be awarded here. Such defendant, alone, conducts a store in Chicago. At Milwaukee, he and the defendant Buengar, as copartners, conduct another. Different infringing acts are alleged in each suit, though the sales in Milwaukee are referred to in the former suit. Under such circumstances, the complainant could not obtain full relief in the first suit; and the

parties, in their answer herein, have not attempted to claim its pendency as ground for abatement.

I think complainant has made a case entitling it to a temporary injunction. Such injunction may issue, the complainant to give an undertaking in the sum of \$1,000, conditioned for the payment of such damages as defendants may sustain by reason thereof, if the court should ultimately determine that it was not properly awarded.

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LEONHARDT v. LYNCH.

(District Court, D. Maryland. October 14, 1912.)

PATENTS (§ 328\*)—INVENTION—DUMPING WAGON.

The Leonhardt patent, No. 709,716, for a dumping wagon, held void for lack of patentable invention.

In Equity. Suit by William Leonhardt against Francis T. Lynch. On final hearing. Decree for defendant.

George H. Howard, of Washington, D. C., for complainant.

A. V. Cushman, of Washington, D. C., and Mann & Co., of Baltimore, Md., for defendant.

ROSE, District Judge. In this case respondent is charged with having infringed letters patent 709,716, issued to the complainant September 23, 1902. The patent says the invention consists—

"In the construction of the body of a dumping cart or wagon adapted especially for garbage and other noxious materials, which should be exposed as little as possible during transportation, in such manner that, with a given cubical content and a standard wheel gage, the sides thereof, over which the materials have to be shoveled, will be lower than those commonly found in vehicles."

The form of wagon shown in the drawings and described in the specifications of the patent is simple. It includes a flat-bottomed wagon with vertical sides, which sides, at the extreme forward end, are carried up higher than elsewhere in order that they may support a driver's seat. Such seat rests upon the tops of this section of the sides. The sides, except the portion of them which support the driver's seat, are lower than those in the majority of open wagons, but not lower than are often found in such wagons. The sides back of the seat are fitted with outwardly and upwardly flaring extensions. These extensions seem to make an angle of perhaps 45 degrees with the vertical portion of the sides. The tailboard of the wagon is carried up markedly higher than the upward edge of these flaring extensions. At the forward end of the wagon, and back of the driver's seat, the front of the wagon extends up to the same height as that reached by the tailboard. This front and the tailboard support a top which is substantially parallel to the bottom of the wagon. The patent does not say how wide this top should be. From the drawings it would appear that it is of considerable width—not less than one-half the width of the bottom, perhaps as much as two-thirds of it. Two alternative

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

methods of closing the spaces which remain between the outward edges of the top and the outward edges of the flaring extensions are shown in the patent. One is by the use of a set of hinged wooden doors; the other is to fasten a heavy canvas cover to each edge of the top, so that the cover will stay in place when thrown down over the outward edge of the flaring extensions. When the wagon is being loaded, the canvas cover on the side into which the material is being shoveled is thrown back upon the top, and there rests.

Some ten years or more ago the city of Baltimore employed a private corporation to collect garbage and ashes. Complainant was asked by the president of this company to design a type of wagon or cart suitable for such work. He did so. His suggestion was approved. The company ordered from him a number of two-horse wagons, which were constructed in the precise manner shown in the patent already described, and still more one-horse carts. The latter differed from the wagons in two respects only: Their cubical content was naturally smaller. They were made without a driver's seat. The flaring edges extended to the extreme front of the carts. The driver of such a cart walked, or sat on the shafts, or on the top.

Subsequently the city of Baltimore decided that it would do the work of collecting garbage and ashes by its own employes. It took over the plant of the company. The city thus acquired the wagons and carts which had been made by the complainant. It purchased others from him. Still later, when it wanted more one-horse carts, it advertised for bids for furnishing them. These advertisements called for carts like one of the complainant's then owned and used by the city. Respondent put in the lowest bid. The complainant protested that no one other than himself had the right to make carts of that design. The law officer of the city, being of the opinion either that complainant's patent was not valid, or that the form of cart in question was not covered by the patent, advised the municipal corporation to ignore the protest. The contract was awarded to the respondent. He made and sold such carts to the city. This suit followed.

The patent has but a single claim. In the patentee's original application it read as follows:

"In a dumping wagon, the body proper thereof of rectangular shape in cross-section, and provided at the sides with the flaring extensions described; the said extensions having inclined lids substantially as specified."

In this form the examiner rejected it, as anticipated by the prior patents to Bourne, No. 415,895, November 26, 1889, and to Lebach, No. 496,163, April 25, 1893. The complainant amended, by restricting the wagon bodies upon which he claimed a patent to those the edges of the flaring extensions of which were lower than the rectangular portion, and in distinctly specifying that the inclination of the lids of the covers should be downward. As amended, the claim was allowed, without further question or controversy. As it stands in the patent it reads:

"In a dumping wagon, the body proper thereof of rectangular shape in cross-section, and provided at its sides with flaring extensions, the edges of

which are lower than those of the rectangular portion, and downwardly inclined lids or covers for the said extensions, substantially as and for the purpose specified."

If the patent is valid at all, the question as to whether respondent infringes it depends upon what is the "rectangular portion," which the claim makes a standard for the determination of the height of the edges of the flaring extensions of the body proper. Respondent points out that the bottom of the wagon, the portion of the two vertical sides which support the wagon seat, together with the wagon seat, do constitute a "rectangular portion" of the wagon body. He calls attention to the fact that in the drawings no other strictly "rectangular portion" is shown. He asserts that the edges of the flaring extensions shown in the patent drawings are lower than the wagon seat. The carts which respondent has made have no wagon seat. He therefore contends that he has not infringed, because in his construction there is no "rectangular portion."

Complainant says, and says truly, that the wagon seat is no part of his invention. In order that the wagon shall be easily loaded, it is important that the upward and the outward edges of the flaring extensions shall be as close to the ground as they can be made, in a wagon of sufficient cubical content. It is utterly immaterial whether they are higher than the wagon seat, or lower than the wagon seat, or whether there is any wagon seat at all. Nevertheless, a rectangular portion of the wagon body is mentioned in the claim. Where, in the structure shown in the drawings and described in the specifications, is it to be found? Complainant says that the edges of the rectangular portion of the wagon, which the claim requires to be higher than the edges of the flaring extensions, are those of the flat top. Its expert argues that if the vertical sides were carried up to the plane of the top, and then the top extended out in a horizontal direction until it intersects these sides as so extended, there would be a perfect rectangle. A cross-section of the covered wagon has eight sides and eight angles. Only two of the latter are right angles. He contends, however, that such section might in common parlance be described as "rectangular."

It is not easy to make out what the invention of the patent is, or even what the inventor supposed it to be. In the patent he says that it consists in so arranging the sides that they shall be lower than those commonly found in vehicles with the same cubical content and a standard wheel gage, and in providing that the material to be carried in the wagon shall be exposed as little as possible during transportation. The portion of the problem which concerns the sides he solved by adding to the vertical portions thereof extensions which flare outward and upward. That was old in the art. He now claims that his invention consists in the combination of a particular cover with these flaring sides.

Covered wagons were old. It is admitted that their covers had been supported upon a rope or pole extending from the front to the rear of the wagon. A cover so supported necessarily inclined downwardly. According to complainant's expert, the distinguishing feature

of his invention is the broad, flat top. This, it is said, facilitates the packing of the garbage into the cart. It may be doubted whether it has any advantage in this respect over an all-canvas cover.

The claim says nothing about the top. The law requires an inventor in his claim particularly to point out and distinctly to claim the part, improvement, or combination which he claims as his invention or discovery. If complainant's invention was what he now asserts it is, he has not done what the law says he must do. An examination of the state of the art at the time complainant devised his wagon, as such state of the art is shown in prior patents, demonstrates that wagons with flaring sides and wagons with downwardly inclined covers were old and common. In view of what was well known and had been frequently described, it is difficult to believe that anything which complainant did required any exercise of the inventive faculty. If he invented anything, it was limited to some particular combination of elements which it was his duty clearly to describe. *Seymour v. Osborne*, 11 Wall. 541, 20 L. Ed. 33. See, also, *Wolff Truck Frame Co. v. American Steel Foundries Co.* (C. C. A.) 195 Fed. 940.

His learned and experienced counsel has dwelt much upon the cases which say that sometimes the most convincing evidence that an exercise of the inventive faculty was required is found in the fact that the want had long existed and that the patentee met it, as evidenced by the extensive use into which his invention at once went and the avidity with which others sought to infringe it. There is no such state of facts shown by this record. Complainant made a wagon that suited his customer. It proved useful and convenient for the service. When the city needed more wagons, it ordered more of the same type. It does not appear in the record that otherwise there has been any demand for them.

In accordance with these views, I shall sign a decree holding the patent invalid and dismissing the bill of complaint.

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NORTHERN INSULATING CO. v. UNION FIBRE CO. et al.

(District Court, D. Minnesota, First Division. October 4, 1912. On Further Hearing, October 11, 1912.)

PATENTS (§ 312\*)—SUIT FOR INFRINGEMENT—ESTOPPEL TO DENY VALIDITY.

Evidence considered, and *held* to establish that defendant did not commence making an article which infringed a patent owned by complainant as assignee until after the patentee entered its employment, and was therefore affected by his estoppel to deny the validity of the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 543-549; Dec. Dig. § 312.\*]

In Equity. Suit by the Northern Insulating Company against the Union Fibre Company and James E. Lappen. On motion for preliminary injunction. Motion granted.

Williamson & Merchant, of Minneapolis, Minn., for complainant.  
John E. Stryker, of St. Paul, Minn., and L. L. Brown, of Winona, Minn., for defendants.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WILLARD, District Judge. This case is here upon a motion for a temporary injunction in a suit alleging infringement of letters patent No. 908,681, dated January 5, 1909, for flax felt, issued to the defendant Lappen and certain assignees, and now owned by the plaintiff.

No question can be made as to the infringement. That appears from the affidavits of the defendants themselves. The validity of the patent has not been established by any judicial decree. The plaintiff's claim is that the defendants are estopped to assert its invalidity.

Lappen assigned all his rights in the patent on January 8, 1909, to the Le Roy Fibre Company, assignor of the plaintiff. He continued in the employ of the Le Roy Fibre Company, of which he was a stockholder, until February, 1910. On the 15th of that month he made his first contract with the defendant the Union Fibre Company. That contract, among other things, gave the company a certain time within which to exercise an option for the acquisition of certain Canadian rights. On February 26, 1910, a second contract was made between Lappen and the defendant company, apparently for the purpose of indicating the exercise by the company of the option above referred to. The second contract contained practically all that the first contract contained, but was more explicit in certain respects. It recited that Lappen considered himself defrauded out of his rightful interests in the Le Roy Fibre Company, and in certain patents which he had given the company the right to use, and that he was desirous of protecting his rights in connection therewith. The Union Fibre Company agreed to employ counsel and pay the expense of such litigation as should be decided upon by the parties, in order to secure Lappen's rights. Lappen agreed to assign to the Union Fibre Company a half interest in any property, patents, or stock interests which he might secure from the Le Roy Fibre Company, or from any of the individual stockholders connected therewith.

Lappen assigned, by the contract, to the Union Fibre Company, the exclusive right to use or manufacture material under any or all of his patents pertaining to the cooking, degumming, treating, or manufacture of flax fibre or insulating materials, and the exclusive right to employ and use all processes patented by him therefor, and the exclusive right to use all machinery patented therefor. By the terms of the contract the Union Fibre Company agreed to pay Lappen a royalty—

"upon all of the flax felt of the kind heretofore made commercially by the Le Roy Fibre Company, at Le Roy, Minn., which it shall manufacture during the life of his composition patent therefor, notwithstanding said composition patent shall be declared void, or the manufacture thereof shall be adjudged an infringement upon the Kelley patent."

The royalty specified in the contract was to be 15 cents per 1,000 square feet on all insulating materials  $\frac{1}{2}$  inch or over in thickness; 10 cents per 1,000 square feet on all material less than  $\frac{1}{2}$  inch, and not less than  $\frac{3}{8}$  of an inch in thickness; and  $7\frac{1}{2}$  cents per 1,000 square feet on all material less than  $\frac{3}{8}$  of an inch in thickness. These royalties were to be paid to the first party (Lappen) by the second

party (the Union Fibre Company), so long as the second party should see fit to manufacture under said patents, or until the expiration of said patents.

The contract up to this point said nothing about the employment of Lappen by the Union Fibre Company; but the second part of it did provide for such employment, and he agreed thereby to work for the company for \$100 a month and to assign to the company an undivided half interest in any patents which he might secure, or inventions which he might make while he was in their employ. This contract was to continue at least until January 1, 1912.

Lappen continued in the employment of the defendant company under this contract until January, 1912, when on the 4th day of that month another contract was made between him and the Union Fibre Company. This contract contained the same agreement for the exclusive right to manufacture and sell under the Lappen patents as did the other contracts. It also provided for the payment of royalties in substantially the same way as did the prior contracts. It further provided that the Union Fibre Company should pay the royalties during the life of the patents, whether the same should be declared void or not, and whether they were adjudged an infringement upon the Kelley patent, or not, and regardless of whether Lappen should remain in the employ of the second party or not. This contract also provided for the employment of Lappen by the defendant company, and he is now in their employ under the terms thereof.

The patent in suit is not described in any one of these contracts by its number or by its date, but that it is covered by all of them admits of no doubt. If in February, 1910, when Lappen made his first contract with the defendant company and went into their employment, the defendant company had not manufactured and sold any flax felt like that described in Lappen's patent, the estoppel by which Lappen is unquestionably bound would extend to the company. It would then plainly appear that the defendant company acquired its knowledge of the patent and the way to manufacture the article described therein from Lappen, and under all the authorities its co-operation with Lappen in the infringement would be such as to estop it as well as him.

The vital question, therefore, in the case, is whether or not the Union Fibre Company had been engaged in manufacturing and selling this material prior to February, 1910. It claims that it had been prior even to the issuance of Lappen's patent, and it presented affidavits in support of that claim. One of these affidavits is made by Kelley, to whom the Kelley patent mentioned in the contracts above referred to was issued, who assigned his patent to the defendant company, and who for some time was in its employ. In this affidavit Kelley says that at Mineral Point, Wis., prior to 1901, he manufactured and sold considerable quantities of a product which is exactly described by the language used in the claims of the Lappen patent. He, however, gives the names of no persons to whom he made any such sales. He further says that in 1903, when he was manager of the lith depart-

ment of the defendant company, it, under his direction, made and sold many thousands of feet of the so-called flax fibre felt, which product he says is exactly described by the claims of the Lappen patent. He fails, however, to mention the names of any persons to whom any of this product was sold. He attaches to his affidavit a sample of the product, but he does not state when this sample was made. He simply says that it was identical with the article that he made at Mineral Point, and at the defendants' factory in Winona. John J. Brown's affidavit states that when employed by the defendant he knew that it, under the direction of Kelley, made many thousand feet of flax fibre lith and sold it, and that the product is the same as the product described in Lappen's patent. He, however, fails to give the names of any persons to whom the product was sold. Roe, another manager of the defendant, says that between 1902 and 1910 the defendant manufactured and sold large quantities of the product which is described in Lappen's patent, and that this product was sold under the name of flax fibre lith. The sample which he attaches he says was manufactured at Winona during the year 1908, or earlier. He gives the names of no purchasers of this article. The defendant Lappen in his affidavit says that prior to the 15th day of February, 1910, he saw specimens of flax felt which had been manufactured by the defendant company, and which were similar to the felt described in his patent. Lappen calls this article flax fibre felt. In Thompson's affidavit it is said that the sample attached thereto was actually made at the defendant company's factory in the year 1908, or earlier, and that he more than four years ago nailed it into a chicken coop. Thompson does not say that any of this article was ever sold. Alfred G. Brown, the manager of the defendant company, says that, beginning with the year 1903, his company sold to a large number of customers flax fibre lith, which he says is the same article as that described in the Lappen patent. He says that this material was extensively used by numerous customers for insulating purposes, and was sold under the name of flax fibre lith.

This is substantially all the evidence that is presented by the defendant. Upon the part of the plaintiff there was presented the affidavit of Gebhard Bohn, the president of the plaintiff company, who said that the White Enamel Refrigerator Company, another company in which he was interested, had acted as agent for the products of the Union Fibre Company for about a year from October 21, 1904, and that he never knew that the defendant company manufactured any material similar to the material manufactured under the Lappen patent until 1911, and that the defendant company never marketed any such material through his company during the time it acted as the Union Fibre Company's agent.

J. L. Deppen, who was a salesman in Chicago from January, 1909, to January, 1911, in the office of Bingham & McParthin, sales agents of certain products of the defendant company, says that in the latter part of 1910 he sold, as such agent for the defendant company, a product called felt-lino, which Brown, the general manager of the



defendant company, says is the same product as flax fibre lith. Deppen also says that he never sold any of this product before that time. Boswell, in the employ of the Minneapolis Paper Company, says that from 1907 until the fall of 1910 his company bought from the defendant company more or less of two kinds of heat insulating materials. They never bought from the defendant company any such material as the defendant company now sells under the name of felt-lino, nor did the defendant company ever offer any of that material to them.

The most satisfactory proof, however, upon this subject, is found in the documentary evidence. In a letter to the White Enamel Refrigerator Company, dated October 21, 1904, the defendant company gave a list of articles manufactured by the defendant company and the prices for said articles. Flax fibre lith does not appear in this list. Bohn testifies that this letter was written after a conversation between himself and officers of the defendant company, the subject-matter of which conversation was a proposed contract by which the White Enamel Refrigerator Company was to act as sales agent for the defendant company. It is difficult to believe that, if the defendant company really was then manufacturing and selling large quantities of flax felt, as they say they were, they would not have included it in the list of their products which they then furnished to their proposed sales agent.

There was also offered in evidence a catalogue published by the defendant company for the year 1906. Flax fibre lith nowhere appears in this catalogue as a product then manufactured or sold by the defendant company. It does contain a description of materials composing their different kinds of "lith," in nearly all of which some mineral element appears. It also contains a list of the company's customers in 1906. No affidavits are presented from any of these customers to the effect that they had purchased flax felt from the defendant company prior to 1910.

It is, moreover, very difficult to understand why the defendant company would employ Lappen in 1910, and pay him a royalty on all the flax felt produced by them thereafter under his patent, if prior to that time they were thoroughly well acquainted with the method of manufacturing that product, had been manufacturing it for several years before Lappen's application for his patent was filed, and claimed a right so to do.

It is not necessary to rely upon the rule announced in several cases that the existence of a prior use in patent cases must be established beyond a reasonable doubt. In this case the evidence establishes almost beyond a reasonable doubt that the defendant company never sold flax felt prior to Lappen's connection with it in 1910.

A temporary injunction, as prayed for in the complaint, should be granted. Whether or not the injunction should be suspended, so as to allow the defendant company to fulfill its contract with the Santa Fé Railroad Company, is a matter upon which I will hear counsel on Friday, October 11, 1912, at 12 o'clock noon.

## On Further Hearing.

This case came on to be further heard on October 11, 1912, with the same counsel appearing for the respective parties, pursuant to the direction contained in the decision filed October 7, 1912, concerning the suspension of the temporary injunction with reference to the contract between the defendant company and a subsidiary company of the Atchison, Topeka & Santa Fé Railway Company. After hearing counsel, it is now ordered that upon the filing by the plaintiff of a bond, with sureties to be approved by the clerk of this court, in the sum of \$5,000, a temporary injunction issue as prayed for in the complaint.

It is further ordered that upon the filing of a bond by the defendant company, the Union Fibre Company, in the sum of \$10,000, with sureties to be approved by the clerk of this court, it be allowed to complete its contract with the Santa Fé Land & Improvement Company, mentioned in the affidavit of A. G. Brown, filed on October 11, 1912, and the said injunction shall not operate so as to prevent such completion. Said bond shall be conditioned to pay to the plaintiff all profits which the said defendant may make out of said contract, or the damages which the plaintiff may suffer or has suffered by reason of the securing of said contract by the defendant, as the plaintiff may hereafter elect, if said injunction shall be made perpetual. As a further condition of being allowed to complete said contract,

It is further ordered that the said defendant file in the office of the clerk of this court a statement of the amount of material already furnished under said contract, and that on the 1st day of each month hereafter it file a statement of the amount of material furnished on the said contract during the preceding month.

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ANDREWS WIRE & IRON WORKS v. WILSON MFG. CO.

(District Court, W. D. Pa. September 25, 1912.)

## No. 62.

## 1. PATENTS (§ 283\*)—VALIDITY—KNOWLEDGE BY PATENTEE OF PRINCIPLE OF OPERATION.

A patentee should not be deprived of the benefit of his invention, if meritorious, because he may not understand the principle of its operation.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 448-450, 452; Dec. Dig. § 283.\*]

## 2. PATENTS (§ 328\*)—VALIDITY AND INFRINGEMENT—TOASTER.

The Andrews patent, No. 897,513, for a toaster, was not anticipated, and discloses invention; also *held* infringed.

In Equity. Suit by the Andrews Wire & Iron Works against the Wilson Manufacturing Company. On final hearing. Decree for complainant.

A. O. Behel, of Rockford, Ill., for plaintiff.

Dalzell, Fisher & Hawkins and W. G. Doolittle, all of Pittsburgh, Pa., for defendant.

ORR, District Judge. This case is before the court for final hearing upon the pleadings and proofs. The bill is in the usual form, and charges infringement by the defendant of letters patent of the United States No. 897,513, issued September 1, 1908, to the plaintiff, as assignee of Charles Andrews, Jr. Although not admitting infringement, the defendant has specially attacked the validity of the patent, alleging that the prior art relating to toasters disclosed every element which is found in the toaster covered by the patent in suit.

The utility of the patent clearly appears from the evidence that within three years after its date the plaintiff was shipping to the trade 500 of the Andrews toasters daily, and that defendant was manufacturing and selling similar toasters. In his specification the patentee states that the object of his invention "is to construct a toaster in which a perforated bottom plate is at varying distances from the wire top, in order that the heat may act uniformly on the articles being toasted." His theory is there expressed as follows:

"By forming the main portion so that it is depressed at its center, the heat, being greater at the center, will have farther to travel, after passing through the perforations, before coming in contact with the article being toasted, than the heat, which is not so intense, passing through the perforations near the outer edge of the toaster. By locating the perforations at varying distances from the wire top, the heat will be uniform throughout the extent of the toaster."

[1] The correctness of this theory of Andrews is denied by defendant's expert. Whether it is correct or not is immaterial, and should not affect the question of validity. If a patentee has perfected a new and useful apparatus, he should not be deprived of the benefit of his invention because he may not understand the principal upon which it operates. *Eames v. Andrews*, 122 U. S. 40-55, 7 Sup. Ct. 1073, 30 L. Ed. 1064; *Westinghouse Electric & Mfg. Co. v. Montgomery Electric Light & Power Co.*, 153 Fed. 890-901, 82 C. C. A. 636.

[2] There is but one claim in the patent, and that is as follows:

"A toaster, comprising a perforated sheet metal main portion having its center depressed and formed with V-shaped edges, the outer walls of the edges formed with rests, and a top seated in the rests in a fixed manner."

The elements of the claim are (a) a perforated sheet metal main portion; (b) having its center depressed; (c) and formed with V-shaped edges; (d) the outer walls of the edges formed with rests; and (e) a top seated in the rests in a fixed manner. The references to the prior art show that nearly all of the elements are old in the art. Toasters with a perforated sheet metal main portion, having their centers depressed and having rests, were not by any means new; but toasters with such a main portion formed with V-shaped edges, which form rests for the toaster, and at the same time secure the top in a fixed manner, as specified in the patent, were new. It would answer no useful purpose to review the prior patents, as no one of them has all the elements of the patent in suit. The alleged examples of prior use possess some but not all of the elements of the patent.

There is no combination shown to have existed in the art which embraced them all.

Notwithstanding this, the question of invention is not without difficulty. The differences between the Andrews toaster and others seem slight, yet such differences are marked. The substantial difference lies in this: That the Andrews toaster alone has the extended edges of the bottom plate turned out, to form rests, and then inward, over the grid, whereby the latter is securely attached to the bottom plate. In other words, the turned edge holds the device level when in use, and securely fastens the wire mesh or grid, without the necessity and expense of holding it or wiring it in place. This is the important feature of the patent. In view of it, the court would not be justified in holding the patent, as thus limited, invalid for lack of invention.

Defendant, however, insists that it is not infringing the patent, chiefly because its toasters do not have the V-shape in their edges. The shape of the edge of the plaintiff's toasters seems to have been arbitrarily selected, and does not necessarily arise from the twofold demand upon the edge, which has been mentioned above, to wit, to hold the device level when in use and to securely fasten the grid. It is mentioned in the claim as V-shaped. In defendant's toaster the edge is turned down to form the rests, and then inwards to hold the grid in a fixed manner. The edge is not V-shaped. Defendant surely cannot escape infringement by turning the edge of its toasters so that the edge is U-shaped, or some other shape, when such turning is to meet the twofold demand upon the edge. If so, then truly "the letter killeth." The toaster of the defendant is in all important respects similar to that of the plaintiff. It is true it is made of heavier metal; its perforations are elongated, instead of circular; and its center is not quite so much depressed. It, however, has the extended edges of the bottom plate turned out to form rests, and then inward over the grid, whereby the latter is securely attached to the bottom plate. In this respect the toaster of the defendant infringes the patent in suit.

Plaintiff is entitled to a decree for an injunction and an accounting.

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EMPIRE RICE MILL CO., Limited, v. K. & E. NEUMOND.

(District Court, E. D. Louisiana, October 19, 1912.)

No. 13,861.

1. COURTS (§ 315\*)—JURISDICTION—FEDERAL COURTS—MEMBERS OF PARTNERSHIP.

For the purposes of federal jurisdiction, the members of a partnership or joint-stock company are not presumed to be citizens of the state of the domicile, and jurisdiction is only established on proof of diversity of citizenship of the members.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 861; Dec. Dig. § 315.\*]

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**2. COURTS (§ 315\*)—FEDERAL COURTS—PARTNERSHIP.**

A partnership, though considered a legal entity in Louisiana, cannot be regarded either a corporation, or a quasi corporation, for the purpose of determining federal jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 861; Dec. Dig. § 315.\*]

**3. PARTNERSHIP (§ 200\*)—ACTIONS—NATURE AND EFFECT.**

Though a commercial partnership in Louisiana is an entity separate and distinct from the persons composing it, and it must sue and be sued in the firm name, yet the members may be joined in the same proceeding, and judgment rendered against the firm and the partners in solido.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 369-371; Dec. Dig. § 200.\*]

**4. PARTNERSHIP (§ 204\*)—ACTION AGAINST FIRM—PROCESS.**

When suit is brought against a firm, even after dissolution, for a firm debt contracted before dissolution, a citation, issued to the firm and served on one of the partners, will bring the firm and the partner served within the court's jurisdiction, without reference to whether the notice of dissolution had been given to the creditor.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 376-381; Dec. Dig. § 204.\*]

**5. PARTNERSHIP (§ 204\*)—ACTION—PROCESS.**

Where there was diversity of citizenship between plaintiff and the members of a firm as individuals, service by delivering process to one of the partners was sufficient to confer jurisdiction over the firm and the partner served, though the domicile of the firm's business was the same as that of plaintiff.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 376-381; Dec. Dig. § 204.\*]

At Law. Action by the Empire Rice Mill Company, Limited, against K. & E. Neumond. On exceptions to the jurisdiction of the court. Sustained in part, and overruled in part.

D. B. H. Chaffe and A. D. Preston, both of New Orleans, for plaintiff.

Merrick, Lewis, Gensler & Schwarz, of New Orleans, for defendant.

FOSTER, District Judge. This is a suit on a contract by a corporation, organized under the laws of Louisiana and domiciled in the city of New Orleans, against a commercial partnership, also domiciled in New Orleans, doing business in the firm name of K. & E. Neumond, composed of Karl Neumond and Eugene Neumond, both citizens of the empire of Germany, and against its individual members, for an amount exceeding \$3,000. The prayer is for judgment in solido against the firm and against its members individually. A citation, addressed "to K. & E. Neumond, a commercial firm, and Karl Neumond and Eugene Neumond, the individual members thereof," together with a copy of the petition, was served on Karl Neumond in person in the city of New Orleans, and a return of service on Neumond individually, and on the firm, was duly made.

Exceptions to the jurisdiction were filed on the ground that K. & E. Neumond, the commercial firm, is domiciled and doing business in the city of New Orleans, and hence, being under the law of Lou-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 199 F.—51

isiana a legal entity, is a citizen of Louisiana, diversity of citizenship does not exist. This exception was overruled, and defendants then filed additional exceptions on the grounds that the partnership with which the contract was made was not in existence at the time of the service, and, if it is to be held that the partnership of itself has no citizenship, the court for that reason has no jurisdiction over it; and, in the alternative, the defendants urge a reconsideration of their exception previously filed.

By an agreed statement of facts it appears that K. & E. Neumond was a commercial partnership, domiciled in New Orleans, composed of Karl Neumond and Eugene Neumond, both citizens of Germany, and that it was succeeded on July 1, 1910, by a firm of the same name, composed of Karl Neumond and Eugene Neumond and Ludwig Iseman, and due notice thereof was published in the daily papers of New Orleans and sent by circular to the trade.

The rule with regard to suits by or against corporations in the federal courts is so well settled and of such long standing that in pleading they are generally designated as citizens of the state of their creation; but it is not because they are in fact citizens in any sense of the word that they have standing in court. In the earlier decisions the Supreme Court always took occasion to say that corporations were not citizens; but they held that the artificial body would be considered as a company of individuals transacting their joint affairs in a legal name, and later they laid down the rule that the stockholders would be conclusively presumed to be citizens of the state creating the corporation. *Bank of the United States v. Deveaux*, 5 Cranch, 61, 3 L. Ed. 38; *Louisville Railroad Co. v. Letson*, 2 How. 497, 11 L. Ed. 353; *Marshall v. B. & O. Railway Co.*, 16 How. 314, 14 L. Ed. 953; *Covington Drawbridge Co. v. Shepherd*, 20 How. 227, 15 L. Ed. 896; *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207.

[1] In principle there would seem to be no difference between a corporation and a partnership, if the latter has the right to sue in the firm name. The Supreme Court, however, has always denied as to a partnership, or joint-stock company, the presumption that its members are citizens of the state of its domicile, and has always required the allegation, or proof, of the diversity of citizenship of its members. *Chapman v. Barney*, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800.

But, for all I have been able to discover, the requirement has gone no further, and where diversity of citizenship between the members of a partnership and the adverse parties to a suit has been shown jurisdiction has been entertained. *Great Southern Fireproof Hotel Co. v. Jones*, 177 U. S. 449, 20 Sup. Ct. 690, 44 L. Ed. 842; *Id.*, 193 U. S. 532, 24 Sup. Ct. 576, 48 L. Ed. 778.

In the case of *Thomas v. Board of Trustees*, 195 U. S. 207, a suit by a citizen of Michigan, the Supreme Court decided the question squarely, and held that the federal courts would have jurisdiction of a suit against a board of trustees, not a corporation, but authorized to sue and be sued in their collective name, without bringing in the individuals, if it was alleged they were all citizens of Ohio. See, also,

*Yonkerman Co. v. Fuller's Adv. Agency* (C. C.) 135 Fed. 613; *Bruett v. Austin* (C. C.) 174 Fed. 668; *Martin v. Meyer* (C. C.) 45 Fed. 435.

[2] A partnership in Louisiana is considered a legal entity; but, so far as I am aware, except for the decision in *Liverpool, Brazil & River Platte Navigation Co. v. Agar & Lelong* (C. C.) 14 Fed. 615, it has never been considered a corporation, or even a quasi corporation. That case I do not find persuasive, and it is certainly opposed to the decisions above cited.

[3, 4] However, it is well settled in Louisiana that a commercial partnership is in contemplation of law a moral being, an entity separate and distinct from the persons who compose it. Title to the personal property vests in it, and not in the partners, though they are bound in solido for its debts. It must sue and be sued in the firm name; but the members may be joined in the same proceeding, and judgment rendered against the firm and the partners in solido. When suit is so brought, even after dissolution, on a debt of the firm contracted before the dissolution, a citation, addressed to the firm and served on one of the partners, will bring in the firm and the partner served, and it is immaterial whether or not notice of the dissolution had been given to the creditor. C. C. arts. 2801 to 2890; C. P. art. 198; *Smith v. McMicken*, 3 La. Ann. 322; *Montague v. Weil*, 30 La. Ann. 54; *Succession of Pilcher*, 39 La. Ann. 363, 1 South. 929; *Wolf v. Tailor Made Pants Co.*, 52 La. Ann. 1369, 27 South. 893; *Id.*, 110 La. 427, 34 South. 590; *In re M. F. Dunn & Bro.*, 115 La. 1084, 40 South. 466.

[5] In this case diversity of citizenship is shown, there was proper service of the firm and of Karl Neumond, and both can stand in judgment in this court. Service of the firm and both members was also attempted by handing a citation and copy of the petition to Ludwig Iseman. It is, of course, ineffective, and should be quashed.

The exception of Karl Neumond and of the firm will be overruled, and the exception of Eugene Neumond to the service of citation will be sustained.

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## In re CONEY ISLAND LUMBER CO.

### Petition of STILWELL.

(District Court, E. D. New York. October 19, 1912.)

#### 1. BANKRUPTCY (§ 467\*)—PROCEEDINGS—FINDINGS OF SPECIAL COMMISSIONER—CONFLICTING EVIDENCE.

A finding of fact by a special commissioner in bankruptcy proceedings, based on conflicting evidence, will be sustained by the court, unless entirely erroneous.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. § 467.\*]

#### 2. BANKRUPTCY (§ 317\*)—SERVICE OF ATTORNEY BEFORE BANKRUPTCY—FEES.

Where, prior to bankruptcy, the debtor employed an attorney to prosecute a suit to foreclose a mechanic's lien without any specified contract

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for the attorney's services, the attorney, having prosecuted the suit to conclusion and turned over the proceeds, amounting to \$541.92, and \$147.85 costs, was entitled to an allowance of \$200 for his services.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 493-495; Dec. Dig. § 317.\*]

**3. BANKRUPTCY (§ 314\*)—CLAIMS—ATTORNEY'S FEES—SERVICES BEFORE BANKRUPTCY.**

Claimant, an attorney, had rendered services to the bankrupt more than four months before the bankruptcy, the value of which amounted to \$249.50. He had no express contract for fees, but both he and the insolvent expected that he would be paid for such services out of the proceeds of a mechanic's lien, which he later foreclosed. *Held*, that such acknowledgment was equivalent to an equitable assignment, and that he was entitled to allowance for such services out of the proceeds in the lien case.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 469-473, 478, 483-487, 489, 490; Dec. Dig. § 314.\*]

In Bankruptcy. In the matter of the Coney Island Lumber Company. Application by Van Mater Stilwell, an attorney, for an allowance for services rendered to the bankrupt. Granted.

See, also, 199 Fed. 197.

Conway, Williams & Kelly, of New York City, for trustee.  
Van Mater Stilwell, of Brooklyn, N. Y., pro se.

CHATFIELD, District Judge. The petitioner has claimed certain fees for services to the bankrupt in the foreclosure of a mechanic's lien for materials supplied by the bankrupt, and has testified to an alleged agreement with the president of the corporation as to the amount of such compensation. He asserts, also, that in the absence of agreement he is entitled to an attorney's lien for the reasonable value of his services against the proceeds of the litigation in question, and that this lien was preserved when the proceeds of the litigation were, under order of this court, turned over to the trustee in bankruptcy.

The special commissioner to whom the matter was referred has reported that upon the testimony he finds no contract, but that the petitioner did perform certain services. In view of the size of the estate, he fixes the reasonable value of those services at \$50 and the costs allowed in the foreclosure action.

The petitioner has excepted to the report, and these exceptions have been brought up on motion. The trustee in bankruptcy asks for the confirmation of the report as it stands.

[1] The special commissioner has made a finding of fact upon hearing the witnesses, which should not be disturbed, for there was a plain conflict of testimony, and the court cannot say that the conclusion of the special commissioner was not justified, although it is apparent that the petitioner made, or supposed he made, a definite proposition to the president of the bankrupt with respect to the services in question. This finding of fact is to the effect that no actual contract existed.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



There is no question that the services were rendered, and there is no question that they were of such value that a contract for the amount claimed would be valid, if its making were substantiated.

[2] But, in the absence of a contract, the claimant was still entitled to reasonable compensation for the services rendered by him, as against the particular litigation in which he was occupied. If the employment had been terminated by the bankruptcy proceedings, nevertheless a claim would exist for past services, which could be allowed in bankruptcy, and the litigation could not be taken away from the control of the attorney, and the property ordered turned over to the bankrupt estate, without making provision that his services should be respected and compensation given therefor.

The amount recovered in this litigation was \$541.92, with costs amounting to \$147.85, and Mr. Stilwell's charge was 25 per cent., or \$135.48, plus the costs. It would seem that a 25 per cent. charge for services involving the conduct of such litigation was reasonable in amount; but, if the costs are added, the total seems out of proportion to the recovery. The allowance of the special commissioner of substantially \$200 seems adequate.

[3] The balance of Mr. Stilwell's claim is made up of a bill for services amounting to \$249.50, rendered to the bankrupt more than four months prior to bankruptcy, and which the claimant alleges was to be paid out of the proceeds of the recovery in the mechanic's lien action. In other words, he postponed the demand for payment upon an agreement that he should retain it from the sum collected, if it be collected.

Again the finding of the special commissioner that there was no contract is a determination which, upon conflicting testimony, should not be overruled, unless clearly contrary to the facts proven. No written assignment of proceeds from the pending litigation was made. We can, therefore, disregard the question as to whether Mr. Stilwell had a contract to take his pay for prior services out of the proceeds of the mechanic's lien action, and we have presented merely the situation of an attorney conducting one litigation, and expecting, with the knowledge of the client, to be paid for other services out of the proceeds of the future litigation, and with the intervention of bankruptcy proceedings against the client before the money comes into the hands of the attorney.

This is equivalent to an equitable assignment, and would be valid if the parties reach a situation where the payment can be taken out of funds not subject to a superior right. It is apparent that if the moneys realized from the mechanic's lien action had been paid to Mr. Stilwell before bankruptcy, and he had deducted therefrom both compensation for that litigation and also for his previous services, the court would have allowed that deduction, subject only to scrutinizing the amount of the items, in the absence of any definite contract therefor.

As the litigation was not taken from Mr. Stilwell's hands, and he was allowed to conduct the same, but had a right to possession of the proceeds only to the extent of protecting his attorney's lien, it would

seem that he could ask this court to allow him, out of the proceeds, only such amount as he could have shown the right to possess, and any equitable assignment or claim for reasonable compensation for services rendered would have to be approved by the court, in asking for the actual possession of the proceeds.

On this basis, the reasonable value of the claimant's services and disbursements, for which he charged \$249.50, is not disputed by the trustee, and the court sees no reason to reduce the amount of the claim, as the charges were not exorbitant and were properly earned.

The petitioner may therefore receive the sum of \$449.50 from the fund in question.

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In re HALLIN.

(District Court, W. D. Michigan, S. D. October 30, 1912.)

1. BANKRUPTCY (§ 57\*)—ACTS OF BANKRUPTCY—BONUS TO LENDER.

An alleged bankrupt executed a chattel mortgage for \$475, covering a stock of goods, receiving from the lender \$450 in cash; the balance being a bonus of extra interest demanded by the lender for making the loan. Of the amount received, the borrower paid \$300 to cancel and discharge a prior mortgage existing on the same property, and of the remainder \$50 was paid to a bank to take up a note previously given by him for money with which to pay a merchandise account to another creditor. *Held*, that the payment of the bonus did not constitute an act of bankruptcy, on the theory that it was a conveyance of the debtor's property with intent to hinder, delay, or defraud creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 232-236; Dec. Dig. § 57.\*]

2. BANKRUPTCY (§ 58\*)—ACTS OF BANKRUPTCY—PREFERENCES.

The payment of a \$50 note to a bank did not constitute an act of bankruptcy, as a payment in full to one creditor with intent to prefer it.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 263-277; Dec. Dig. § 58.\*]

3. BANKRUPTCY (§ 81\*)—INVOLUNTARY PROCEEDINGS—PETITION.

An involuntary bankruptcy petition alleged that the debtor was insolvent, that he had committed acts of bankruptcy, in that, on May 29, 1912, he gave a chattel mortgage covering certain of his assets with intent to hinder, delay, and defraud his other creditors, that on the same date he transferred and conveyed certain of his property to one of his creditors, whose name was unknown, but which could be ascertained by reference to the files of the village clerk at F., with intent to hinder, delay, and defraud his other creditors, that on the same date he did transfer certain of his property to creditors, whose names were unknown, with intent to prefer such creditors over other creditors of the same class, and that on the same date he did convey certain of his property with intent to hinder, delay, and defraud his creditors. *Held* that such petition was insufficient, in that it did not set forth any act of bankruptcy with sufficient particularity.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 370-423; Dec. Dig. § 81.\*]

In Bankruptcy. In the matter of bankruptcy proceedings against Oscar E. Hallin. On application for adjudication. Denied.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Arthur E. Fixel and Max H. Finkelston, both of Detroit, Mich., for petitioning creditors.

E. L. Brooks, of Fremont, Mich., for alleged bankrupt.

SESSIONS, District Judge. On September 27, 1912, three of the creditors of Oscar E. Hallin, whose claims aggregate upwards of \$1,500, filed a petition praying that Hallin be adjudicated an involuntary bankrupt. The alleged acts of bankruptcy are set forth in the petition as follows:

"And your petitioners further represent that said Oscar E. Hallin is insolvent, and that within four months next preceding the date of this petition the said Oscar E. Hallin committed an act of bankruptcy, in that he did heretofore, to wit, on the 29th day of May, 1912, give a certain mortgage for four hundred and seventy-five (\$475) dollars, covering certain of the assets of said alleged bankrupt, which mortgage was given with the intent to hinder, delay, and defraud the other creditors of said bankrupt.

"And your petitioners further represent that the said Oscar E. Hallin, while insolvent and within four months next preceding the date of this petition, committed another act of bankruptcy, in that he did heretofore, to wit, on the 29th day of May, 1912, transfer and convey certain of his property to one of his creditors, the name of whom is not known, but which can be ascertained by reference to the files of the village clerk at Fremont, Mich., with intent to hinder, delay, and defraud his other creditors.

"And your petitioners further represent that the said Oscar E. Hallin is insolvent, and that while insolvent, and within four months next preceding the date of this petition, the said Oscar E. Hallin committed another act of bankruptcy, in that he did heretofore, to wit, on the 29th day of May, 1912, transfer certain of his property to creditors whose names are unknown, with the intent to prefer said creditors over his other creditors of the same class.

"And your petitioners further represent that the said Oscar E. Hallin, within four months next preceding the date of this petition, committed another act of bankruptcy, in that he did heretofore, to wit, on the 29th day of May, 1912, convey certain of his property with the intent to hinder, delay, and defraud his creditors."

[1] The alleged bankrupt entered and filed a denial of bankruptcy, and demanded a trial by the court, which has been had. At the trial it was made to appear by the evidence that on the 29th day of May, 1912, Hallin executed and delivered to Charles B. Buck a chattel mortgage in the sum of \$475, covering his stock of goods. At that time Mr. Buck paid to Mr. Hallin \$450 in cash, the remaining \$25 being a bonus or extra interest demanded by and paid to Mr. Buck for making the loan. Of the amount so received by the alleged bankrupt, upwards of \$300 was paid to cancel and discharge a chattel mortgage previously existing upon the same property, and \$50 was paid to a bank to take up and pay a note of that amount previously given by him to raise money with which to pay a merchandise account owing to another creditor.

Petitioners now concede that the giving of the chattel mortgage under the circumstances was not in itself an act of bankruptcy, but insist that the including in the chattel mortgage of the sum of \$25 as a bonus or extra interest, and the payment of the bank note in full, each constituted an act of bankruptcy within the purview of the statute. In other words, petitioners now claim that the giving of the mortgage for \$25 more than the actual amount of

money borrowed or received by the mortgagor constituted a conveyance of the debtor's property with intent to hinder, delay, or defraud his creditors, and that the payment in full, while insolvent, of the note to the bank, constituted a transfer of a portion of his property to one of his creditors, with the intent to prefer such creditor over his other creditors.

[2] The evidence fairly shows that at the time of the giving of the chattel mortgage on May 29th the alleged bankrupt was insolvent, although the margin or difference between his debts and the value of his assets was not large, and the excess of his debts over the fair value of his property was not sufficient to be of much, if any, evidential force or effect upon the question of his intent. Nor is there any satisfactory evidence that he then knew or believed himself to be insolvent. It is true that his creditors were pressing him for payment, and that he did not have the money to meet his past-due bills. It is also true that his credit was very limited. On the other hand, he had quite an amount of outstanding accounts belonging to him, and the evidence fairly establishes that he was endeavoring to pay his debts in full, and falls far short of proving an intent on his part either to defraud his creditors or to prefer one creditor over the others. The note at the bank seems to have been paid in the ordinary course and in the expectation of continuing in business, and at least in the hope of ultimately paying all of his obligations. It was a just debt, small in proportion to the entire amount of his debts, and the preference given was almost trifling. *Goodlander-Robertson Lumber Co. v. Atwood*, 152 Fed. 978, 82 C. C. A. 109, 18 Am. Bankr. Rep. 510; *Clark v. Henne & Meyer*, 127 Fed. 288, 62 C. C. A. 172, 11 Am. Bankr. Rep. 583; *Loveland on Bankruptcy*, page 320.

While the contract to pay a bonus or extra interest was unlawful, and could not be enforced by the mortgagee, yet it is a matter of common knowledge that lenders of money upon chattel security usually exact from the unfortunate borrower something in the way of a bonus. In complying with such a demand the alleged bankrupt did no more than is often done in such cases, and there is an entire lack of evidence to impeach his good faith, or to show that he intended to hinder, delay, or defraud his creditors. In fact, the proofs negative the existence of any such intent on his part.

[3] It is evident, also, that the petitioners, in their vague, uncertain, and unsatisfactory allegations relating to the giving of the chattel mortgage, did not refer, or intend to refer, to the fact that the mortgage was given for an excessive amount. It is only after the proofs have developed this slight irregularity that the present claim is made, and it now comes too late.

The petition itself is wholly insufficient, in that it does not set forth any act of bankruptcy with the required particularity as to essential data and details, does not apprise the alleged bankrupt of what he is to be called upon to meet, and, therefore, does not warrant the granting of any relief. In *re Rosenblatt & Co.*, 193 Fed. 638, 113 C. C. A. 506, 28 Am. Bankr. Rep. 401; In *re Pure Milk*

Co. (D. C.) 154 Fed. 682, 18 Am. Bankr. Rep. 735; In re Blumberg (D. C.) 133 Fed. 845, 13 Am. Bankr. Rep. 343; Clark v. Henne & Meyer, 127 Fed. 288, 62 C. C. A. 172, 11 Am. Bankr. Rep. 583; In re Nelson (D. C.) 98 Fed. 76, 1 Am. Bankr. Rep. 63.

An order will be entered dismissing the petition.

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UNITED STATES v. KOLODNER.

(District Court, M. D. Pennsylvania. October 26, 1912.)

No. 433.

1. ALIENS (§ 68\*)—NATURALIZATION—STATUTES—DEPOSITIONS.

Naturalization Law (Act June 29, 1906, c. 3592, 34 Stat. 599 [U. S. Comp. St. Supp. 1911, p. 533]) § 9, provides that the hearing on a petition for naturalization shall be in open court, and that the applicant and his witnesses shall be examined under oath before and in the presence of the court. *Held*, that such provision was mandatory, and that depositions could not be received or considered, except as authorized by the succeeding section.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138-146; Dec. Dig. § 68.\*]

2. ALIENS (§ 68\*)—NATURALIZATION—PROCEEDINGS—PROOF—DEPOSITIONS—"DISTRICT."

Naturalization Law (Act June 29, 1906, c. 3592, 34 Stat. 599 [U. S. Comp. St. Supp. 1911, p. 533]) § 10, provides that, in case the petitioner for naturalization has not resided in the state, territory, or district for five years continuously immediately preceding the filing of his petition, he may establish by two witnesses, both in his petition and at the hearing, the time of his residence within the state, provided that it has been for more than a year, and the remaining period of his five years' residence within the United States required to be established may be proved by the deposition of two or more witnesses who are citizens of the United States, on notice to the Bureau of Immigration and Naturalization and the United States attorney for the district in which the witnesses reside. *Held*, that the word "district," as used in such section, meant a federal district, and not the District of Columbia; and hence, where an applicant for naturalization had not resided continuously for five years in the district where he applied for citizenship, his residence in another state, territory, or district sufficient to establish a five years' residence in the United States could be proved by deposition.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138-146; Dec. Dig. § 68.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2136-2138; vol. 8, pp. 7639, 7640.]

Petition by the United States against Jacob Kolodner to cancel a certificate of naturalization. Denied.

A. B. Dunsmore and Andrew Hourigan, both of Wilkes-Barre, Pa., for plaintiff.

WITMER, District Judge. On the 24th day of February, 1910, Jacob Kolodner filed in the Circuit Court of the United States for the Middle District of Pennsylvania his petition for naturalization, and produced as witnesses to such petition Morris Freginbaum and Harry

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Williams, each of whom made affidavit that they had known the applicant to have resided in the United States, and within the district, for a period of two years preceding the date of filing his application. In order to establish the other three years of continuous residence required by the act of Congress, the petitioner, on proper order and allowance, took the depositions of Lewis Flinkman and Simon Flinkman, of the city of Philadelphia, before Henry J. Robb, clerk of the Circuit Court for the Eastern District of Pennsylvania, which he presented to court upon hearing his application. The court, then presided over by my predecessor, Judge Archbald, received the depositions for the purpose offered, against the objection of the agent for the Bureau of Naturalization, and admitted the applicant to citizenship. Since then suit has been instituted in behalf of the government, under the fifteenth section of the Naturalization Law of June 29, 1906 (34 Stat. 601, c. 3592 [U. S. Comp. St. Supp. 1911, p. 537]), for the cancellation of the certificate of naturalization granted, upon the specific ground that the court was not authorized to receive the depositions taken of witnesses residing within the state where the application was filed and being heard.

The fourth section of the act of Congress above referred to provides that an alien may be admitted to become a citizen of the United States on petition verified by the affidavits of at least two creditable witnesses, who are citizens of the United States, and who shall state in their affidavits that they have personally known the applicant to have been a resident of the United States for a period of at least five years continuously and of the state, territory, or district in which the application is made for a period of at least one year immediately preceding the date of the filing of his petition.

[1] The ninth section requires that the hearing on such petition shall be in open court, and that the applicant and his witnesses shall be examined under oath, "before the court and in the presence of the court." This provision is specific and mandatory, and, except as provided in the tenth section, the court is not authorized to receive or consider evidence taken by depositions.

[2] The tenth section, however, permits depositions to prove the fact of five years' continuous residence within the United States in cases of applicants for naturalization, whose residence in the state, territory, or district has been less than five years. That the Congress had in mind the territorial jurisdiction of the federal court in framing this act is apparent from the use of the words "state, territory, or district," as appears from the fourth and tenth sections; and it is equally certain that it did not intend the word "district," as was argued by counsel, to apply to the "District of Columbia"—such word being used as a common and not a proper noun. When the applicant has resided within the jurisdiction of the court where he presents his application for a period of one year or more preceding the date of the filing of his petition, and having resided beyond such jurisdiction during the period required for naturalization, he may proceed with his hearing by producing in court the required witnesses who have known him during the time he has resided in such district, and prove by the depo-

sition of witnesses living beyond the territory or jurisdiction of the court for the balance of such time. And this view of the act is not in conflict with the case of *United States v. Nisbit* (D. C.) 168 Fed. 1005, cited by the attorney for the government, in which it was held that the superior court of Washington had no jurisdiction to receive depositions to prove five years' continuous residence within the United States, because such depositions were not of witnesses resident beyond the state, territory, or district where the application was heard. There the hearing was in the superior court of the state of Washington for Jefferson county, and the depositions were of witnesses taken in the county of Pacific, of the same state, and all within the Western district of Washington in the Ninth circuit of the United States.

There are other reasons why I should hesitate to reverse the order of the court, heretofore made, and set aside and cancel the certificate of naturalization granted, had I not reached the conclusion to agree with the court that the depositions taken and considered are authorized by the act.

The petition is therefore denied.

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## IN RE LANDS OF FIVE CIVILIZED TRIBES.

### THE 30,000 LAND SUITS.

(District Court, E. D. Oklahoma. August 14, 1912.)

#### 1. INDIANS (§ 15\*)—LANDS—RESTRICTIONS ON ALIENATION—EFFECT OF DEATH OF ALLOTTEE.

The provision of Choctaw and Chickasaw Supplemental Agreement July 1, 1902, c. 1362, 32 Stat. 643, § 16, that surplus lands allotted to members of the tribes shall be alienable "one-fourth in acreage in one year; one-fourth in acreage in three years and the balance in five years, in each case from date of patent," is not in any way limited or modified by the proviso "that such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal government for less than its appraised value," which could only become operative as to any particular tract after the expiration of the one, three, or five years' restriction while the tribal governments were still in existence, but imposes a restriction on alienation not personal to the allottee, but which runs with the land and affects it as well in the hands of heirs as of the original allottee, and prohibits alienation by an allottee member of the tribes or his heirs until the expiration of the periods named.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 37-44; Dec. Dig. § 15.\*]

#### 2. INDIANS (§ 15\*)—RESTRICTION ON ALIENATION OF LANDS—CONSTRUCTION OF AGREEMENT—"DATE OF PATENT."

Choctaw-Chickasaw Supplemental Agreement July 1, 1902, c. 1362, 32 Stat. 643, § 16, provides that "all lands allotted to members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year; one-fourth in acreage in three years and the balance in five years, in each case from date of patent." Allotments to members of the Choctaw and Chickasaw Tribes were made under what is known as the Atoka Agreement, embodied in Curtis Act June 28, 1898, c. 517, 30 Stat. 495, and such Supplemental Agreement. The Curtis

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Act provided that patents to the allottees should be jointly executed and delivered by the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, and the Supplemental Agreement made no change in that respect. There was no provision in either of the agreements, as there was in those with the Creeks and Cherokees, requiring the patents to be approved by the Secretary of the Interior. *Held*, that in view of the provision of Act March 3, 1893, c. 209, 27 Stat. 645, authorizing generally allotments in severalty of the lands of the Five Civilized Tribes, that upon such allotment the reversionary interest of the United States in the lands allotted "shall be relinquished and shall cease," there was no necessity for such approval to operate as a relinquishment of that interest, and that the "date of patent" referred to in said section 16 of the Supplemental Agreement, from which the periods of restriction were to run, was the date when the patent was signed by the second of the two chief executives of the tribes.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 37-44; Dec. Dig. § 15.\*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1830, 1831.]

3. **INDIANS (§ 15\*)—RESTRICTIONS ON ALIENATION OF LANDS.**

The term "issuance of patent," as used in said Act July 1, 1902, c. 1362, 32 Stat. 643, § 16, under the law as it then stood, referred to the time when the patent was delivered to the allottee, there being no provision making its record necessary to the passing of title; but under Act April 26, 1906, c. 1876, 34 Stat. 139, § 5, which provides that "all patents or deeds to allottees \* \* \* shall be recorded in the office of the Commissioner to the Five Civilized Tribes, and when so recorded shall convey legal title," and repeals all acts and parts of acts inconsistent therewith, the recording of a patent is equivalent to its issuance under former acts so far as it affects the period of restriction.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 37-44; Dec. Dig. § 15.\*]

4. **INDIANS (§ 15\*)—RESTRICTIONS ON ALIENATION OF LANDS—ALLOTMENTS TO FREEDMEN—STATUS.**

Under the Atoka Agreement with the Choctaw and Chickasaw Nations, embodied in Curtis Act June 28, 1898, c. 517, 30 Stat. 495, and Supplemental Agreement July 1, 1902, c. 1362, 32 Stat. 641, the entire allotments to freedmen of such tribes had the status of homesteads, and the restrictions on alienation therein imposed were not removed by Act April 21, 1904, c. 1402, 33 Stat. 189, removing restrictions on the sale of lands of all allottees not of Indian blood, except as to minors and homesteads.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 37-44; Dec. Dig. § 15.\*]

5. **INDIANS (§ 15\*)—RESTRICTIONS ON ALIENATION OF LANDS—HOMESTEADS OF DECEASED SEMINOLE ALLOTTEES.**

Act March 3, 1903, c. 994, 32 Stat. 982, which provides in section 8 that homestead allotments to Indians of the Seminole Tribe "shall be inalienable during the lifetime of the allottee, not exceeding 21 years from the date of the deed for the allotment," had the effect of reducing the term of inalienability from a perpetuity, as provided in the original act under which the allotments were made, and on the death of an allottee, although before patent, his equitable interest becomes immediately alienable by his heirs.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 37-44; Dec. Dig. § 15.\*]

6. **INDIANS (§ 15\*)—RESTRICTIONS ON ALIENATION OF LANDS—HOMESTEADS OF DECEASED CREEK ALLOTTEES.**

Under Creek Supplemental Agreement June 30, 1902, c. 1323, 32 Stat. 500, § 16, construed in the light of contemporaneous legislation relating

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



to all others of the Five Civilized Tribes, the general restriction on alienation for five years from the date of the agreement applies only to the surplus lands of an allottee, and on the death of an allottee, without leaving children born after May 25, 1901, whether before or after the expiration of the five years' restriction, his homestead allotment is immediately alienable by his devisees in case of a will, or by his heirs in the absence of a will.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 37-44; Dec. Dig. § 15.\*]

In Equity. Suits by the United States to set aside a large number of alleged illegal conveyances of lands of the Five Civilized Tribes of Indians, known as the "30,000 Land Suits." On demurrers to bills raising various questions.

#### Choctaw-Chickasaw Cases.

CAMPBELL, District Judge. [1] In the argument on Saturday was presented the question whether in the case of the death of members, other than freedmen, of the Choctaw and Chickasaw Nations after receiving their allotments, and within the restriction periods of one, three, and five years mentioned in the Supplemental Agreement (Act July 1, 1902, c. 1362, 32 Stat. 642), the heirs of such deceased allottees might sell the surplus lands before the expiration of such restriction periods; that is to say, whether the restrictions, other than that contained in the proviso to section 16, ran with the land, or were personal to the allottee, and ceased with his death. It cannot be doubted that unless the restrictions upon the lands in the hands of the heirs, contemplated for by the government, can be found in the Choctaw-Chickasaw Supplemental Agreement of July 1, 1902, they did not exist. If they are to be found in the agreement, it must be in one of the four sections thereof reading as follows:

"12. Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw Nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead.

"13. The allotment of each Choctaw and Chickasaw freedman shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment."

"15. Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold except as herein provided.

"16. All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent: Provided, that such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value."

Section 12, above quoted, clearly relates only to homesteads. Section 13 relates to freedman allotments. Clearly the restrictions con-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tended for are in neither of these sections, and must therefore be in section 15 or 16, or both. Section 15 is negative in its effect, protecting the land from incumbrance by any deed, debt, or obligation of any character contracted prior to the time at which the land may be alienated under the act, and negating the idea that under any circumstances might it be sold or incumbered before the time at which it might be alienated. Here is involved a restriction upon incumbrance and sale of the land, but for the time such restriction is to continue we must look to section 16, which fixes the time when such lands may be alienated. Section 15 designates the character of certain of the restrictions, while they shall exist, and section 16 fixes the term of their existence. For the answer, therefore, to the question whether they continue longer than the life of the allottee we must look to section 16. That alone is the section which affirmatively determines when the land may be alienated, and by the provisions of section 15 all restrictions, except that contained in the proviso to section 16 cease when the right of alienation attaches. If the proviso had not been attached to section 16, it would have read:

"All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead, as herein provided, shall be alienable after issuance of patent, as follows: One-fourth in acreage in one year; one-fourth in acreage in three years; and the balance in five years; in each case from date of patent."

In view of the provisions of section 15, this amounts to saying that the lands shall be inalienable until the expiration of the periods mentioned. In the case of *Goodrum v. Buffalo*, 162 Fed. 817, 89 C. C. A. 525, decided by the Circuit Court of Appeals for this circuit, the court was considering an act of Congress relating to the Quapaw Tribe of Indians, whereby the previous action of the National Council of that tribe, providing for allotment of their land in severalty, was ratified by Congress. Act March 2, 1895, c. 188, 28 Stat. 907. In this act it was provided (referring to said action of the council) that:

"The Secretary of the Interior is hereby authorized to issue patents to said allottees, in accordance therewith; provided, that said allotments shall be inalienable for a period of 25 years from and after the date of said patents."

One question decided in the Buffalo Case was whether this restriction was personal to the allottee, and ceased with his death, or ran with the land and affected it in the hands of his heirs until the expiration of the 25 years from date of patent. The court said:

"The language of the statute under which the patent was issued to John Medicine is 'that said allotments shall be inalienable for a period of 25 years from and after the date of said patents.' It is a limitation attached to and running with the land, in no wise dependent upon the life or death of the patentee. It was as much within the policy and purpose of the government to see that the heirs of the allottee, in case of his death, were protected against alienation of the land, as the allottee himself; otherwise they might become a charge upon the public, and the beneficent policy of the government in bringing about the allotment of lands in severalty would be thwarted."

If it were not for the proviso, attached to section 16, the ruling in the Buffalo Case, *supra*, would certainly apply to this case; for it would be a clear construction by the Circuit Court of Appeals of an

essentially similar act. But we have the proviso added here, which it is contended evidences the intention of Congress and the tribes, that the one, three, and five years' restrictions should be personal to the allottee, and cease with his death. And it is urged that this contention is sustained by the decision of the Supreme Court in *Mullen et al. v. United States*, 224 U. S. 448, 32 Sup. Ct. 494, 56 L. Ed. 834, decided April 15, 1912.

In the *Mullen Case*, the Supreme Court, after quoting sections 12, 13, 15, and 16, say:

"It will be observed that the homestead lands are made inalienable 'during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment.' The period of restriction is thus definitely limited, and the clear implication is that, when the prescribed period expired, the lands were to become alienable; that is, by the heirs of the allottee upon his death, or by the allottee himself at the end of the 21 years. Thus, with respect to homestead lands, the supplemental agreement imposed no restriction upon alienation by the heirs of a deceased allottee. And the reason may be found in the fact that each member of the tribes, each minor child as well as each adult, duly enrolled as required, was to have his or her allotment; so that each member was already provided with a homestead as a part of the allotment, independently of the lands which might be acquired by descent. On the other hand, the proviso of paragraph 16, which relates to the additional portion of the allotment, or the so-called 'surplus' lands, contains a restriction upon alienation not only by the allottee, but by his heirs. Whatever may have been the purpose, a distinction was thus made with regard to the disposition by heirs of the homestead and surplus lands respectively."

Here the Supreme Court was remarking the fact that a distinction was made with regard to alienation by the heirs as between the homestead and the surplus, the distinction being that the former was not restricted, and the latter was restricted in the hands of the heirs; the restriction being contained in the proviso. Evidently it did not then occur to the court that the one, three, and five years' restriction attached to the land in the hands of the heirs, as well as in the hands of the allottee, or it would not have referred to the restriction affecting the heirs as having been found only in the proviso. It is further said by the court:

"We have, then, a case where all the allotted lands going to the heirs are of the same character, and there is no restriction upon the right of alienation expressed in the statute. Had the lands been allotted in the lifetime of the ancestor, one-half of them, constituting homestead, would have been free from restriction upon his death. The only difficulty springs from the language of paragraph 16, limiting the right of heirs to sell 'surplus' lands. But, on examining the context, it appears that this provision is part of the scheme for allotments to living members, where there is a segregation of homestead and surplus lands, respectively. Whatever the policy of such a distinction which gives a greater freedom for the disposition by heirs of homestead lands than of the additional lands, there is no warrant for importing it into paragraph 22, where there is no such segregation. It would be manifestly inappropriate to imply the restriction in such cases so as to make it applicable to all the lands taken by the heirs, and there is no occasion, or authority, for creating a division of the lands so as to impose a restriction upon a part of them."

But it must be remembered that in the *Mullen Case* the question was not, in the first instance, what were the nature and extent of

the restrictions imposed by sections 15 and 16, but whether, whatever restrictions, if any, these sections did impose upon the lands in the hands of heirs of the allottees, would be imported into section 22. The court found that the proviso to section 16 imposed a certain restriction upon the land in the hands of the heirs. Whether or not that section had imposed any other restriction upon the lands in the hands of the heirs, the one imposed by the proviso, at any rate, would have attached to section 22, had the government's contention in that case been correct. The first question to be determined, then, in the Mullen Case, was whether, whatever restrictions were imposed by sections 15 and 16, so far as the heirs were concerned, attached to the lands allotted to the heirs under section 22. This the Supreme Court decided in the negative, and it therefore became unnecessary to decide the character or extent of the restrictions imposed by sections 15 and 16. It cannot, therefore, be said that the question involved here was decided by the Mullen Case. The restriction imposed by the proviso to section 16, prohibiting alienation for less than the appraised value, can only become operative as to any particular tract after the expiration of the one, three, or five years restriction, as the case may be. Until that time, no alienation is permitted. Hence, until then, there is no necessity of placing a minimum purchase price upon the same. The parties to the agreement, therefore, must have contemplated that the tribal governments might continue after the expiration of the one, three, and five year periods. The proviso clearly expresses the intention that during such continuance of the tribal governments, after the expiration of the said restriction periods, the further limitation as to the purchase price, not being less than the appraised value, should affect the lands in the hands of the allottee and his heirs. But, when by alienation it should pass into the hands of third parties, there was then no further duty or desire by the parties to the agreement to control it in any way in the hands of such third parties, even though, as in many instances might be the case, the tribal governments were still in existence. Hence, instead of merely providing in the proviso, as in the former part of the section, that the land should be inalienable for less than the appraised value until the expiration of the tribal governments, which would have affected it in the hands of third persons as well as in the hands of the allottee or his heirs, the limitation in the proviso specifically mentions the allottee and his heirs as the ones, and the only ones, affected by the limitation. As sections 15 and 16 construed together clearly provide that one-fourth of the land, in acreage, allotted to a member, shall not be alienated before the expiration of one year, and one-fourth, in acreage, shall not be alienated before the expiration of three years, and the remainder not before the expiration of five years, in each case from date of patent, and as I do not find that this provision is in any way limited or modified by the proviso relating to sale for less than the appraised value, it is my opinion that, as held in the Buffalo Case, *supra*, the one, three, and five years' restrictions run with the land, and affect it as well in the hands of the heirs as of the original allottee.

This construction I think entirely consistent with the language of the agreement, and, so construed, evidences the same policy expressed in the contemporary Creek and Cherokee Agreements as to restricting the alienation of the lands in the hands of the heirs as well as of the allottees.

**"Date of Patent" Choctaw-Chickasaw Agreements.**

[2] The question is presented as to what may be said to be the "date of patent," as the term is used in section 16 of the Choctaw-Chickasaw Supplemental Agreement, approved July 1, 1902. The section reads:

"All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent, as follows: One-fourth in acreage in one year; one-fourth in acreage in three years, and the balance in five years; in each case from date of patent: Provided that such lands shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value."

It is contended by the government that the date of patent is determined by the date of approval thereof by the Secretary of the Interior. On the other hand, the defendants contend that it is the date upon which the patent is signed by the last Governor or Principal Chief of the tribe, as the case may be. In the act approved March 3, 1893 (chapter 209, 27 Stat. 645), Congress took the initial step in the process of legislation by which has been accomplished the allotment of the lands of the Five Civilized Tribes in severalty to the individual members thereof. By section 15 of that act it was provided:

"The consent of the United States is hereby given to the allotment of lands in severalty not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles; and upon such allotments the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States. And the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated to pay for the survey of any such lands as may be allotted by any of said tribes of Indians to individual members of said tribes; and upon the allotment of the lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease."

By the same act there was established the Commission to the Five Civilized Tribes, which has since represented the United States in negotiations with the Indians looking to the allotment of lands contemplated by that act. The Choctaws and Chickasaws did not avail themselves of the permission granted by section 15, above quoted, to allot their lands, but in the act approved June 28, 1898 (chapter 517, 30 Stat. 495), known as the "Curtis Act," was incorporated what is commonly known as the "Atoka Agreement," between the Commission and representatives of the two tribes mentioned, providing in detail for the allotment of their lands in severalty to the members thereof. The agreement began with this provision:

"That all the lands within the Indian Territory belonging to the Choctaw and Chickasaw Indians shall be allotted to the members of said tribes so as to give to each member of these tribes, so far as possible, a fair and equal

share thereof, considering the character and fertility of the soil and the location and values of the lands."

Following the portion of this agreement relating in detail to the division of the land between the individual members by allotment, it is provided:

"That, as soon as practicable after the completion of said allotments, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation shall jointly execute, under their hands and the seals of the respective nations, and deliver to each of the said allottees patents, conveying to him all the right, title, and interest of the Choctaws and Chickasaws in and to the land which shall have been allotted to him in conformity with the requirements of this agreement, excepting all coal and asphalt in or under said land. Said patents shall be framed in accordance with the provisions of this agreement, and shall embrace the land allotted to such patentee and no other land, and the acceptance of his patents by such allottee shall be operative as an assent on his part to the allotment and conveyance of all the lands of the Choctaws and Chickasaws in accordance with the provisions of this agreement, and as a relinquishment of all his right, title, and interest in and to any and all parts thereof, except the lands embraced in said patents, except also his interest in the proceeds of all lands, coal, and asphalt herein excepted from allotment. That the United States shall provide by law for proper record of land titles in the territory occupied by the Choctaw and Chickasaw Tribes."

Before allotment had been accomplished under the foregoing legislation, the Commission and representatives of the tribes entered into a Supplemental Agreement (32 Stat. 641) changing materially the provisions with regard to the amount of land each member was to receive in allotment, changing somewhat the provisions imposing restrictions upon the sale or incumbrance of the land, and providing for the disposition of allotments due deceased members. No further provision is made in this Supplemental Agreement for the execution or issuance of patents or deeds for the allotments provided for. In the portion thereof, however, relating to townsites and the sale of lots therein to the owners of improvements thereon, etc., this provision appears:

"Upon the payment of the full amount of the purchase price of any lot in any townsite in the Choctaw and Chickasaw Nations, appraised and sold as herein provided, or sold as herein provided, the chief executives of said nations shall jointly execute, under their hands and the seal of the respective nations and deliver to the purchaser of the said lot a patent conveying to him all right, title, and interest of the Choctaw and Chickasaw Tribes in and to said lot."

It will be noted that the foregoing provision as to deeds or patents for town lots is similar to that of the Atoka Agreement, regarding deeds or patents for allotments, apparently contemplating that the deeds or patents, after execution by the chief executive officers of the tribes, shall be by them delivered direct to the allottee, or the purchaser, as the case may be. Section 68 of this Supplemental Agreement provides that no act of Congress or treaty provision, nor any provision of the Atoka Agreement inconsistent with this agreement, shall be in force in said Choctaw and Chickasaw Nations, but, as, there is no provision made in the Supplemental Agreement for the execution and delivery of deeds or patents for allotments, the provision,

therefor, contained in the Atoka Agreement, as above quoted, is not in conflict, and hence must be treated as remaining in force, and the scheme of allotment in the Choctaw and Chickasaw Nations, after the Supplemental Agreement, must be found in that agreement and the provisions of the Atoka Agreement not inconsistent therewith. It is significant that in the Supplemental Agreement the same plan for passing title to the purchaser of town lots is provided as was provided in the Atoka Agreement for passing title to allotments; it being provided in both instances that the deed or patent in each case should be executed by the chief executives of both nations, and by them delivered to the allottee or purchaser, as the case might be. In the Creek and Cherokee Agreements it was provided that the deeds or patents for allotments should be executed by the Principal Chief, and by him delivered to the allottee. But there was a further provision that the conveyance should be approved by the Secretary of the Interior, which should serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in the deed or patent. These lands were held by the Choctaw and Chickasaw Nations under grant from the United States in fee simple to them and their descendants to inure to them while they should exist as a nation and live on it (treaty of Dancing Rabbit Creek, Kappler's Treaties, 221), with the right of reversion to the United States only in case the Indians or their heirs should become extinct or abandon the same (Treaty of 1855, Kappler's Treaties, 532). We have seen that by the act of March 3, 1893, the consent of the United States was expressly given to the allotment of these lands by the tribes to the individual members of the tribes. By the same act, the Commission to the Five Civilized Tribes was established, whose duty it was to negotiate with the tribes for the purpose of reaching agreements for the allotment of the land; the express purpose being to bring about a condition looking to ultimate statehood. If the consent expressly given by the act of March 3, 1893, cannot be said to be in terms imported into the Atoka Agreement and the Supplemental Agreement with the Choctaw and Chickasaw nations, it is there by implication as strongly as if given in terms. A grant may be made by law as well as by a patent pursuant to law. 10 Ency. of U. S. Sup. Ct. Repts. 150, and cases cited. It is not necessary to the passing of the reversionary interest of the United States to the allottee that the agreement should contain a grant in technical terms, but the intent of Congress to do so may be gathered from the whole scope of the agreements and other congressional legislation on the subject and the facts involved. *New York Indians v. United States*, 170 U. S. 1, 18 Sup. Ct. 531, 42 L. Ed. 927.

There having been no provision in the agreements referred to requiring, as in the case of the other tribes mentioned, that the deeds or patents should be approved by the Secretary of the Interior, which should serve as a relinquishment of the right, title, and interest of the United States in the lands, it follows that it was the intention of Congress that this relinquishment on the part of the United States should be expressed in the legislation itself, either directly or by implication.

Whenever, pursuant to allotment as provided in the Atoka and Supplemental Agreements, the chief executive officers of the two nations had both executed a patent to the allottee, it became a completed instrument, requiring only issuance or delivery to pass the title. I therefore conclude that the "date of patent" referred to in section 16 of the Supplemental Agreement is fixed by the date upon which the last of the two chief executives of the tribes involved affixed his signature to the instrument. This establishes a definite date, apparent from the instrument itself, from which the restrictions began to run, and must be held to have been the date contemplated by the parties to the agreement as "date of patent."

#### Issuance of Patent.

[3] By section 16 of the Supplemental Agreement, above quoted, it was provided that the land should be alienable "after issuance of patent" upon the expiration of the several periods mentioned. The question is presented as to when "issuance of patent" may be said to be accomplished. The term "issuance," as defined by the several dictionaries, may be said to be the act of putting, sending, or giving out; promulgation; distribution. We have seen that the Atoka Agreement provided that the chief executives of the two nations should jointly execute and "deliver" to each allottee a patent or patents conveying all right, title, and interest of the tribes in the lands allotted to him. Clearly the delivery of the patent to the allottee under this provision is its issuance. It was also provided in the Atoka Agreement that the United States should provide by law for proper recording of land titles in the territory occupied by the Choctaw and Chickasaw Tribes. By section 66 of the Supplemental Agreement it was provided that:

"All patents to allotments of land, when executed, shall be recorded in the office of the Commissioner to the Five Civilized Tribes within said nations in books prepared for the purpose, until such time as Congress shall make other suitable provision for record of land titles as provided in the Atoka agreement, without expense to the grantee; and such records shall have like effect as other public records."

By section 5 of the act approved April 26, 1906 (chapter 1876, 34 Stat. 139), it was provided that:

"All patents or deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of the Commissioner to the Five Civilized Tribes, and, when so recorded, shall convey legal title, and shall be delivered under the direction of the Secretary of the Interior to the party entitled to receive the same."

By section 29 of the same act, it was provided that:

"All acts and parts of acts inconsistent with the provisions of this act shall be and the same are hereby repealed."

From the provisions of the Atoka Agreement it appears that it was then contemplated that the recording of the patent had nothing to do with the passing of title to the allottee. With the allotment of the land in severalty, under provisions whereby portions of it might be alienated by the allottees from time to time, and thus



become the subject of transfer as any other real estate, the necessity for registry of land titles arose. By section 66 of the Supplemental Agreement, above quoted, Congress, as contemplated by the Atoka Agreement, provided for the recording of land titles in the office of the Commission to the Five Civilized Tribes, such record to be without expense to the allottee, and to have the same effect as other public records. Here the recording is still not made any part of the process by which title is passed to the allottee, so that until the act of April 26, 1906, above referred to, the legal title passed to the allottee upon the issuance—that is, the delivery—of patent to him and acceptance thereof by him. The “issuance of patent” was accomplished by its delivery to and acceptance by him, whether previously recorded or not. The delivery and acceptance of the patent, like the delivery and acceptance of any conveyance to land, were necessary, as the law then stood, to pass the legal title, and it was in the contemplation of the parties to the Supplemental Agreement that the allottee should not be permitted to alienate any of his land before acquiring the legal title. But in the act of April 26, 1906, we have seen that recording in the office of the Commission to the Five Civilized Tribes is made a prerequisite to the conveyance of legal title to the allottee, in that it is provided that, when so recorded, the patent shall convey legal title. All former inconsistent acts or parts of acts are repealed. Under this act, the recording of the patent is equivalent to its issuance under former acts, so far as the right to alienate is concerned.

#### Whether Choctaw-Chickasaw Freedman Allotments Had Status of “Homesteads” Prior to Act of April 26, 1906.

[4] There is presented in the Choctaw and Chickasaw Nations the further question, Did the allotments to Choctaw and Chickasaw freedmen have the status of homesteads prior to Act April 26, 1906, so that Act April 21, 1904, c. 1402, 33 Stat. 189, removing restrictions from the sale of lands of all allottees not of Indian blood, except as to minors and homesteads, did not apply to such allotments?

The Atoka Agreement provided:

“All the lands allotted shall be nontaxable while the title remains in the original allottee, but not to exceed twenty-one years from the date of patent, and each allottee shall select from his allotment a homestead of one hundred and sixty acres, for which he shall have a separate patent, and which shall be inalienable for twenty-one years from date of patent. This provision shall also apply to the Choctaw and Chickasaw freedman to the extent of his allotment.”

By the foregoing provision the entire allotment of the Choctaw and Chickasaw freedman became nontaxable while the title remained in the original allottee, not exceeding 21 years from the date of patent. No homestead selection was necessary on the part of the freedman allottee, because the homestead provision was made to apply to the “extent of his allotment”—that is, to his entire

allotment—and, for the same reason, separate patent was unnecessary. The provision imposing inalienability for 21 years was also made to apply to his entire allotment. This gave to the entire allotment of the Choctaw and Chickasaw freedman exactly the status of the homestead of 160 acres of an Indian member of said tribes. It was clearly the intention of the contracting parties that the entire freedman allotment should be his homestead, and was so considered by them. By the Supplemental Agreement, approved July 1, 1902 (32 Stat. 641), relating to these tribes, it was provided:

"12. Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw Nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead."

"13. The allotment of each Choctaw and Chickasaw freedman shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment."

\* \* \* \* \*

"68. No act of Congress or treaty provision, nor any provision of the Atoka agreement, inconsistent with this agreement, shall be in force in said Choctaw and Chickasaw Nations."

Section 12, above quoted, provides for the selection of a homestead by each member of the tribe, other than freedmen. Such member is to designate as a homestead out of his allotment land equal in value to 160 acres of average allottable land, which shall be inalienable during his lifetime, not exceeding 21 years from date of certificate of allotment, and separate certificate and patent shall issue therefor. For the reason observed as to the Atoka Agreement, the selection of a homestead by a freedman was unnecessary, under the terms of the Supplemental Agreement, as the entire freedman allotment is there also given the same status, and for the same reason it was unnecessary to provide for separate homestead patent. The other distinctive feature of the homestead of a member not a freedman, that of inalienability during the lifetime of the allottee not to exceed 21 years, is, however, expressly made to attach to the entire allotment of each freedman. While it is not in terms called a homestead, it has all the features of the homestead of a member, not a freedman, except as to selection and separate patent, which are unnecessary to accomplish the purposes of the contracting parties. So that the provision of the Atoka Agreement, above referred to, which expressly made these freedmen allotments homesteads, cannot be said to be inconsistent with this agreement. In section 12 above quoted it is clear that the one thing sought to be accomplished by the parties to the agreement by that section was the establishment of homesteads for members not freedmen, attaching to those homesteads restrictions different from those attaching to surplus lands, obviously in order to afford such members a greater degree of protection as to their homesteads than pertained to their surplus lands. In section 13, immediately

following, still evidently having in mind the subject of homesteads, the contracting parties consider the freedmen of the tribes, and attach to their entire allotments identically the same restrictions as to alienation pertaining to homesteads of Indian members of the tribes. The intention is manifest in this latter agreement to give the freedman allotments the status of homesteads. The very terms of the Supplemental Agreement refute the contention that, as an act revisory of the Atoka Agreement, it repeals by implication the provision of the latter agreement, making freedman allotments homesteads.

"The doctrine that a statute is impliedly repealed by a subsequent statute, revising the whole matter of the first, does not apply where the revisory statute declares what effect it is intended to have upon the former, as where it provides that it shall operate to repeal all inconsistent or repugnant acts." 36 Cyc. 1081.

In the act approved April 26, 1906, it was provided:

"Lands allotted to freedmen of the Choctaw and Chickasaw Tribes shall be considered 'homesteads,' and shall be subject to all the provisions of this or any other act of Congress applicable to homesteads of citizens of the Choctaw and Chickasaw Tribes."

It is contended on the part of the government that this provision is merely declaratory of the law established by the Atoka and Supplemental Agreements, and is a legislative construction of them. The defendants contend, on the other hand, that this provision demonstrates that Congress construed the prior legislation as not constituting these freedman allotments "homesteads," and that the purpose of this provision was to change that condition, and make them henceforth "homesteads." As said by the Supreme Court in *Tiger v. Western Investment Co.*, 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738:

"When several acts of Congress are passed touching the same subject matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject."

The same court said in the case of *United States v. Freeman*, 3 How. 556, 11 L. Ed. 724:

"The correct rule of interpretation is that, if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law that all acts in *pari materia* are to be taken together as if they were one law. [*Earl of Ailesbury v. Pattison*, 1] Doug. 30; [*King v. Commissioners of Excise*] 2 T. R. 387; [*King v. Mason*] Id., 586; [*King v. Inhabitants of Bowness*] 4 Mau. & Sel. 210. If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute ([*Sir William Moore's Case*] Ld. Raym. 1028), and, if it can be gathered from a subsequent statute in *pari materia* what meaning the Legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute (*Morris v. Mellin*, 6 Barn. & C., 454; [*Sandiman v. Breach*] 7 Id. 99). Wherever any words of a statute are doubtful or obscure, the intention of the Legislature is to be resorted to, in order to find the meaning of the words. *Wimbish v. Tailbois*, Plwd. 57. A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter. *Stowel v. Zouch*, Plwd. 366. These citations are

but different illustrations of the rule that the meaning of the Legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the Legislature proceeded, from the end in view or the purpose which was designed, the limitation of the rule being that, to extend the meaning to any case not included in the words, the case must be shown to come within [the same reason upon which the lawmaker proceeded, and not only within] a like reason. This court has repeatedly, in effect, acted upon the rule, and there may be found, in the reports of its decisions, cases under it, like the cases which have been cited from the reports of the English courts. In 4 Dall. 14 [Wrong citation. See *Brown v. Barry*, 3 Dall. 365], 'The intention of the Legislature, when discovered, must prevail, any rule of construction declared by previous acts to the contrary notwithstanding.' In [*Pennington v. Cox*] 2 Cranch, 33 [2 L. Ed. 199]: 'A law is the best expositor of itself—that every part of an act is to be taken into view for the purpose of discovering the mind of the Legislature,' etc. In the case of *United States v. Fisher et al., Assignees of Blight*, in the same book [2 L. Ed. 304], the court said: 'It is undoubtedly a well-established principle in the exposition of statutes that every part is to be considered, and the intention of the Legislature to be extracted from the whole,' etc. In [*Wilkinson v. Leland*] 2 Pet. 662 [7 L. Ed. 542]: 'A legislative act is to be interpreted according to the intention of the Legislature, apparent upon its face. Every technical rule as to the construction or force of particular terms must yield to the clear expression of the paramount will of the Legislature.' In [*The Elizabeth*, 1] Paine, 11 [Fed. Cas. No. 4,352]: 'In doubtful cases, a court should compare all the parts of a statute, and different statutes in *pari materia*, to ascertain the intention of the Legislature.'"

In *Lewis' Sutherland on Statutory Construction*, § 471, it is said:

"A legislative department is supposed to have a consistent design and policy, and to intend nothing inconsistent or incongruous. The mischief intended to be removed or suppressed, or the cause or necessity of any kind which induced the enactment of the law, are important factors to be considered in its construction. The purpose for which the law was enacted is a matter of prime importance in arriving at a correct interpretation of its terms."

When it is considered that the freedmen of the Creek and Seminole Nations were provided with homesteads, which were clearly excepted from the operation of the act of April 21, 1904, and that by the Atoka Agreement the allotments of the Choctaw and Chickasaw freedmen were also made homesteads, and but for the effect of the Supplemental Agreement, as construed by the defendants, would also have been excepted from the removal of restrictions effected by the act of April 21, 1904, a policy on the part of the government and the tribes to give the freedman a homestead protected by the same restrictions attaching to the homesteads of those not freedmen is clearly manifest. To warrant a construction of the Choctaw and Chickasaw Supplemental Agreement which would except the freedmen of those tribes from the operation of this policy, requires that such intention appear in the agreement in plain and unmistakable terms. I do not find that it so appears, and I conclude that it was the intention of the parties to that agreement that the Choctaw and Chickasaw freedmen allotments should retain the status of homesteads. The provisions of Act April 26, 1906, above referred to, construed in the light of all kindred and nearly cotemporaneous legislation, appear to have been intended to more clearly evidence the purpose of Congress manifest in the

Atoka and Supplemental Agreements that the Choctaw and Chickasaw allotments should have the status of homesteads, occasioned no doubt by the difference of opinion which had arisen with regard to the effect of the supplemental agreement. I therefore conclude that the restrictions upon alienation attaching to Choctaw and Chickasaw freedman allotments under the Atoka and Supplemental Agreements were not removed by the act of April 21, 1904.

As to Alienability of Homesteads of Deceased Seminole Allottees.

[5] The question is presented in the Seminole cases whether after Act March 3, 1903, c. 994, 32 Stat. 982-1008, and prior to the date and issuance of patent, the heirs of a deceased Seminole allottee could alienate the homestead allotment inherited by them.

It has been held by the Supreme Court of Oklahoma, following the reasoning of the United States Supreme Court in *Mullen et al. v. United States*, cited elsewhere, that after the act of March 3, 1903, all restrictions theretofore existing as to Seminole homesteads were removed by the death of the allottee, and that the delivery of patent was not a necessary essential. *Stout v. Simpson* (Okl. Sup.) 124 Pac. 754. In the original Seminole Agreement of December 16, 1897, approved by the act of Congress of July 1, 1898 (30 Stat. 567), it was provided that:

"All contracts for sale, disposition or encumbrance of any part of any allotment, made prior to date of patent, shall be void."

In the same agreement it was further provided:

"Each allottee shall designate one tract of forty acres, which shall by the terms of the deed be made inalienable and nontaxable as a homestead in perpetuity."

Section 8 of the act of March 3, 1903, *supra*, is as follows:

"Sec. 8. That the tribal government of the Seminole Nation shall not continue longer than March fourth, nineteen hundred and six: Provided, that the Secretary of the Interior shall at the proper time furnish the principal chief with blank deeds necessary for all conveyances mentioned in the agreement with the Seminole Nation contained in the act of July first, eighteen hundred and ninety-eight (Thirtieth Statutes, page five hundred and sixty-seven), and said principal chief shall execute and deliver said deeds to the Indian allottees as required by said act, and the deeds for allotment, when duly executed and approved, shall be recorded in the office of the Dawes Commission prior to delivery and without expense to the allottee until further legislation by Congress, and such records shall have like effect as other public records: Provided further, That the homestead referred to in said act shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the deed for the allotment. A separate deed shall be issued for said homestead, and during the time the same is held by the allottee it shall not be liable for any debt contracted by the owner thereof."

Each Seminole allottee, by virtue of the allotment, prior to patent, had a complete, equitable interest in the land allotted to him, the inalienability of which, where it was inalienable, was not due to the quality of the interest of the allottee, but to the express restriction imposed. This equitable interest was one which, in the absence of restriction, the allottee could convey, and it was a descendible interest.

*Goat v. United States*, 224 U. S. 458, 32 Sup. Ct. 544, 56 L. Ed. 841, decided by the United States Supreme Court April 29, 1912. The effect of the provisions quoted from the original Seminole Agreement was to place on the homestead a restriction upon alienation in perpetuity, and upon the surplus a restriction upon alienation until execution of patent. Here was an express perpetual restriction upon alienation, so far as the homestead was concerned. The issuance of patent in no way affected or modified that. But as to the surplus, the provision voiding contracts for sale, disposition, or incumbrance prior to the date of patent fixed the term of restriction upon such land and limited it to date of patent. Five years later, in section 8 of the act of March 3, 1903, above quoted, Congress decided to reduce the term of inalienability attaching to homesteads from a perpetuity to that of a term comprising the lifetime of the allottee, not exceeding 21 years from the date of the deed for the allotment. By this latter legislation Congress expressly provides that the homestead shall be inalienable for the term fixed. If the allottee lived more than 21 years after the date of the deed to his allotment, the restriction expires at the end of such 21 years and before his death. If he die before the expiration of such period, then, by the express terms of the act, his death ends the period of restriction. It is to be noted that section 8 of the latter act is not, in terms, an amendment of the original agreement, to be read into it as if all had been enacted at the same time. The restriction period as to homesteads provided by section 8 is complete in itself. The provision that such homesteads shall be inalienable during the terms mentioned is equivalent to saying that the restriction shall not continue longer. We have seen that, but for the express restrictions imposed, the equitable interest vested in the allottee prior to patent is alienable. It follows that, when the restriction term expired by death prior to patent, the equitable, descendible interest became immediately alienable in the hands of the heirs.

As to Alienability of Homesteads of Deceased Creek Allottees.

[6] In the Creek cases is argued and involved the question whether or not the homestead restriction of 21 years, or during the life of the allottee, is a restriction added to and involving the general five years restriction; that is, whether or not the devisees or heirs of a deceased Creek allottee could sell the homestead immediately after his death, notwithstanding less than five years had elapsed since the approval of the Creek Supplemental Agreement.

In the Creek Supplemental Agreement (Act June 30, 1902, c. 1323, 32 Stat. 500), it was provided:

"16. Lands allotted to citizens shall not in any manner whatever, or at any time, be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear.

"Selections of homesteads for minors, prisoners, convicts, incompetents, and aged and infirm persons, who can not select for themselves, may be made in the manner provided for the selection of their allotments, and if for any reason such selection be not made for any citizen it shall be the duty of said Commission to make selection for him. The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after May 25, 1901, but if he have no such issue then he may dispose of his homestead by will, free from the limitation herein imposed, and if this be not done the land embraced in his homestead shall descend to his heirs, free from such limitation, according to the laws of descent herein otherwise prescribed. Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its validity."

This section is substantially the same as section 7 of the original Creek Agreement (Act March 1, 1901, c. 676, 31 Stat. 861), except that it changes the date from which the five-year limitation is to run and the law of descent which controls.

It is contended by the government that the five-years limitation prescribed in both sections is the "basic" limitation attaching to all the land, inclusive of homestead; that then the homestead limitation of 21 years attaches as a sort of special limitation added to the former, so far as homesteads are concerned; and that in the portion of the section providing that in the absence of children born after May 25, 1901, the allottee may dispose of his homestead by will "free from the limitation herein imposed," and, if this be not done, the land embraced in his homestead shall descend to his heirs, free from "such limitation," the "limitation" referred to as being removed is solely the 21-years limitation upon alienation of homesteads, leaving still upon the land and running with it into the hands of the devisees or heirs the 5-years limitation upon alienation above referred to; so that, if within 5 years from the date of the approval of the agreement the allottee should die, leaving no children born after May 25, 1901, having made a will devising his homestead, the devisees would be relieved of the 21-years restriction, but not of the 5-years restriction, and could not dispose of the land until the expiration of the 5 years; and that in such case, in the absence of a will, the heirs could not dispose of the homestead during such five years, although they were relieved of the 21-years restriction. This is the construction placed upon section 7, above referred to, by the Supreme Court of Oklahoma in the case of *Barnes v. Stonebraker*, 28 Okl. 75, 113 Pac. 903, following a decision of Hon. Frank L. Campbell, an attorney of the Interior Department, rendered in August, 1906. In view of the rule that the departmental construction placed upon an act affecting a matter of which a department has control should be a very persuasive element for the court's consideration in determining the meaning of the act, and the further fact that the Supreme Court of the state has concurred in such construction, I should be very loath not to follow them. But as these decisions are only persuasive, and not controlling, so far as this court is concerned, and the question is now presented to me for determination, if on consideration of the sections involved they shall not appear to my mind to be reasonably susceptible of the

construction above given, then, of course, it will be my duty to follow my own convictions.

If the contention of the government is correct, then the Creek Agreement in respect to alienation of homesteads by the heirs after the allottee's death is different from that of any other of the Five Civilized Tribes. For reasons stated elsewhere in this opinion, it is determined that subsequent to the act of March 3, 1903, Seminole homesteads were alienable by the heirs immediately upon the death of the allottee. *Stout v. Simpson*, *supra*. This was also true of the Cherokees as appears from sections 13, 14, and 15 of the Cherokee Agreement. Act July 1, 1902, c. 1375, 32 Stat. 716. It was also true of the Choctaws and Chickasaws. *Mullen v. United States*, *supra*.

In view of the uniformity of so many features of the plan appearing in the legislation relating to the several tribes, so far as allotments are concerned, and especially the uniformity of the provisions regarding homesteads, it may, I think, be safely assumed that Congress and the Creek Nation intended that the death of the allottee in the absence of children born after May 25, 1901, should effect the removal of all restrictions upon the homestead, the same as in all the other tribes, if the language of the agreement is reasonably susceptible of such construction; and a different construction should not be given it, unless it is clearly sustained by that language.

It is first provided that lands allotted to citizens shall not in any manner whatever, or at any time, be incumbered, taken, or sold, to secure or satisfy any debt or obligation, without the Secretary's approval, before the expiration of 5 years from the date of the approval of the agreement. This is equivalent to saying that during such period the land shall be free from any incumbrance. It is then provided that during the same period the land shall not be alienated by the allottee or his heirs. This is equivalent to saying that the land shall be inalienable by the allottee or his heirs, without the Secretary's approval, during such period. Then following, the homestead is taken up separate and distinct from the surplus, and, as to that, it is provided that it shall be and remain nontaxable, inalienable, and free from any incumbrance for 21 years from the date of the deed therefor. Identically the same restrictions as to incumbrance and sale are placed upon the homestead as upon the surplus, except that the term of their existence is made 21 years, instead of 5 years. As further evidencing the intention in the minds of the parties to the agreement to make separate and distinct provisions complete in themselves, respectively, as to the surplus and homestead, is the provision that for the homestead a separate deed shall be issued, in which "this condition" shall appear. What condition? Evidently not the 5-years restriction first provided, but the 21-years restriction provided especially for the homestead. These are the provisions of the first paragraph of section 16. It has two paragraphs. The second, after providing for selections for minors, incompetents, etc., and where the allottee shall fail to make his selection, proceeds:

"The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after May 25, 1901, but if he have no such issue then he may dispose of his homestead by will,



free from the limitation herein imposed, and if this be not done the land embraced in his homestead shall descend to his heirs, free from such limitation, according to the laws of descent herein otherwise prescribed. Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its validity."

This provision is not treating alone of cases where the allottee shall die after the expiration of the five-years period, but clearly contemplates as well deaths which may occur within that period. In either event, it is provided that in the absence of children born to him after May 25, 1901, the allottee may dispose of his homestead by will, and, if this be not done, it shall descend to his heirs, in either case free from "the limitation herein imposed." Wherein imposed? Evidently not in the second paragraph, for the limitation imposed in that paragraph has relation to a case where children are born after May 25, 1901, and we are now contemplating a case where there are no such children. Clearly we must find the limitation referred to in the first paragraph of the section. But there we find two different limitations, one for a term of 5 years, and the other for a term of 21 years. Each is imposed in the first paragraph, and may therefore be referred to as "herein imposed"; and it is the contention of the government that the parties to the agreement intended they should both apply to the homestead. But the singular is used; only one limitation is referred to, which the government contends evidences an intention not to remove both limitations. It is further contended that the limitation referred to is the 21-years restriction and not the 5-years restriction. But they are both "herein imposed," and if, as contended, both apply to the homestead, then what warrant is there for holding that the term "limitation" has reference to the 21-years restriction, rather than the 5-years restriction? If it had been in the minds of the parties to the agreement that both the 5-years and 21-years limitations should attach to the homestead, and it was their intention to remove only the 21-years limitation and not the 5-years limitation, both limitations being "herein imposed," would they not have specified to which limitation reference was made? That they did not do so, and that they seem to have contemplated that as to homesteads there was but one limitation, "herein imposed," leads, I think, reasonably to the conclusion that they intended that as to homesteads only the 21-years restriction should apply, and that the 5-years restriction was confined in its effect to surplus. This is borne out by the provision that the allottee may dispose of the homestead by will. As said in *United States v. Schurz*, 102 U. S. 378, 26 L. Ed. 167:

"Blackstone describes four modes of alienation or transfer of title to real estate, which he called common assurances, the first of which is by matter in pais, or deed, the second by matter of record, or an assurance transacted only in the King's public courts of record, the third by special custom, and the fourth by devise in a last will or testament."

In *Burbank v. Rockingham Insurance Co.*, 24 N. H. 550, 57 Am. Dec. 300, it is said:

"As understood at common law, to alienate real estate is voluntarily to part with the ownership to it, either by bargain and sale, or by some con-

veyance, or by gift or will. The right to alienate was a right which the owner had over the real estate to divert it from the heir. Alienation differs from descent, in this: that alienation is effected by the voluntary act of the owner of the property, while descent is the legal consequence of the decease of the owner, and is not changed by any previous act of volition of the owner. A sale and conveyance is an alienation that takes effect from the time of the transfer, while a devise is an alienation that takes effect on the decease of the testator, according to the terms of the will. But property not transferred or devised is not alienated, according to the principles of the common law."

Now as the making of a will is an alienation, and the death of the testator makes the will effectual to immediately pass title to the devisees, and we have seen that, so far as the homestead is concerned, the death of the allottee is made to have the same effect in the absence of children born after May 25, 1901, whether it occur before or after the expiration of the 5 years, it follows that to permit the making of a will within the 5-years period is to permit alienation within that period, should the allottee after making the will die within the period. So far, then, as disposition of the homestead by will is concerned, the allottee is clearly permitted to alienate within the 5-years period, if by his death during the period the will becomes effective. It would, I think, be absurd to say, in view of the clear language of the section, that, if the allottee died testate within the 5-years period, the devisee or devisees, who might all be persons not of Indian blood, and as to whom the government owed no duty of guardianship or protection such as it owes its Indian wards, must not themselves alienate the land until the expiration of the 5-years period. Therefore, as to devisees, it seems clear that in the limitation from which the land is freed in their hands are contemplated all the restrictions theretofore imposed upon the land. And it is freedom from the same limitation which the heirs of the deceased enjoy in case no will is made. I therefore conclude, in view of the entire section, studied in the light of cotemporaneous legislation regarding the other tribes, and the purposes sought to be accomplished, that the only reasonable construction is that the parties to the agreement intended that upon the death of the Creek allottee, in the absence of the children mentioned, whether before or after the expiration of the 5-years restriction period affecting his surplus his homestead allotment should become immediately alienable by his devisees in case of will, and by his heirs in the absence of a will.

## UNITED STATES v. NEVIN et al. SAME v. APPEL et al.

## SAME v. OPPENHEIM.

(District Court, D. Colorado. September 26, 1912.)

Nos. 2,584, 2,585, 2,592.

## 1. CRIMINAL LAW (§ 280\*)—PLEA IN ABATEMENT—SUFFICIENCY—IRREGULARITIES AS TO GRAND JURY.

A plea in abatement in a criminal case on the ground of irregularities in the constitution of the grand jury, to be good, must allege facts showing that defendant was prejudiced thereby.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 645-651; Dec. Dig. § 280.\*]

## 2. GRAND JURY (§ 8\*)—MANNER OF SELECTING JURORS.

That some members of a grand jury were by order of the court summoned by the marshal from the body of the district, without the drawing of names, is not such an irregularity as will affect the validity of an indictment, where such members were duly qualified.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 16-20; Dec. Dig. § 8.\*]

## 3. GRAND JURY (§ 9\*)—ADDITIONS TO PANEL.

That the court directed the summoning of additional grand jurors, although there were a sufficient number impaneled and sworn at the time to constitute a legal grand jury, is not an objection to the legality of the panel.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 21-26; Dec. Dig. § 9.\*]

## 4. CRIMINAL LAW (§ 284\*)—OBJECTIONS—REVIEW OF EVIDENCE BEFORE GRAND JURY.

The court in a criminal case will not inquire into the evidence before the grand jury, to ascertain whether it was all competent or sufficient to warrant the indictment, and especially on a plea verified on information and belief only.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 655; Dec. Dig. § 284.\*]

Review by trial court of evidence given by grand jury, see note to *McGregor v. United States*, 69 C. C. A. 488.]

Prosecutions by the United States against Deweese C. Nevin and others, against Jacob S. Appel and others, and against William Oppenheim. On demurrer to pleas in abatement. Sustained.

Fred A. Maynard, Sp. Asst. Atty. Gen., for the United States.

E. M. Cranston and W. M. Downing, both of Denver, Colo., for defendants Nevin et al.

T. J. O'Donnell and J. E. Robinson, both of Denver, Colo., for defendants Appel et al.

Edw. C. Stimson, of Denver, Colo., for defendant Oppenheim.

LEWIS, District Judge. To indictments found and returned by the grand jury at the November, 1911, term, the defendants in each of these cases have filed pleas in abatement. Each of the pleas makes objection to the manner of selecting five of the grand jurors. The facts in that respect, as disclosed by the record (copied into the Op-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

penheim plea), are these: The grand jury, consisting of eighteen members, was regularly impaneled, sworn and charged on the 7th of that month; after it had progressed with its labors two of the grand jurors were finally excused, and thereafter and on November 22d, Grand Juror Straub was reported and by the court found to be "ill and unable to constantly attend the further consideration at all times of all matters to be presented to the grand jury"; it was further made to appear that all cases which had been presented to the grand jury up to that time had been concluded and finished, but that there were other matters for consideration by the grand jury. The reason for not finally excusing Juror Straub was that the grand jury had not made report on investigations which it had concluded, and it could not do so at that time on account of the inability of said Straub to be present in court; and it was considered advisable, if not necessary, that at least sixteen grand jurors who had participated in investigations make report thereof. For that reason said Straub was retained as a member of the body in order that he might, if possible, act with his fifteen fellow members in making report on their prior investigations. And under these conditions the court, on November 22d, ordered that a special venire facias issue to the marshal of the district commanding him that he summon five good and lawful men from the body of the district, and not from bystanders, that they attend the court and serve as grand jurors until discharged, said venire being made returnable on the following day. Under the marshal's return five men came into court in obedience to the writ and were then and there sworn and charged as grand jurors and placed upon the panel with the fifteen remaining jurors, Straub being still absent. Juror Straub, not having been finally excused, returned and acted as a grand juror with the other twenty on December 22d, on which day final report was made and the grand jury was discharged. The pleas allege that investigation of and action on these cases was taken after November 23d, when the five additional persons had been added to the body. It is contended that the court was without power to add members to the body while it was still composed of sixteen (Straub not being discharged), and also that the court was without power to make the order for an open venire, but should have first ascertained and fixed the persons to be called in by drawing that number of names from the box. It is claimed, for defendants, that the body, after the five persons thus drawn had been added, did not constitute a grand jury and was without authority to find and present these indictments.

None of the pleas charges that any of the five persons thus added were disqualified to act as grand jurors, nor sets forth any facts disclosing that said five persons, or other members of that body, were prejudiced or in any manner unfit as grand jurors to act in these cases.

The plea of the defendants in case 2,585 adds an additional ground. It alleges that two of the defendants in that case were officers of the J. S. Appel Suit & Cloak Company, a corporation, adjudged a bankrupt on November 14, 1911; and that thereafter said two defendants were required to appear before the referee and give testimony

in said bankruptcy proceeding; that attorneys for creditors of said bankrupt, who heard said testimony given before the referee, appeared before the grand jury as witnesses and disclosed to said body the testimony of said two defendants before said referee; that said grand jury considered the same and would not have found and returned the bill in case 2,585 but for said disclosure. This plea also alleges that nine other named witnesses were sworn and examined in the investigation which resulted in the finding of this indictment, but it charges that each of said nine witnesses gave illegal evidence before the grand jury, in that, neither of "said witnesses had or claimed to have any personal knowledge of anything in the said supposed indictment alleged as a matter of fact, and that the testimony of the said several witnesses, and each of them, was hearsay only, all of which will appear from an inspection of the minutes of the said supposed grand jury."

To each plea the prosecution has demurred.

[1] I. There is serious doubt whether any of the pleas in so far as they challenge the placing of the five additional men on the grand jury, is good in substance. Neither of them alleges facts showing disqualification or prejudice on the part of the five added or any members of that body. On considering the sufficiency of such a plea it is said, in *Agnew v. U. S.*, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624:

"Another general rule is that for such irregularities as do not prejudice the defendant he has no cause of complaint, and can take no exception. *U. S. v. Richardson* (C. C.) 28 Fed. 65; *U. S. v. Reed*, 2 Blatchf. 456, Fed. Cas. No. 16,134; *U. S. v. Tallman*, 10 Blatchf. 21, Fed. Cas. No. 16,429; *State v. Mellor*, 13 R. I. 666; *Cox v. People*, 80 N. Y. 500; *People v. Petrea*, 92 N. Y. 128. \* \* \* And, moreover, the plea is fatally defective in that, although it is stated that the drawing 'tended to his injury and prejudice,' no grounds whatever are assigned for such a conclusion, nor does the record exhibit any such."

On a demurrer to a like plea Judge Bellinger, in *U. S. v. Mitchell* (C. C.) 136 Fed. 896, 907, uses this language:

"Instead of conclusions and opinions, there must be something tangible, justifying a presumption of injury to the defendant in a substantial right, before the court will interfere."

In *U. S. v. Benson* (C. C.) 31 Fed. 896, it appeared from the plea that some of the grand jurors were not "assessed on the last assessment roll of his county, on property belonging to him," a qualification required by the state statute (Code Civ. Proc. § 198); but it did not appear from the plea that such jurors were otherwise unfit or in any manner prejudiced. Mr. Justice Field, who sat in the case with Circuit Judge Sawyer and District Judge Hoffman, expressed the view that this was an irregularity only and cured by the statute of jeofailes (section 1025, R. S. U. S. [U. S. Comp. St. 1901, p. 720]), and added:

"The apprehensions, therefore, of one of the learned counsel as to the fearful consequences which may follow in other cases if the indictment be sus-

tained in this case in the face of his objections, may be considered with composure, and dismissed."

See also *Lowdon v. U. S.*, 149 Fed. 673, 79 C. C. A. 361; *U. S. v. Am. Tobacco Co. (D. C.)* 177 Fed. 774, 780.

[2] II. The objection taken to the calling of the five additional jurors while the number then in the panel had not been permanently reduced to less than sixteen, embodies two propositions, first, that the court was without authority to select or cause the marshal to select the persons to be added in any other manner than to first draw their names from the box, and second, the court was without power to add additional grand jurors while that body was composed of sixteen members.

The first proposition is foreclosed against the plea by *U. S. v. Eagan (C. C.)* 30 Fed. 608. Mr. Justice Brewer expressed himself on the proposition thus:

"But it is insisted there was an irregularity in the organization of this grand jury, in that five of the jurors were not drawn in the manner provided by the act of 1879. But a challenge to a grand jury, based on the mere ground of irregularity in its organization, was never regarded with any favor; less so to-day than ever, \* \* \* so that I have no doubt that the court has to-day, as it always has had, the power to summon from the bystanders to fill up a petit jury, and to summon from the body of the district, in an emergency, for completing a grand jury."

And Judge Thayer added:

"But this irregularity in choosing the five grand jurors will not avail (after the jury has been sworn, and have found indictments) as ground for quashing the indictment so found, either on plea in abatement or otherwise, when it appears that the jurors so irregularly chosen were competent and qualified jurors, residing in the district, and that the only irregularity consists in the method of selecting them. \* \* \* If the point to be decided by the court was to be determined solely with reference to the common law, and without reference to local laws, the better opinion seems to be that no objection to an indictment ought to be allowed, based merely on an irregularity in the manner of selecting a part or the whole of the grand jury which found the bill, if, in all other respects, they were duly-qualified jurors. Thus, in *Thompson and Merriam on Juries*, it is said that the only objection which can be taken to the grand jurors by plea in abatement, after they had been sworn and made presentments, 'must be such as would disqualify the juror to serve in any case; in other words, the plea must show the absence of positive qualifications demanded by law,' and not merely an irregularity in the method of selection. Vide *Thomp. & M. Juries*, §§ 533-536, inclusive, and authorities cited."

[3] On the second proposition,—in *Wolfson v. United States*, 101 Fed. 430, 432, 41 C. C. A. 422, it appears that twenty-three names were first drawn, from which sixteen grand jurors were selected. At a second drawing ten additional names were added, from which seven more grand jurors were selected and placed on the panel, making a grand jury of twenty-three members. It was objected (a) that the first drawing having furnished a sufficient number (16) to constitute a grand jury, the court was without jurisdiction to add to that number, and (b) the court was without authority to order the second drawing because a sufficient number to constitute a grand jury had been obtained from the first drawing. The objection was overruled, and while the reason given was that the point was not raised in apt time, the court evidently held

the view that the objection was without merit, because it went to an irregularity and did not touch the substantial rights of the defendant to his prejudice.

In *State v. Ward*, 60 Vt. 142, 14 Atl. 187, it appears that the court discharged one Hoffman from the grand jury and substituted in his place Ellis. It was objected that Ellis was not lawfully summoned, that he was not qualified to serve at that term as a grand juror, that the court had no right to discharge Hoffman from the panel and no right to substitute Ellis. The court, through Ross, Judge, spoke thus to the point:

"In *State v. Champeau*, 52 Vt. 313 [36 Am. Rep. 754], it is plainly intimated, if irregularity enters into the drawing or impaneling of the grand jury, it must be shown to work a wrong or injury, to be available. In *State v. Gravelin* (Vt.) a petition for a new trial was prosecuted, in which it was shown that a grand juror who acted in finding the indictment, and a petit juror who participated in finding the respondent guilty of murder, were irregularly, and without the authority of law, drawn and summoned from the town of Chester, in that the person who drew and summoned them was a mere volunteer, wholly unauthorized to act in that behalf, and yet the petition was denied; the persons drawn being competent to serve in their respective capacities. In *Mann v. Fairlee*, 44 Vt. 672, the same doctrine was held in regard to summoning a petit juror. It is the duty of the court to order the drawing and summoning of both the petit and grand jurors, and to duly impanel them. This duty imposes on the court a responsibility which calls for the exercise of sound judgment and discretion. It has been generally held that the court charged with the duty of impaneling either the petit or grand jury was clothed with a discretionary power, in furtherance of justice, to excuse a competent juror regularly drawn, and order a talesman called to fill his place, and that the exercise of such discretion is not revisable. \* \* \* If such excuses should not reduce the number of the grand jury below a working quorum, they presumably reduce the strength and efficiency of a full panel, which the statute has given for the protection of the accused and of the state,—of the accused if innocent, and of the state if he is guilty. If the number of the grand jury should be reduced to 12 and the 12 should find or fail to find an indictment, it does not follow that the action of the 12 would be the same if aided by the counsels and deliberations of the other 6 required by the statute. To secure the full rights of the accused and of the state a full panel of the grand jury should be secured when possible."

In *People v. Lauder*, 82 Mich. 109, 46 N. W. 956, it appeared that a grand jury composed of twenty members was impaneled, sworn and charged, and began its labors. On order of the court, made at the request of the prosecuting attorney, three additional names were drawn as grand jurors, the object being to obtain from the box the name of Charles Flowers, a stenographer, who might act as one of the grand jurors and at the same time take the evidence. His name was drawn as one of the three and he was added, but the other two were omitted from the panel. The entire court agreed with the opinion of Morse, Judge, on this point. At page 130 of 82 Mich., and page 962 of 46 N. W., he uses this language:

"As the record appears before us, it must be conceded that the three additional names were ordered to be drawn after the 20 men had been sworn and charged and organized as a grand jury; and that the object of drawing these names was to obtain, if possible, the summoning of Charles Flowers as a juror, that he might also act as a stenographer. That he did so act, under the promise of extra pay by the board of county auditors must be also conceded. \* \* \* 82 Mich. 136, 46 N. W. 964. It is manifestly in the dis-

cretion of the court, under our statutes, to impanel a grand jury of any number of men not more than 23 or less than 16. If, after the jury had been impaneled and sworn with 20 members, the court had seen fit to add more thereto, and had forbidden the 20 to do any business until the others were drawn and summoned, and, after such others appeared and were accepted, had called the 20 in, and, adding the others, had sworn and charged them over again, there certainly could have been no cause of complaint; or, if a person drawn and summoned before the 20 were sworn, but, failing to appear until afterwards, had been, on appearance, sworn and sent to the jury-room to join his fellows, this would not have invalidated the panel, or have been a cause for quashing an indictment found by the grand jury as so constituted. \* \* \* So we think that, in its discretion, the court may increase the number of grand jurors, after they are sworn and charged, to any number not more than 23, if the exigencies of justice require it in the opinion of the court. Such discretion could not be used to the disadvantage or persecution of any accused person, as this would manifestly be an abuse of discretion; and, if, as suggested by a member of this court upon the hearing, such addition was made for the purpose of procuring votes enough to find an indictment against any person who could not be indicted without such addition, such indictment would not be permitted to stand. In this case, the addition was made for the purpose of securing a juror who was a stenographer."

[4] III. As to the second ground of the plea in the Appel case, wherein complaint is made of the character and sufficiency of the proof on which the grand jury acted, we first observe that the verification of the plea is merely upon information and belief. To permit an investigation as to character or sufficiency of proof before a grand jury under a plea so verified would open the door to abuse and an intolerable practice. It would be an invitation to every defendant to thus uncover, before trial, the proof against him and would be an ever present means for delay. We next observe that the plea does not set forth the evidence given by the nine other witnesses, nor its substance. All it says in that regard is that they did not testify of their knowledge of the facts, did not know the facts, their testimony was hearsay and the minutes kept by the grand jury will so show. Much of this is mere opinion and conclusion. Neither is it claimed in the plea that the minutes of the grand jury contain all of the testimony given by said nine witnesses, nor does it clearly appear whether the claim in that respect is that the testimony of all of said nine witnesses was hearsay in fact or that by the minutes it appears that their testimony was not of their own knowledge. But waiving these objections, the plea in this respect does not tender an issue that can be investigated. *Holt v. U. S.*, 218 U. S. 245, 31 Sup. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 1138.

In *U. S. v. Cobban* (C. C.) 127 Fed. 713, Judge Beatty, at page 720, adopts the language of Mr. Justice Nelson in *U. S. v. Reed*, 2 Blatchf. 435, Fed. Cas. No. 16,134:

"No case has been cited, nor have we been able to find any, furnishing authority for looking into and revising the judgment of the grand jury upon the evidence for the purpose of determining whether or not the finding was founded upon sufficient proof."

And Judge Beatty added:

"And, further, that it was contrary to the policy of the law to try the question whether the grand jury had sufficient or any evidence to warrant their finding."



In *U. S. v. Brown*, 1 Sawy. 533, Fed. Cas. No. 14,671, the same inquiry as to the competency of the evidence produced before the grand jury was attempted to be raised under motions to quash. It is said:

"This being so, the affidavits of the defendants impugning the conduct and judgment of the grand jury, can not be considered upon the hearing of this motion. If the contrary practice were established, there would be no need of grand juries, and the court would necessarily assume both the function of indicting and trying criminals; for it is safe to presume that in most cases the defendant would object to being tried upon the indictment, and support such objection by his affidavit that he believed the grand jury acted upon incompetent or insufficient evidence. The wit of man could not devise a mode of indicting which would not be liable to this objection from the defendant. In the administration of criminal justice, confidence must be reposed somewhere; and it must be admitted that there are few bodies concerned in it, that may be more safely trusted than the grand juries of this district. The material allegation of each of these affidavits, that the affiant believes the grand jury acted upon his evidence in finding the indictment against himself and co-defendant, is quite as likely to be false as true, because the affiant has no means of knowing the fact."

Judge Rapallo, speaking to this point in *Hope v. People*, 83 N. Y. 418, 38 Am. Rep. 460, says:

"We find no authority for the position that the sufficiency of the evidence upon which an indictment is found by the grand jury is a question which can be raised by plea to the indictment, or that the reception of incompetent or irrelevant evidence by the grand jury can be pleaded."

*Kingsbury v. State*, 37 Tex. Cr. R. 259, 39 S. W. 365 (Texas Court of Criminal Appeals):

"This court has held that the indictment will not be quashed or set aside because the grand jury had no evidence before them authorizing the presentation of the bill, and that this matter of evidence *vel non* will not be inquired into."

*State v. Dayton*, 23 N. J. Law, 49, 56, 53 Am. Dec. 270:

"But conceding that the proposition is fully established, that there was not legal and competent evidence before the grand jury, does that afford the subject matter to sustain either a motion to quash or a plea in abatement? We are clearly of opinion, that in this state, at least, it does not. If the position be sound that every indictment not found upon the production of legal and competent evidence before the jury is essentially vicious, it follows that in all cases where the witnesses produced before the grand jury are from any cause legally disqualified or incompetent to testify, or where any essential link in the chain of testimony is sustained by evidence not in itself legal, the indictment can not be sustained, although there be ample competent testimony, not produced before the grand jury, to sustain the charges of the indictment."

See, also, *U. S. v. Terry* (D. C.) 39 Fed. 355; *U. S. v. Jones* (D. C.) 69 Fed. 973, 978-979; *State v. Boyd*, 2 Hill (S. C.) 288, 27 Am. Dec. 376; *Creek v. State*, 24 Ind. 153; *State v. Tucker*, 20 Iowa, 508; *State v. Logan*, 1 Nev. 509.

But since the formulation of these views, the case of *McKinney v. U. S.*, 199 Fed. 25 (Eighth Circuit Court of Appeals), has come to hand, the opinion therein being filed July 22d, last. That opinion alone requires us to decide this question against the defendants. Judge Hook, for the majority, says:

"Some courts have held rather broadly that it is proper for a trial court to go behind an indictment and inquire into the character of the evidence

upon which the grand jury acted. *United States v. Farrington* (D. C.) 5 Fed. 343; *United States v. Kilpatrick* (D. C.) 16 Fed. 765; *Royce v. Oklahoma*, 5 Okl. 61, 47 Pac. 1083. Other courts have taken the contrary view. *United States v. Reed*, 2 Blatchf. 435, Fed. Cas. No. 16,134; *United States v. Brown*, 1 Sawy. 531, Fed. Cas. No. 14,671; *United States v. Terry* (D. C.) 39 Fed. 355; *United States v. Jones* (D. C.) 69 Fed. 973; *United States v. Cobban* (C. C.) 127 Fed. 713. We think the latter is the better rule, though doubtless in extreme instances a court may do what is needful to prevent clear injustice or an abuse of judicial process. This qualification, however, is far from a recognition of the right of a defendant to compel a review of the evidence upon which he was indicted."

These views render it unnecessary to consider whether the testimony of defendants Appel and Hasbach, given before the Referee and disclosed to the grand jury, as claimed in the plea, was competent and admissible proof before that body.

The demurrers to the pleas in each case will, therefore, be sustained, and the defendants in each case required to plead to the general issue.

It is so ordered.

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BARRIELLE v. BETTMAN.

(District Court, S. D. Ohio, W. D. October 3, 1912.)

No. 6,382.

1. EVIDENCE (§ 37\*)—JUDICIAL NOTICE—HISTORICAL FACT—CIVIL LAW—FRENCH JURISPRUDENCE.

A court may take judicial notice of the historical fact that the civil law is the foundation of French jurisprudence, but not of its details; nor is it bound to know the extent of its adoption, or its modifications, if any, to meet the necessities and demands of modern civilization, or of changes in the form of government which have taken place in that country.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 52; Dec. Dig. § 37.\*]

2. EVIDENCE (§ 81\*)—FOREIGN LAW—PRESUMPTIONS.

Since French institutions are Latin, and not Anglo-Saxon, it will not be presumed that the English law is in force in France; the English common law being regarded as in force only in those states or countries settled by English colonists.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 81;\* Common Law, Cent. Dig. §§ 14-16.]

3. EVIDENCE (§ 97\*)—FOREIGN LAWS—PROOF.

Under the rule that laws of foreign countries must be pleaded and proved, the existence of a law of France authorizing heirs of a decedent's estate to sue to collect a claim was a fact which plaintiffs were required to allege and prove.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 97.\*]

4. DESCENT AND DISTRIBUTION (§ 89\*)—CLAIMS DUE ESTATE—FOREIGN ESTATES—RIGHT TO SUE—WHAT LAW GOVERNS.

In a suit to recover a claim due the estate of a deceased citizen of France from a citizen of Ohio, the law of Ohio governs the question of the right of the decedent's heirs to maintain the suit.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 346-350, 368-381; Dec. Dig. § 89.\*]

5. ABATEMENT AND REVIVAL (§ 72\*)—DEATH—PERSONS ENTITLED TO REVIVE—HEIRS.

Rev. St. Ohio 1908, § 5154, provides that on the death of a plaintiff the action may be revived in the name of his representative, to whom his right has passed. If his right has passed to his personal representative, the revivor shall be in his name; and if it has passed to his heirs or devisees, who could support the action if brought anew, the revivor may be in their names. *Held* that, in an action for the recovery of personal assets belonging to a decedent's estate, the real party in interest under the administration act is, and has always been, the decedent's administrator, and where a citizen of France died during the pendency of an action against a citizen of Ohio to recover the purchase price of certain goods, the action could be continued by his administrator only, and not by his heirs, and hence a recovery in the name of his heirs was ineffectual. *Held*, also, that the enactment of section 4993 did not make the heirs the real parties in interest, for the reason that before the adoption of the Code no right of action existed in the heirs of a decedent, either at law or in equity, for the recovery of personal assets belonging to a decedent's estate, and such being the case, the Code did not create such right of action in them.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 377-402, 412-416; Dec. Dig. § 72.\*]

Action by H. Barrielle, Aîné, against Morris L. Bettman, surviving partner, etc. On motions of plaintiff and defendant for a new trial. Granted.

Oscar W. Kuhn and Eugene C. Pociety, both of Cincinnati, Ohio, for plaintiff.

Simeon M. Johnson, of Cincinnati, Ohio, for defendant.

SATER, District Judge. The question is: Shall a new trial be granted? The contracts for the glacé fruits mentioned in the pleadings were made in 1906, at Apt, in the republic of France. The goods were delivered at Marseilles to the defendant's agent and shipped to Cincinnati. The vendor, Barrielle, alleging himself to be a citizen of such republic, sued in this court to recover the purchase price of the goods, and subsequently died. Thereupon Paul Barrielle, Marie Beauchamp, Eugenie Beauchamp, and Marthe Barrielle, a minor, by Paul Beauchamp, her guardian, to obtain a revivor of such suit and their substitution as parties plaintiff, made an application which recites that they are the children and sole heirs at law of Barrielle, and residents and citizens of the republic of France, and that under the laws of that country the rights of Barrielle in the cause of action set forth in his petition passed immediately upon his death to them as such heirs at law. On the representations made, the cause was revived, and the substitution ordered; but the reasons for and against the same were not fully presented to the then presiding judge.

The defendant disclaims all liability on account of the goods purchased. He denies that the substituted plaintiffs are the children and sole heirs at law of Barrielle, that they, or any of them, in person or through a guardian, can rightfully prosecute the action, and, for want of information, that Barrielle was a citizen of France. By

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

way of counterclaim he asserts in each of his two causes of action set up in his cross-petition damages for \$2,700 for breach of contract, on the ground that the goods (on account of hidden defects of slow development and therefore not sooner discernible) were, on arrival and examination at Cincinnati, found to be unsound and unfit for resale. The defendant at all times by proper action and averment insisted that only an administrator could revive or prosecute the action. When the case was called for trial, the court suggested delay until after the appointment and substitution of an administrator; but, plaintiffs' counsel not desiring so to do, the case was permitted to proceed, with the understanding on the part of both branches of this court, as well as of the plaintiffs and the defendant, that the question of parties would be re-examined on motion for a new trial, should one be filed. A verdict having been returned for defendant on the first cause of action, and against him on the second, both parties moved for a new trial.

[1, 2] Whether or not, under the laws of France, Barrielle's cause of action passed at his death to his sole heirs at law, and, with the right to prosecute this case, vested in them as his successors in interest, at what age minority ceases in France, by what procedure a guardian may be appointed for a minor, and what the powers of a guardian so appointed are, as regards the estate of his ward and of its ancestor, were material facts to be alleged and proved by a preponderance of the evidence. 5 Ency. Ev. 813. A court may take judicial notice of the historical fact that the civil law is the foundation of French jurisprudence, but not of its details. 5 Ency. Ev. 808, note. Nor is it bound to know the extent of its adoption, or its modifications, if any, to meet the necessities and demands of modern civilization or the changes in the form of government which have taken place in that country. Its institutions are Latin, and not Anglo-Saxon, and it will not be presumed that the English common law is in force in any state or country not settled by English colonists. *Banca De Sonora v. Bankers' Mut. Casualty Co.* (Iowa) 95 N. W. 232, 235; *Davison v. Gibson*, 56 Fed. 443, 444, 5 C. C. A. 543; *Savage v. O'Neil*, 44 N. Y. 298; *Flato v. Mulhall*, 72 Mo. 522.

[3] In England and America, at law and in equity, the rule has been consistently maintained that the courts of one country cannot take cognizance of the laws of another without plea and proof (*Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 445, 9 Sup. Ct. 469, 32 L. Ed. 788; 5 Ency. Ev. 808), and the existence, therefore, of a French law, such as plaintiffs claim, was a matter of fact triable by the jury, and to be proved by competent evidence, like any other fact material to the case. *Ingraham v. Hart*, 11 Ohio, 255; *Evans v. Reynolds*, 32 Ohio St. 163. The plaintiffs did not plead or prove such law in any of the respects above mentioned, and it must therefore be presumed to be the same as that of Ohio, and the law of that state must govern (*Cleveland v. Duryea*, 1 Cin. Super. Ct. R. 324; 5 Ency. Ev. 813, 814; *Flato v. Mulhall*; *Carpenter v. Grand Trunk Ry. Co.*, 72 Me. 388, 39

Am. Rep. 340), and the court must proceed accordingly (*Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*); but under the state law an action to recover possession of assets belonging to a decedent's estate must be prosecuted by his administrator and cannot be maintained by his heirs (*Davis v. Corwine*, 25 Ohio St. 668; *McBride v. Vance*, 73 Ohio St. 258, 262, 76 N. E. 938, 112 Am. St. Rep. 723, 4 Ann. Cas. 191). There is, therefore, a fatal defect both in plaintiffs' pleadings and proof.

[4] Further consideration of this case might well end at this point, were its future disposition not dependent on the question as to the right of the plaintiffs, in any event, to maintain this action—a question which was held in abeyance until this time. On the hearing to revive and substitute, portions of the Code Napoléon, as indicated by the file papers, were cited. Stress was laid on the requirement of the Ohio Code that an action must be prosecuted in the name of the real party in interest (section 4993, R. S.), except as in such section provided; but slight emphasis was given by counsel to the administration act, the decisions under it, and the remedy afforded to foreign suitors situated as these plaintiffs are. In the determination of this question the French law may properly be considered; for, if the plaintiffs may maintain this action in their own names, it is on account of some right acquired by the foreign law which the courts of Ohio respect, as not in conflict with the settled policy of the state. A review of the methods of procedure in the settlement of decedents' estates in France and in Ohio is essential to a solution of the problem before us. In so far as deemed material, the French law is briefly as follows:

Under the Code Napoléon, the succession or inheritance is opened by the death of the ancestor. Section 718. No distinction is made between the real and personal property of a succession (section 732), both of which descend in one mass to the children and descendants of the deceased in equal portions (sections 731, 745). By fiction of law, the representatives of a decedent enter into the place, degree, and rights of the ancestor; i. e., the heirs step into the shoes of the deceased ancestor (section 739; *Hunter's Roman Law* [2d Ed. 1885] 744; *Domat's Civil Law*, § 2470; *Blair v. Cisneros*, 10 Tex. 34; *Woerner, Am. Law Adm.* § 203; *Schouler, Ex'rs*, § 6), and consequently on his death there passes to them all his property, rights, and actions, and all his debts and obligations, which debts and obligations the heirs are bound to satisfy, whether the assets are sufficient or not, each contributing a proportionate amount (sections 724, 870, 873; *Hunter's Roman Law*, 747). To relieve an heir of the consequences which may result from such responsibility, he need not accept the succession, but is given the privilege of renouncing it, in which event he is considered as never having been an heir, or of accepting simply under privilege of an inventory. Sections 775, 785, 774. He may have at least 40 days in which to accept or renounce, but married women are incapable of a succession without the authority of their husbands, or act of

law, and a succession falling to minors cannot be validly accepted, save in conformity with the previous authority of the family council, and then only under the benefit of inventory. Sections 461, 776, 778. The heir may for his own protection declare at the office of the civil court of first instance of the circle in which the succession is opened that he does not mean to assume the quality of an heir except under the privilege of an inventory, in which event an inventory of the succession property must be made. Sections 793, 794. The effect of the privilege of inventory gives the heir two advantages: (1) Of not being bound to payment of the debts of the succession, except the amount of the value of the goods collected by him, besides the power of discharging himself of the payment of the debts by abandoning all the goods of the succession to the creditors and legatees. (2) Of not confounding his personal property with that of the succession and of preserving towards it the right of claiming the payment of his own demands. Section 802. The heir so demanding an inventory is charged with the administration of the goods of the succession, and must render an account thereof to the creditors and legatees (section 803), and is relieved from responsibility for the ancestor's obligations beyond the amount received. Acceptance has a retroactive effect, and, when once made, the heir is considered as having succeeded as from the death of the ancestor. The terms "administration" and "administrator," as found in the statutes of those countries in which the common-law system has been adopted, do not occur in the civil law. Schouler, *Ex'rs*, § 6.

The settlement of a decedent's estate under the Ohio law is not made by his heirs or legal representatives, but by a personal representative, who, according to the definition of that term in Bouvier's Law Dictionary, and as will appear from a comparison of sections 6134 and 6135, R. S., is either his administrator or executor. In the administration act the distinction between heirs and administrators is clearly and repeatedly drawn. Neither so succeeds the decedent as to be individually liable for his debts. An administrator is a trustee, with special functions defined by statute, and is charged with the duty of winding up the estate and speedily determining the trust, that creditors may be paid and heirs enter into full enjoyment of their inheritance. He is appointed by, and, unlike an heir, is an officer of, the court. His possession of the decedent's property is taken in obedience to the court's order, is its possession, and cannot be disturbed by any other court. *Byers v. McAuley*, 149 U. S. 615, 13 Sup. Ct. 906, 37 L. Ed. 867; 2 Bl. Com. 496; *Orlopp v. Schueller*, 4 Ohio Cir. Ct. R. (N. S.) 611, 614; *Sampsell v. Sampsell*, 17 Ohio Cir. Ct. R. 455, 462; *Swiggett v. White*, 8 Bull. 22. He is required to take an oath of office, to give bond for the faithful administration of his trust, and to account to the court at stated intervals, to which he is responsible for his acts. Publicity attends his conduct. Administration under him is unitary. He has a fixed situs, and may thus be readily reached by heirs and creditors. On the appointment of an administrator, the personal estate of the deceased passes to and vests in him, not in the heir, and his

title as administrator relates back to the death of the intestate deceased (*Sommers v. Boyd*, 48 Ohio St. 648, 658, 29 N. E. 497), and is applied first to the payment of the decedent's debts, the heirs taking only the residue. Their interest is secondary, and is capable of conversion into unqualified ownership only through the process of administration. *McBride v. Vance*, 73 Ohio St. 266, 76 N. E. 938, 112 Am. St. Rep. 723, 4 Ann. Cas. 191. Even the real estate which descends upon the heir, who takes it subject to a lien for the decedent's debts, which attaches immediately on his death (*Straman v. Rechtime*, 58 Ohio St. 443, 444, 51 N. E. 44), is provisionally assets in the administrator's hands, and it is his duty to subject it to the payment of the decedent's debts, whenever the personality proves insufficient for that purpose (*Favorite v. Booher*, 17 Ohio St. 548, 558). The administrator alone can sue to recover personal property. *Davis v. Corwine*, 25 Ohio St. 668; *McBride v. Vance*, *supra*; *Lewis v. Eutsler*, 4 Ohio St. 354, 360. A debtor of the estate cannot be required to pay to the heir, but may require the appointment of an administrator to receive payment. *McBride v. Vance*, *supra*. Were he to make payment to the heir, to whom the title to the claim against him has not passed from the administrator in the course of distribution, and debts of the decedent be outstanding, he could be compelled to pay again to the administrator, unless such debts are barred by the statute of limitations. If he should pay a mortgage to the heirs, who had not acquired title thereto through an administrator, he could not obtain a valid cancellation of it. Section 4135. Where there is any personal property to distribute, or any debts owing to the decedent, there must in Ohio be an administration of the estate (section 5994, R. S.; *Rockel*, Complete Ohio Probate Prac. § 55), unless estates not exceeding in value \$100 be exempted by section 6005, R. S. The same author laments the fact (section 56) that, if an estate be not more than sufficient to pay the widow's allowance, it must nevertheless be subjected to administration in the orderly manner prescribed by statute. The Supreme Court in the *McBride Case*, *supra*, speaking to this point, employs the following language:

"In *Woerner's American Law of Administration* (2d Ed.) § 199, it is said that the necessity of administration arises out of the common-law doctrine that the personal property of the decedent descends to the executor or administrator, and that this doctrine is recognized substantially in all the states except Louisiana, and, further: 'The direct consequence of this principle of the law is that without due course of administration the claims of creditors cannot be lawfully satisfied, and neither heirs nor legatees can obtain a legal title to their legacies or distributive shares, and that neither devisees nor heirs can hold the real estate to which they succeed free from the claims of creditors of the deceased, against whom limitation does not, in some states, run after the debtor's death, until there be lawful administration of his estate. Another consequence is that the payment of debts to the deceased can be coerced by no one but the lawfully appointed executor or administrator, even in equity, because there is no privity between the debtors and any person other than the legal representative. He stands as the representative of those interested in the devolution of the personalty of the deceased, including creditors of the estate, as well as legatees and distributees.' \* \* \* Section 5994, Revised Statutes, provides that, upon the decease of any inhabitant of this state, letters testamentary, or letters of administration on the estate,

shall be granted by the probate court of the county in which the deceased was an inhabitant or resident at the time of his death; and when any person shall die intestate in any other state or country, leaving any estate to be administered within this state, administration thereof shall be granted by the probate court of any county in which there is an estate to be administered."

[5] Thus it appears that "administration" and "succession" are essentially different. The one means the dealing with a deceased person's property according to law; the other, the succeeding to it beneficially. Valuable collations of cases which accord with the Ohio rule, as well as of those which, under given circumstances, depart therefrom, are found in *Buchanan v. Buchanan*, 75 N. J. Eq. 274, 71 Atl. 745, 22 L. R. A. (N. S.) 454, and note, 138 Am. St. Rep. 563, 20 Ann. Cas. 91, and *Woerner's American Law Adm'n*, §§ 199-201.

Such, then, being the settled law of the state, the remedy to be pursued to collect personal assets therein due to a nonresident's estate must be that prescribed by the local law, and his heirs, whatever their rights may be, cannot maintain an action to recover the same on the ground that they are the real parties in interest, because they are not such. In *Dixon v. Ramsay*, 3 Cranch, 319, 2 L. Ed. 453, Mr. Chief Justice Marshall thus states the rule as to the remedy:

"All rights to personal property are admitted to be regulated by the laws of the country in which the testator lived; but the suits for those rights must be governed by the laws of that country in which the tribunal is placed. No man can sue in the courts of any country, whatever his rights may be, unless in conformity with the rules prescribed by the laws of that country."

See, also, *Story on Conflict of Laws*, § 556; *Williams, Executors* (3d Am. Ed., 1849) 1302; *Harrison v. Baldwin*, 5 Ohio Cir. Ct. R. 310; *Heaton v. Eldridge & Higgins*, 56 Ohio St. 87, 98, 46 N. E. 638, 36 L. R. A. 817, 60 Am. St. Rep. 737; *Bouvier's Law Dict., Lex Fori*; *Boyer v. Knowlton Co.*, 85 Ohio St. 104, at page 113, 97 N. E. 137, at page 138. In the last named case it is said:

"We think rules of comity cannot be recognized to overthrow an express statute of our state. It prescribes a rule of conduct to govern our own citizens, and we do not think that residents of another state should be more favored, unless the statute so permits."

Closely in point is *Embry v. Millar*, 1 A. K. Marsh. 300, 10 Am. Dec. 732, which involved a contest over certain slaves brought to this country after the death of their former owner, who died in the Spanish dominions. It was said:

"The succession to his personal estate should no doubt be regulated by the laws of the country where Sims died; but to recover any part thereof which may have been in this country at that time, as the remedy must be governed by the laws here, there should most clearly, as was decided in the Supreme Court of the United States in the case of *Fenwick v. Sears*, 1 Cranch, 259 [2 L. Ed. 101], and in the case of *Dixon v. Ramsay*, 3 Cranch, 319 [2 L. Ed. 453], be administration obtained from the proper court in this country. The latter of these cases was brought by an executor in the District of Columbia, upon letters testamentary granted in a foreign country, and although the principle is there admitted that the succession to the testator's personal estate is to be governed by the law of the country where he died, yet upon the principle of the remedy being regulated by the laws of the place where the suit is brought, it was held that the action could not be maintained. As from the authorities in Cranch, therefore, it is proper, to enable the executor to recover the possession of the testator's estate in certain cases, although



he may have been domiciled abroad, to obtain probate of his will, where suit is brought. In giving an exposition to the act of this country, conferring jurisdiction in testamentary matters, we should, unless restrained by a different import, so interpret it as to enable the courts of this country to take the probate in those cases as well as when the testator may have resided here."

The contention that the plaintiffs, as Barrielle's sole heirs, may maintain this action under section 4993, R. S., as the real parties in interest, is unsound. All foreigners, *sui juris*, and not otherwise disabled by the laws of the place where the suit is brought, may maintain suits to vindicate their rights and redress their wrongs; but the rule which applies to the question, who shall be parties to the action, is established by the law of the forum, and is said to belong rather to the form of the remedy than to the right and merit of the claim. Story, *Conflict of Laws*, § 565; Bates, *Pl. Pr. & Forms*, 8; *Kirkland v. Lowe*, 33 Miss. 423, 69 Am. Dec. 355. Bates (page 15) in discussing the last-named section, cites *Davis v. Corwine* to the point that for the recovery or collection of intestate personalty the real party is the administrator. To the same effect are *Childress v. Emory*, 8 Wheat. 642, 667, 5 L. Ed. 705; *Popp v. Cincinnati, H. & D. Ry. Co.* (C. C.) 96 Fed. 465.

The real party in interest does not mean one who would be affected by a judgment, but relates only to a legal interest, or one which would have been recognized, either at law or in equity before the Code. Bates, p. 8. In *Galpin v. Lamb*, 29 Ohio St. 529, 536, it is said:

"The rules of the Code in respect to parties are substantially the same as those which prevailed in equity before the adoption of the Code. Where no right of action existed in a party, either at law or in equity, the Code does not create one."

The right to administer estates belonged originally to the king by prerogative as *parens patriæ*, subsequently to the lord of fee, and ultimately to the bishop or ordinary of the diocese, upon trust to distribute the residue after deducting the *partes rationabiles* for charitable or pious uses. On account of abuses which arose, there were enacted the statutes of Westminster II, of 31 Edward III, c. 2 (which is the original of administrators as they at present stand, 2 Bl. Com. 496), and of 22 and 23 Car. II, c. 10, to which statutes our present conception of the office of an administrator is due. Am. & Eng. Ency. Law (1st Ed.) 170, 171.

Section 5154, R. S., provides:

"Upon the death of the plaintiff, the action may be revived in the name of his representatives to whom his right has passed; if his right has passed to his personal representative, the revivor shall be in his name; and if it has passed to his heirs or devisees who could support the action if brought anew, the revivor may be in their names."

If the property involved had been real estate, the revivor would necessarily have been in the names of the heirs or devisees. *Valley Ry. Co. v. Bohm*, 29 Ohio St. 633; section 5155, R. S. As it was personalty, the right of action passed to the personal representative, and the revivor should have been in his name—a conclusion in which my Associate concurs.

The motions for a new trial are sustained.

**In re CHARLES TOWN LIGHT & POWER CO.**

(District Court, N. D. West Virginia. November 4, 1912.)

**1. BANKRUPTCY (§ 228\*)—REFERENCE—QUESTIONS OF FACT—REFEREE'S DECISION—REVIEW.**

A referee's judgment on questions of fact raised in a bankruptcy proceeding must be given favorable consideration on a petition to revise, and in case of doubt the question must be solved in favor of his finding.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig. § 228.\*]

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

**2. CORPORATIONS (§ 232\*)—STOCK—VALUE—PROPERTY.**

Under the law of West Virginia, the fact that property received by a corporation in full payment of stock issued is taken at an overvaluation will not make the holder liable as for an unpaid subscription until the transaction has first been impeached for fraud on the corporation by a proceeding instituted by or on behalf of the corporation itself.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 879, 880, 883, 884; Dec. Dig. § 232.\*]

**3. CORPORATIONS (§ 232\*)—STOCK—PAYMENT IN PROPERTY—OVERVALUATION—ASSENTING STOCKHOLDERS—ESTOPPEL.**

Stockholders of a corporation existing at the time of a transfer of property to the corporation in return for stock at an overvaluation, who assented to and confirmed the contract, are estopped from thereafter impeaching it, as are also subsequent creditors under ordinary conditions, who extended credit to the corporation on the strength of the property so acquired.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 879, 880, 883, 884; Dec. Dig. § 232.\*]

**4. FRAUDULENT CONVEYANCES (§ 27\*)—DEBTS—SECURITY—CORPORATE BONDS.**

Where the principal stockholder and manager of a corporation personally borrowed money from certain banks, which he advanced to the corporation to improve and operate the property and to increase its value in the interest of subsequent creditors, and thereafter deposited certain of the corporation's bonds to secure the banks, such deposit did not constitute a fraud as against subsequent creditors of the corporation.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 66-71; Dec. Dig. § 27.\*]

**5. CORPORATIONS (§ 432\*)—PLEDGES—BONDS—TREASURER'S AUTHORITY.**

Evidence *held* to warrant a referee's finding that a corporation's treasurer had authority to pledge bonds of the corporation to certain banks to secure loans procured by the treasurer for the corporation's benefit.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717, 1718, 1724, 1726-1737, 1743, 1762; Dec. Dig. § 432.\*]

**6. BANKRUPTCY (§ 310\*)—PREFERRED CLAIMS—DEED OF TRUST—OMISSION TO RECORD—"CREDITORS."**

Bankr. Act July 1, 1898, c. 541, § 64b, 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), provides that debts owing to any person who by the laws of the states or the United States is entitled to priority shall be entitled to priority under the bankrupt law, and Code W. Va. 1906, c. 74, § 3103, declares that a deed of trust shall be void as to creditors until and except from the time it is duly admitted to record. *Held*, that since the word "creditors," as used in section 3103, has been construed by the Supreme Court of Appeals of the state to mean creditors who have secured a lien on the property, and not general creditors, bondholders of the

bankrupt were not precluded from claiming their debts as secured by the bonds, as against general creditors, because the deed of trust was withheld from record.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 501-507; Dec. Dig. § 310.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1713-1727; vol. 8, pp. 7622, 7623.]

**7. BANKRUPTCY (§ 151\*)—BANKRUPT'S TRUSTEE—PURCHASER FOR VALUE.**

A bankrupt's trustee, though declared by the amended act to have the rights of a judgment creditor, as well as the power specifically conferred by the bankrupt act, is not to be regarded as a purchaser of the bankrupt's property for value.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 193; Dec. Dig. § 151.\*]

**8. BANKRUPTCY (§ 310\*)—LIEN CREDITORS—BONDHOLDERS—RIGHT TO PRIORITY—LACHES.**

Where bonds of a bankrupt corporation were given to certain banks to secure loans made for the corporation's benefit, failure of the banks to see that the deed of trust securing the bonds was promptly recorded, and to secure prompt payment of the interest coupons attached to the bonds, did not constitute such laches as deprived the banks of their right to claim that their debts were secured by the bonds.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 501-507; Dec. Dig. § 310.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Charles Town Light & Power Company. On petition to revise an order of the referee touching certain mortgage bonds and their priority. Ruling affirmed.

See, also, 183 Fed. 160.

On the 10th day of December, 1900, Charles E. Ehrehart purchased from Gibson & Stern, trustees in two deeds of trust, at public auction, all the property, real and personal, rights and franchises, of the Charles Town Electric Light, Heat & Power Company, a corporation, and the trustees, by deed dated 10 days after, conveyed the same to him. The purchase price was \$10,150. On November 18, 1901, he and four associates secured the incorporation of the bankrupt, the Charles Town Light & Power Company. Prior to this incorporation, Ehrehart expended some considerable amount of money upon the plant. One day after the incorporation of the bankrupt, he conveyed the plant to it. The consideration set forth in the deed is \$35,000 cash. It is claimed this \$35,000 was not paid in cash however, but was to be payable, \$19,000 in stock of bankrupt, and \$16,000 in its obligations. Another piece of property, known as the "Watson Mill Property," was also purchased by the bankrupt from Kate M. Reiley and conveyed by her to it by deed of date November 19, 1901. The consideration set forth in the deed for this conveyance was \$15,000, paid and receipted for. It seems, however, that it was not paid in cash, but was to be payable, \$11,000 in stock of the bankrupt, and \$4,000 in its obligations. Ehrehart claims to be the assignee of Mrs. Reiley, and to have been entitled, therefore, on November 18, 1904, to \$30,000 of the bankrupt's stock, and to a balance of \$5,000 of its obligations. The interests of his associate shareholders at that date, it is admitted, were nominal. He further claims that for advances made in improvements and operation up to that date the company was indebted to him about \$20,000. He produces checks for considerable amounts so advanced. It is disputed that his debt in this particular was so large, or his interests were so great; but it seems clear that he was the practical owner of the plant, and was, on November 18, 1904, its only creditor. Ehrehart and his associate stockholders, in the course of the operation of the plant at various times prior to November 18,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

1904, had borrowed sums of money upon their individual credit from the Hanover Saving Fund Society and the People's Bank of Hanover, aggregating \$12,816.79, which had been furnished to and expended by the bankrupt in such operation and improvements. Between November 18, 1904, and March 30, 1905, additional loans were made by these two banks to Ehrehart, and by him used for the same purposes, of some \$3,363.69, making a sum total of \$16,450.48 so loaned by them. On this November 18, 1904, the stockholders and directors of the bankrupt held meetings and ratified an issue of \$18,000 of coupon bonds and the execution of a deed of trust, bearing date on that day, upon all the franchises and property of the company. This deed of trust was duly executed to Paul Winebrenner, the treasurer of the Hanover Saving Fund Society. At the time, Ehrehart was the substantial owner of the bankrupt's stock (although not formally issued), its sole creditor so far as disclosed, one of its directors, and its treasurer. The deed of trust was delivered to him, as also the mortgage bonds. It is insisted, and testified to by him and by Gibson, the president of the company, that resolutions were also at this meeting passed by stockholders and directors, directing these bonds to be turned over to Ehrehart to indemnify him for the sums advanced by him to it—in other words, for its indebtedness to him. No record of the passage of such resolutions appears. The records were extremely loosely kept, not in a minute book, but upon loose leaves of paper. Ehrehart took the mortgage and bonds to Winebrenner, the trustee, and had him sign the identification certificate on each of the bonds. The deed of trust was also delivered to him. Thereupon he took up the individual obligations of himself and associates to these two banks, gave to them his sole notes or obligations, and deposited with them these bonds as collateral security therefor. He did not record the mortgage, although it was delivered to him for that purpose. He paid interest for a time, but at last, in 1909, ceased doing that. The banks had no knowledge that the deed of trust was not recorded until in November, 1909, when Winebrenner, the trustee, had it entered of record under date of November 6, 1909. Meantime the company was becoming involved in debt to others. Two creditors, so extending credit to it, before doing so, sent their attorney to Charles Town and had him make a careful search of the records to ascertain what liens existed, if any, against the company's property. He found no record of this deed of trust. Thereupon he went to Moore, the secretary of bankrupt, and asked him if there were any other liens existing against the property, other than those found of record, and was informed by him that there were none. On March 3, 1910, involuntary petition in bankruptcy was filed. The company disputed the right to be adjudged bankrupt. This question was considered by this court, a written opinion filed (183 Fed. 160), and, for reasons therein set forth, on March 13, 1911, the company was adjudged bankrupt, and the cause referred to James D. Butt, referee, for adjudication. This action was affirmed by the Circuit Court of Appeals for this Circuit. 184 Fed. 986, 106 C. C. A. 488. Ehrehart has become bankrupt. Before the referee the two banks have filed proof of claims, in which they assert a lien priority by reason of the bonds held by them and the deed of trust to secure them. The referee has allowed their claims, and given them the preference contended for. It is to revise this action that the petition under consideration has been filed by the trustee.

A. Moore, Jr., of Berryville, Va., and Geo. M. Beltzhoover, Jr., of Charles Town, W. Va., for trustee.

Gans & Haman, of Baltimore, Md., and Brown & Brown, of Charles Town, W. Va., for bondholders.

DAYTON, District Judge (after stating the facts as above). It is insisted by the trustee and objecting creditors that (1) the banks have no provable claims against the bankrupt, because (a) the bankrupt was not on November 18, 1904, indebted to Ehrehart, and (b) Ehrehart had no authority to pledge the bonds as collateral for his personal in-

debtedness; (2) that, if the banks have provable claims, they are not entitled to priority over the unsecured creditors, because (a) the mortgage securing the bonds constitutes a voidable preference, and (b) the mortgage was fraudulently withheld from record, and, therefore, is void as security; (3) that by their negligence and laches the banks have estopped themselves from asserting their claims, or, if allowed to assert them, they should be postponed in payment to the debts of all other creditors.

[1-4] Carefully considered, I am not inclined to think that much difficulty arises in determining the first objection in its first aspect. Its determination involves purely a question of fact. The referee's judgment on such questions must always be given favorable consideration, and in cases of doubt be solved in favor of his finding. By the very complete and able opinion filed by him it is clearly shown that the evidence upon which he bases his findings was very carefully considered by him. A review of this evidence convinces me that the bankrupt was indebted to Ehrehart on November 14, 1904, for sums of money which he had advanced to it. It cannot be successfully contended that Ehrehart had sold to it property at an overvaluation, and should be held to be indebted for the difference between this overvaluation and its true value, to offset this indebtedness for advances made, because it has been held by the Supreme Court of Appeals of this state that the fact that property, received by a corporation in full payment of stock issued, is taken at an overvaluation, will not make the holder of such stock liable as for unpaid subscription until the transaction has first been impeached for fraud upon the corporation. *Bank v. Coal & Coke Co.*, 51 W. Va. 60, 41 S. E. 390. Such impeachment for fraud must be instituted and prosecuted by the corporation itself, or at least by some of its stockholders or creditors existing at the time the sale was made. Stockholders existing at the time, who assented to and confirmed the contract of purchase (as all did in this case), are estopped afterwards from impeaching it. Subsequent creditors, who have extended credit to the corporation upon the strength of the property so acquired, will certainly not be permitted to impeach the purchase under any ordinary conditions. These principles are clearly determined in *Old Dominion Co. v. Lewisohn*, 210 U. S. 206, 28 Sup. Ct. 634, 52 L. Ed. 1025, and cases therein cited. In the case here Ehrehart himself owned the property, and in turning over the property became the substantial owner of all of the stock of the corporation and its sole creditor. These bank debts were not incurred for money which Ehrehart secured in payment for the property, but for additional sums borrowed by him from the banks and advanced by him to the corporation for purposes of improving and operating the property—all to the end of increasing its value in the interest of subsequent creditors. I am wholly unable, from the evidence, to conceive any extraordinary conditions justifying subsequent creditors in regarding themselves defrauded in the premises.

[5] Touching the second aspect of this first objection, as to Ehre-

hart's authority to pledge the bonds to these banks, it would be entirely sufficient to say that the undisputed testimony of Gibson and Ehrehart is that such authority was directly given by vote of the directors; but, even if this were not so, the circumstantial evidence, it seems to me, is entirely sufficient to indicate such authority. It is reasonable to presume that these bonds were authorized by the company to issue in order to settle its outstanding debts; that Ehrehardt, the treasurer of the company, would be the one selected to negotiate settlement of these debts with these bonds; that, being substantially the sole creditor of the company at the time, his taking over of the bonds in payment of his debt would be both satisfactory and ratified by the company; and the fact that no complaint was at the time or since made by the company, or any of its officers or directors, is strong presumptive evidence, in absence of anything to the contrary, that his negotiation was satisfactory and acquiesced in.

[6] The more serious question in the case arises under the third objection stated, which includes substantially both aspects of the second, and may be stated as a single proposition in these words: Have these banks, by either fraudulently concealing their deed of trust, or by reason of negligently withholding it from record, lost the right to prove their debts at all, or, if not, to assert their claim of priority over unsecured creditors? In other words, have they estopped themselves from asserting either debts or priorities, or both? What debts are entitled to priority under the bankrupt law? Section 64b says, among other things:

"Debts owing to any person who by the laws of the states or the United States is entitled to priority."

Section 3103 of the Code of West Virginia, 1906, provides that among other contracts a deed of trust—

"shall be void as to creditors \* \* \* until and except from the time that it is duly admitted to record."

What kind of creditors are referred to? The Supreme Court of Appeals, in *Gilbert v. Peppers*, 65 W. Va. 355, at page 364, 64 S. E. 361, at page 365 (36 L. R. A. [N. S.] 1181), referring to this section of the Code says:

"It does not contemplate general creditors. As to them, it is valid, whether recorded or not. A mere personal debt bears no relation to the property of the debtor, since it does not constitute a lien thereon. Before a creditor can claim any legal right in respect to the property of his debtor, or any interest therein, in law or equity, he must, by some means acquire a lien thereon, as by attachment or reduction of his debt to judgment."—citing *Moore v. Tearney*, 62 W. Va. 72, 57 S. E. 263; *McCandlish v. Keen*, 54 Va. 615; *Dulaney v. Willis*, 95 Va. 608, 29 S. E. 324, 64 Am. St. Rep. 815.

It would seem clear, therefore, that under the laws of West Virginia these banks would have a lien as against these unsecured creditors, represented by the bankrupt trustee, even if the deed of trust had never been recorded, and that the only risk they ran, by not recording it, was that some other creditors might have secured priority over them by obtaining judgment or other liens in the intervening time. This is based upon the mere neglect to record, and does not

refer to deeds of trust executed fraudulently, or to secure, unlawfully, perference from an insolvent debtor, knowing him to be insolvent, and to have fraudulent purpose in view. Even in such cases, ordinarily federal courts, approving Chancellor Kent's saying in *Wiggins v. Armstrong*, 2 Johns. Ch. (N. Y.) 144, that "unless he [the creditor] has a certain claim upon the property of the debtor he has no concern with his frauds," will not allow a simple contract creditor to assail such conveyances for fraud. *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 977, 37 L. Ed. 804.

[7] But exception is made in case of a trustee in bankruptcy, who is held, as to such conveyances and preferences, to have "all the right of a judgment creditor, as well as the power specifically conferred by the bankrupt act." *Dudley v. Easton*, 104 U. S. 99, 26 L. Ed. 668. He is not, however, to be held a purchaser for value. *Hewit v. Berlin Machine Works*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986. Under these conditions, it seems to me that the very recent case of *Holt, Trustee, v. Crucible Steel Co.*, 224 U. S. 262, 32 Sup. Ct. 414, 56 L. Ed. 756, is conclusive. The case involved the exact question that we have here, to wit, the validity, under the recording law of a state, of an unrecorded mortgage as against creditors who became such after it was given, and without knowledge of it, where none of them had secured a lien upon the property. The question arose, as here, in a bankruptcy proceeding. The Supreme Court there affirmed the Circuit Court of Appeals of the Sixth Circuit, holding that the effect to be given to an unrecorded chattel mortgage under sections 67a and 67b must be determined by the recording law of the state, and that under that law the question turns on who are included in the term "creditors," and that where such term has been held by the state courts not to include creditors who have no liens against the property, as has been held in this state (*Gilbert v. Peppers*, *supra*), such unrecorded mortgage gives preference to those secured thereby as against such unsecured creditors. In view of this recent and authoritative ruling, I deem it unnecessary to consider, to any extent, the effect of sections 60a and 60b (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]) and the changes made therein by the amendments of 1903 (Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1909, p. 1314]) and 1910 (Act June 25, 1910, c. 412, § 11, 36 Stat. 842 [U. S. Comp. St. Supp. 1911, p. 1506]). It is sufficient to say that I think Judge Cochran, in *Debus v. Yates* (D. C.) 193 Fed. 427, has very learnedly and clearly considered the question, and that I am in full accord with his views.

[8] Finally, the matter narrows to the contention made that the conduct of these banks has been so tainted with laches and negligence as to practically make their claim of priority fraudulent and void, or has at least estopped them from asserting it. This involves a question of fact largely as regards their conduct. There is no doubt as to their loaning to Ehrehart the money, and claimed that they took these bonds as collateral to secure such loans, that they received them from the treasurer of the company, and that they understood the money

had been borrowed by Ehrehart for the company's use and benefit. Sifted to the bottom, the charge of fraud and estoppel can be based, so far as the banks are concerned, upon only two delinquencies: (a) Failure to see to it that the deed of trust was promptly recorded; and (b) failure to secure prompt payment of the interest coupons attached to the bonds. The Supreme Court, in the *Holt, Trustee, Case*, has said that the first is not sufficient, and I am clearly convinced the second is not, to deprive them of their lien.

I can see no conflict with these conclusions in the ruling of *Moore v. Tearney*, 62 W. Va. 72, 57 S. E. 263, relied on by counsel. On the contrary, it is there expressly held, as in *Gilbert v. Peppers*, that, as against unrecorded conveyances, only lien creditors are protected, while, touching the question of fraudulent conduct, the facts were vitally distinct and different. There *Tearney*, a father-in-law, took two absolute deeds of conveyance from his son-in-law, by which all creditors, lien or otherwise, were designed to be excluded, kept them in his possession unrecorded, until his death six years after, in the meantime allowing the son-in-law to remain in possession, claim the lands as his own, have them assessed in his own name, and to insure in his own name the buildings thereon.

Nor do I overlook the bitter outcry against the injustice done the creditors, arising, in the case of two of them, from the fact that their attorney searched the records, ascertained the recorded liens, and was told by the secretary of the corporation that there were no others. If that statement had been made to him by either Ehrehart, Winebrenner, the trustee, or the banks, the question would be entirely different. Just grounds for estoppel would have arisen, because it was Ehrehart's debt that was secured collaterally by the bonds, the bank held the bonds, and Winebrenner was its treasurer, trustee, and representative. But Moore had no interest, and therefore no power to estop those who had. It would be a very dangerous doctrine to establish that an individual or corporation, by its representative, could, after creating a debt of this kind, estop its recovery by denying that it existed. A calm and dispassionate view does not carry strong conviction of the great wrong done simple contract creditors, so earnestly felt to exist in the minds of counsel; for it is to be borne in mind that their extending credit was a voluntary act on their part, that they could have demanded a lien upon the property before doing so, which would have been entirely good as against the banks' unrecorded one, and the risk they ran by not doing so was of their own creation.

I can see no error in the ruling of the referee in this matter, and it must be affirmed.



## SPERRY &amp; HUTCHINSON CO. v. CITY OF TACOMA, WASH., et al.

(District Court, W. D. Washington, S. D. October 29, 1912.)

No. 1,841.

## 1. COURTS (§ 99\*)—LAW OF THE CASE.

In a suit to restrain the enforcement of a municipal ordinance imposing a license tax on certain dealers in trading stamps, a ruling granting an injunction pendente lite was not a final decision, and hence was not res adjudicata on the question of the validity of the ordinance on a hearing on the merits.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 340; Dec. Dig. § 99.\*]

## 2. JUDGMENT (§ 828\*)—RES ADJUDICATA—JUDGMENT ON DEMURRER.

Complainant instituted a suit in a state court to restrain defendants from enforcing a city ordinance imposing a license tax on certain dealers in trading stamps, including complainant, claiming that the ordinance was unconstitutional as depriving complainant of its property without due process of law, as impairing the obligations of complainant's contracts, and was against public policy, etc. A judgment having been entered sustaining a demurrer to the complaint, complainant refused to plead over, and judgment of dismissal was rendered, whereupon it appealed to the state Supreme Court, and, during the pendency of the appeal, filed a bill in the federal court against the same defendants for the same relief. Defendants pleaded the judgment in the state court as res adjudicata, and by supplemental answer set up the affirmance of the decision by the state Supreme Court. *Held*, that the judgment so affirmed was res adjudicata, and conclusive on the federal court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1504-1509; Dec. Dig. § 828.\*]

Conclusiveness of judgment between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank of Memphis v. City of Memphis*, 49 C. C. A. 468.]

## 3. COURTS (§ 398\*)—FEDERAL COURTS—FEDERAL SUPREME COURT—STATE COURT DECISIONS—CONSTITUTIONAL QUESTIONS—DISCLOSURE.

Where constitutional questions were in fact involved in a suit in a state court carried to the state Supreme Court, the fact that the constitutional questions did not clearly appear so as to confer jurisdiction on the Supreme Court of the United States to review the state court's decision could be cured by certificate from the state Supreme Court or its Chief Justice.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1085-1088; Dec. Dig. § 398.\*]

In Equity. Suit by the Sperry & Hutchinson Company against the City of Tacoma and others to restrain the enforcement of an ordinance imposing a license tax on corporations furnishing trading stamps to be used in connection with sales of goods where the stamps are redeemable by others than the sellers of the goods. On plea in bar. Sustained, and findings and decree ordered for defendants.

See, also, 190 Fed. 682; (Wash.) 122 Pac. 1060.

Daniel J. Lyons, of New York City, and Tucker & Hyland, of Seattle, Wash., for plaintiff.

T. L. Stiles, of Tacoma, Wash., for defendants.

CUSHMAN, District Judge. This cause is now before the court for final decision.

The complaint was filed herein July 28, 1911, by the plaintiff, a corporation of the state of New Jersey, furnishing merchants with "trading stamps," praying to have decreed unconstitutional and void Ordinance No. 2133 of the city of Tacoma, which ordinance requires any one using "trading stamps" in selling their goods, where the "trading stamps" are redeemable by others than the sellers of the goods, to pay an annual license of one hundred dollars. The complaint, in specifying the invalidity of the ordinance, alleges that the same is oppressive, unreasonable, and arbitrarily discriminatory against the complainant and its customers; that it violates both the state and federal Constitutions, and deprives the complainant and its subscribers of the liberty of contract and of their property without due process of law; that it impairs the obligations of its contracts entered into with its subscribers; that it violates section 10 of article 1, of the Constitution and the fourteenth amendment to the Constitution of the United States; that it further deprives complainant and its subscribers of the equal protection of the law, and that it is in restraint of trade and commerce. Defendants interposed a plea in bar, alleging the commencement of a suit by the complainants against the defendants in the superior court of the state of Washington, supported by the same allegations, for the same relief as that prayed in this suit; that in such suit the superior court of the state held that the plaintiff's complaint did not state facts sufficient to constitute a cause of action against the defendants; that complainant declined to amend and the action was dismissed by the court. There was no answer to the plea in bar, complainant contending that the plea was insufficient, as it did not state that the judgment of the state court was a final judgment.

Upon the hearing on the plea, it was conceded that an appeal had been taken from the judgment of the state court pleaded in bar, and this court held the plea in bar insufficient. After the hearing on the appeal in the state Supreme Court, defendants moved for a stay of proceedings in this court, pending a decision on that appeal. The stay was denied. Both the ruling on the plea in bar and that on the motion to stay were made on the ground that the fact that complainant had first brought a suit in the state court, which was still pending on appeal, in the absence of the possession of any res by that court, would not estop the complainant from proceeding herein; nor justify this court in declining to exercise its jurisdiction, concurrent with that of the state courts. Thereafter complainants filed an amended bill herein; the same being somewhat more detailed in its statements. The amended bill did not contain the allegation which was in the original bill, that the city ordinance was in violation of the state Constitution. Issue was joined. The judgment of the state court was pleaded by the defendants as estopping the complainant, and a reference thereafter had, upon which testimony was taken and returned here, after

which, and before the final hearing, the defendants interposed a supplemental answer, which is not denied, alleging the affirmance of the said decision of the superior court by the state Supreme Court; its remittitur to the superior court and the filing of the same therein making such decision final so far as the state tribunals are concerned.

The decision ([Wash.] 122 Pac. 1060, not yet officially reported) of the Supreme Court, in part, is as follows (after stating the case):

"In this court the only question suggested is the validity of the ordinance. The appellant has filed an exhaustive brief in which it contends that the law is void because prohibitive of appellant's business, because it deprives the appellant of its property without due process of law, because it impairs the obligation of contracts, because it is ultra vires, and because it operates in restraint of competition and in restraint of trade, and is thus void as against public policy. We have not, however, found it necessary to follow the plaintiff in its discussion of the several contentions suggested, as we think they have all been foreclosed by the prior decisions of this court. In *Fleetwood v. Read*, 21 Wash. 547, 58 Pac. 665, 47 L. R. A. 205, an ordinance of the City of Tacoma, the exact counterpart of the one now in question, was upheld by us against an attack based on the ground that it was void because of the matters charged against the present ordinance, and in numerous cases, decided both before and since that time, we have upheld similar ordinances against similar attacks. *Walla Walla v. Ferdon*, 21 Wash. 308, 57 Pac. 796; *Stull v. De Mattos*, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892; *Seattle v. Barto*, 31 Wash. 141, 71 Pac. 735; *In re Garfinkle*, 37 Wash. 650, 80 Pac. 188; *Oilure Mfg. Co. v. Pidduck-Ross Co.*, 38 Wash. 137, 80 Pac. 276; *McKnight v. Hodge*, 55 Wash. 289, 104 Pac. 504; *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101 [37 L. R. A. (N. S.) 466]."

Complainant contends that this judgment is not an estoppel, that this court is bound to follow its former rulings in other cases, and also that filed upon the hearing for an injunction pendente lite. *Ex parte Hutchinson* (C. C.) 137 Fed. 949, and (C. C.) 190 Fed. 682. In these cases this court held this ordinance and other similar ordinances invalid. In an unreported case brought by A. L. Hutchinson and Ernest Hutchinson, copartners, against the city of Tacoma, certain of its officers and other parties joined as alleged conspirators against the plaintiffs, an ordinance substantially the same as the one herein involved was, by this court, held invalid. On the merits of this controversy, various other decisions are relied upon by the complainant: *Long v. Maryland*, 74 Md. 565, 22 Atl. 4, 12 L. R. A. 425, 28 Am. St. Rep. 268 (1891); *Commonwealth v. Moorhead*, 7 Pa. Co. Ct. R. 513; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465 (1888); *Commonwealth v. Emerson*, 165 Mass. 146, 42 N. E. 559 (1896); *State v. Ramseyer*, 73 N. H. 31, 58 Atl. 958, 6 Ann. Cas. 445; *State v. Dodge*, 76 Vt. 197, 56 Atl. 983, 1 Ann. Cas. 47; *State v. Dalton*, 22 R. I. 77, 46 Atl. 234, 48 L. R. A. 775, 84 Am. St. Rep. 818; *State v. Sperry & Hutchinson Co.*, 110 Minn. 378, 126 N. W. 120, 30 L. R. A. (N. S.) 966; *Ex parte Drexel*, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. (N. S.) 588, 3 Ann. Cas. 878; *Long v. State*, 74 Md. 565, 22 Atl. 4, 12 L. R. A. 425, 28 Am. St. Rep. 268; *Winston v. Beeson*, 135 N. C. 271, 47 S. E. 457, 65 L. R. A. 167; *Young v. Com-*

monwealth, 101 Va. 853, 45 S. E. 327; *Leonard v. Bassindale*, 46 Wash. 301, 89 Pac. 879; *O'Keefe v. Somerville*, 190 Mass. 110, 76 N. E. 457, 112 Am. St. Rep. 316, 5 Ann. Cas. 684; *Commonwealth v. Sisson*, 178 Mass. 578, 60 N. E. 385.

[1] Although these decisions would be persuasive in the absence of the adjudication in the state court, pleaded as an estoppel, before considering the merits, the question of estoppel must be disposed of. The ruling granting an injunction pendente lite herein is not *res adjudicata* this question, for it was not a final decision.

[2] It is not necessary or proper in this case to consider the questions of comity between the state and federal courts; the value of uniformity of decisions or the doctrine of *stare decisis*. The question is: Was the suit brought by complainant in the state court and by it appealed to the Supreme Court, and there finally decided, of the same scope as the suit now brought in this court, based on the same allegations, between the same parties and for the same relief? Is the question *res judicata*? There is no substantial difference in the two suits. All the questions raised in this suit were distinctly put in issue in the superior court of the state, and the questions raised were therein decided. In fact, the issues were broader, including the alleged invalidity of the ordinance under the state Constitution; but the greater, necessarily, includes the less.

Although the parties in the state court did not present their evidence, the ruling upon the demurrer, going to the merits, complainant's refusal to plead over, and the judgment of dismissal would have the same effect upon the finality of the decision and the estoppel thereunder as though the case were decided after the taking of evidence upon the merits. Those essentials being present in the decision of the state court, the questions raised are *res judicata*. *Fayerweather v. Ritch*, 195 U. S. 276, 25 Sup. Ct. 58, 49 L. Ed. 193. "A judgment rendered on a demurrer is equally conclusive by way of estoppel of the facts confessed by the demurrer as would be a verdict and judgment finding the same facts." 23 Cyc. 1152, note 1 and citations. If this court should now decide contrary to the decision of the state court in this particular matter, there would be no way to give any effect to the decision of that court—a decision invoked upon complainant's own petition and appeal. Complainant contends that the question of the validity of the ordinance under the federal Constitution was not decided by the state court. As shown above, it was therein said:

"The appellant has filed an exhaustive brief in which it contends that the law is void \* \* \* because it deprives the appellant of its property without due process of law, because it impairs the obligation of contracts. \* \* \* We have not, however, found it necessary to follow the plaintiff in its discussion of the several contentions suggested, as we think they have all been foreclosed by the prior decisions of this court."

[3] The foregoing, with complainant's complaint and amended complaint herein, sufficiently shows that the questions under the federal Constitution were raised and necessarily determined in this decision, and the argument of complainant's counsel of inconvenience in

securing a review by the Supreme Court of the United States of the state Supreme Court's decision, because the constitutional questions decided do not therein appear with sufficient clearness is not persuasive, for, were the same conceded, it could be cured by a certificate from the state Supreme Court, or its Chief Justice. 2 Foster's Federal Practice (3d Ed.) § 500, note 44, and citations. In the reply brief of the complainant, it is urged that the complainant should not be penalized for the mistake of its former counsel. The record in this case does not disclose any such mistake on the part of complainant's counsel as would afford a ground for equitable relief.

Findings and decree may be prepared in accordance with this opinion. The questions, other than that of estoppel, will not be considered.

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UNITED STATES v. CANTINI.

(District Court, W. D. Pennsylvania. October 8, 1912.)

No. 2.

**ALIENS (§ 62\*)—NATURALIZATION—CONTINUOUS RESIDENCE—"RESIDED CONTINUOUSLY."**

The provision of Naturalization Act June 29, 1906, c. 3592, § 4, par. 4, 34 Stat. 598 (U. S. Comp. St. Supp. 1911, p. 531), which requires an applicant for naturalization to prove to the satisfaction of the court that immediately preceding the date of his application he has "resided continuously" within the United States five years at least, does not mean that the applicant must not have been outside of the territory of the United States during the preceding five years, but has reference to changes of domicile only; and the fact that an alien within that time returned temporarily to his native country on a visit, without any intention of remaining or abandoning his residence in this country, did not defeat his right to naturalization, and the length of his absence is material only as evidence on the question of intention.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 123-125; Dec. Dig. § 62.\*]

In Equity. Suit by the United States against Giacinto Cantini. Decree for defendant.

H. S. Lydick, Asst. Dist. Atty., of Pittsburgh, Pa., for the United States.

G. I. Zsatskovich, of Pittsburgh, Pa., for defendant.

ORR, District Judge. This is a proceeding on the part of the United States for the cancellation of a certificate of naturalization issued to the defendant by this court. The contention of the United States, as set forth in the bill, is that the certificate of naturalization was illegally procured, because the court was without jurisdiction, because the defendant within a period of five years immediately preceding the date of his certificate was for a time without the United States. There is no allegation that the defendant was party to any fraud, or that the defendant concealed from the court which issued the certificate of naturalization any of the facts

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Index.

upon which the government now bases its present contention. All the material facts appear in the following averments of the answer:

"That I emigrated to the United States from Italy on March 17, 1899; that I continued physically to reside in the United States until September 5, 1908, at which time I went, as was shown and proved to the satisfaction of the district attorney for the United States for the Western district of Pennsylvania, Judge Orr presiding, to visit my parents, expecting to be back in three months; that at that time I requested my employers to retain my place for me; that owing to my marriage, and birth of a child, and other circumstances, my stay was prolonged, and that I returned to the United States on August 22, 1910; that I never abandoned, nor did I ever intend to abandon, my legal residence in the United States, nor did I at any time intend nor did establish a permanent residence outside of the United States; that I proved the foregoing by the testimony of myself and other witnesses, and satisfied the court at the hearing held on March 14, 1911."

The United States has set this cause down for hearing upon bill and answer. Therefore the allegations in the answer are to be taken as true. *Banks v. Manchester*, 128 U. S. 244, 9 Sup. Ct. 36, 32 L. Ed. 425.

Prior to the passage of the act of June 29, 1906 (34 Stat. 596, c. 3592 [U. S. Comp. St. Supp. 1911, p. 531]), which was intended to create a uniform system of naturalization, there was no way in which a certificate of naturalization could be attacked in a collateral proceeding. In *Spratt v. Spratt*, 4 Pet. 393, 408 (7 L. Ed. 897), Chief Justice Marshall says:

"The various acts upon the subject submit the decision on the right of aliens to admission as citizens to courts of record. They are to receive testimony, compare it with the law, and to judge upon both law and fact. This judgment is entered on record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry, and, like every other judgment, to be complete evidence of its own validity."

The act of Congress above referred to recognizes the law to have been as stated by Chief Justice Marshall, because it provides in its fifteenth section a means whereby a certificate of citizenship may be canceled. That section provides:

"That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured."

There are other provisions in the section relating to process, which are not necessary to be mentioned. This section has been declared to be constitutional by the Supreme Court in *Johannessen v. United States*, 225 U. S. 227, 32 Sup. Ct. 613, 56 L. Ed. 1066. This court has jurisdiction of the present proceeding.

There remains but the single question whether or not it had jurisdiction to admit the defendant to citizenship upon all the facts as they are stated in his answer. The contention on the part of the government is that the court should not have issued the certificate of naturalization, because the defendant had not been continuously

within the United States during the five years preceding the date of the certificate. The Naturalization Act provides in the fourth paragraph of section 4:

"It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the state or territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required, and the name, place of residence, and occupation of each witness shall be set forth in the record."

Section 10 of the act is as follows:

"That in case the petitioner has not resided in the state, territory or district for a period of five years continuously and immediately preceding the filing of his petition he may establish by two witnesses, both in his petition and at the hearing, the time of his residence within the state, provided that it has been for more than one year, and the remaining portion of his five years' residence within the United States required by law to be established may be proved by the depositions of two or more witnesses who are citizens of the United States, upon notice to the Bureau of Immigration and Naturalization and the United States attorney for the district in which said witnesses may reside."

It was clearly not the purpose of Congress to intend that an alien seeking citizenship should not leave the territorial limits of the United States within a period of five years preceding his application. Had that been the intention, Congress would have used some language like that used in the Naturalization Act of March 3, 1813 (2 St. at Large, 811, c. 42, § 12), there being in that act a provision that the applicant should—

"for the continued term of five years next preceding his admission as aforesaid have resided within the United States without being at any time during the five years out of the territory of the United States."

But, apart from that, to hold that the language of the present act has the same meaning as is expressed in the act of 1813 would be a conclusion wholly unjustified. At the date of the former act opportunities for communication between residents of foreign states were few, and the expense and perils of travel were great. Under those circumstances, the uninterrupted continuance of the applicant's stay within the limits of the United States demanded by the act of 1813 might not be deemed unreasonable. If that were the law to-day, the alien who gratified his desire to see Niagara Falls from the Canadian side of the river must forego his application for citizenship for a period of five years thereafter.

In the present case, however, the United States does not insist that there shall be no departure from the territory of the United States during the period of five years, but urges that the departure for the length of time in which the defendant was absent from the United States is an unreasonable departure, and therefore, because his de-

parture was unreasonable, the court had no jurisdiction to admit him to citizenship. The court does not believe that the question of the reasonableness or the unreasonableness of an applicant's absence from the United States is a fact which should be determined by it, except in connection with the fact of residence. The fact of residence and the continuity of that residence must be determined by the court, and in determining the fact of residence there must be a consideration of the facts which express the intention of the applicant. If the facts do not clearly show an intention on the part of the applicant to abandon a residence which he has acquired in this country, he must be deemed to be continuing to reside here. In the present case it appears that the defendant had been in this country for considerably over nine years when he returned to Italy to visit his parents for a period of three months; that he requested his employers to retain his place for him, and that, owing to his marriage and the birth of a child and other circumstances, his stay was prolonged; that he never abandoned, nor intended to abandon, his residence here and establish a permanent residence elsewhere; that those facts were proven, not alone by the declaration of the defendant, which is unsafe to rely upon in questions of this kind, but by the oaths of other witnesses at the hearing.

This case is somewhat analogous to *In re Schneider* (C. C.) 164 Fed. 335. That was the case of a sailor, who it was held did not abandon his residence by going to sea. The learned judge held in that case that the word "continuously" cannot be construed literally. It is probable that the word was used to prevent a change of domicile or change of residence within that period, as in the case of one who abandoned his intention to reside in the United States, and left this country to take up his residence elsewhere, and who, after finding that conditions were not satisfactory to him in the new place, returns again and seeks to make use of a formerly abandoned privilege.

It is urged, further, by the government, that the witnesses required as to the facts of residence and good moral character while residing in the United States during the five years preceding the application for naturalization cannot know enough about the man to testify as to his character. We do not think this should be given the weight demanded for it. It was never contemplated that the witnesses as to character should be constantly with the applicant. Evidence as to good character can only be matter of opinion, and witnesses may be in touch with an alien party, who is absent, through correspondence and relatives and mutual friends.

Nor do we think there is much in the proposition that by the long absence he is losing the civilizing influences of the United States and full opportunity to become familiar with its constitutional government. There is no doubt that long temporary absence from the United States would in many cases be deemed to be detrimental to the applicant for naturalization. But it must be considered that advanced civilization is not limited to this country, and that knowledge of our Constitution and the machinery of our government is sometimes possessed in a marked degree by those who are citizens and residents of foreign



countries. The mental qualifications (exclusive of certain prescribed educational requirements), as well as the moral qualifications, of applicants for citizenship, are to be determined by the court, to whom it shall be made to appear that the applicant is—

“attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same.”

Under all the facts, and the law applicable thereto, the court is of opinion that defendant's certificate of naturalization was not illegally procured. The bill must therefore be dismissed, at the costs of the plaintiff.

Let an order be drawn.

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THOMPSON v. WARD et al.

(District Court, N. D. Iowa, E. D. June 29, 1912.)

No. 14, Law.

1. REMOVAL OF CAUSES (§ 107\*)—RESIDENCE—EVIDENCE.

A cause having been removed on the ground that both defendants were nonresidents and citizens of Illinois, evidence *held* insufficient to show that defendant W. was not a resident of Iowa, where he was served, at the time of service.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 225-234; Dec. Dig. § 107.\*]

2. REMOVAL OF CAUSES (§ 107\*)—PETITION FOR REMOVAL—AMENDMENT—TIME.

Where defendant sought to remove a cause on the ground that both defendants were nonresidents and citizens of another state, the petition for removal could not be amended, after the time to answer had expired, so as to allege, as ground for removal, that defendant railroad company was a nonresident, and that the petition showed on its face a separable controversy between plaintiff and defendant railroad company.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 225-234; Dec. Dig. § 107.\*]

Separable controversy as a ground for removal of cause to federal court, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Mecke v. Valleytown Mineral Co.*, 35 C. C. A. 155; *Pollitz v. Wabash R. Co.*, 100 C. C. A. 4.]

At Law. Action by Charles Thompson against G. S. Ward and the Illinois Central Railroad Company. On motion to remand. Granted.

Sager, Sweet & Edwards, of Waterloo, Iowa, for plaintiff.  
Helsell & Helsell, of Ft. Dodge, Iowa, for defendants.

REED, District Judge. The plaintiff brought this suit in the state court against the defendants to recover from them jointly damages for an alleged assault and battery, and a malicious arrest and false imprisonment. The defendants jointly filed a petition to remove the cause to this court upon the ground alone of diverse citizenship, alleging that they were both citizens of Illinois, and the plaintiff a resident of Iowa when the suit was commenced. The

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

state court ordered the removal, and the record has been filed in this court.

[1] The plaintiff moves to remand upon the ground that the defendant Ward was, when the suit was commenced, a citizen and resident of the state of Iowa, and that the petition for removal was therefore improperly granted.

From the affidavit filed by the plaintiff it appears that Ward was, or had been for some time prior to the commencement of the action, in the employ of the defendant railroad company as a special agent, and detailed to look after its property in Waterloo, Black Hawk county, Iowa, but his duties are not otherwise more definitely stated; that he had resided with his wife for more than a year prior to the commencement of the action in Waterloo, Iowa, and voted in that city at the general election in Iowa, in 1910. The action was commenced against Ward by the service of the original notice upon him in Waterloo, December 6, 1911, at the place in that city where he had previously resided.

It is claimed by the defendants that Ward removed from Waterloo to some place in Illinois before the suit was commenced, and that he was not a resident of Waterloo or in the state of Iowa thereafter. Ward made an affidavit in Illinois May 9, 1912, which reads in this way:

"I, G. S. Ward, being first duly sworn, say that I am defendant in above cause, and at the time of the commencement of said suit I did, ever since have, and still reside in Cook county, Illinois, and am a citizen of Illinois."

Two other persons, residents of Chicago, made affidavits as follows:

"That said G. S. Ward at the time of the commencement of said suit was not a citizen of Iowa, having been removed therefrom since October 10, 1911; further, that the household goods of said Ward have been in storage in a warehouse in Chicago since December 12, 1911; further, that the headquarters of said Ward have from that time been in Chicago until recently, when he was transferred to Carbondale, in said state, where he is now temporarily located."

These affidavits were made in Chicago May 11, 1912. They are quite indefinite, and fail to show their knowledge, or means of knowledge, of the ultimate facts which they state. Ward does not deny that he voted in Waterloo at the general election of 1910, and it must be presumed that he was at the time of such election (in November, 1910) a citizen of, and actually residing in the state of Iowa; otherwise, he would not have been entitled to vote at said election, and it will not be presumed that he voted illegally. There was no general election in Iowa in 1911. The alleged assault and malicious arrest and imprisonment of the plaintiff is alleged in his petition to have occurred at Waterloo on October 17, 1911. The return of service of the original notice shows that the service was personally made upon Ward in Waterloo, December 6, 1911, as before stated, and the person serving it makes affidavit that the service was made upon Ward at his (Ward's) place of residence in Waterloo in the presence of his wife, where they were then liv-

ing, and neither stated that they were not then residents of Iowa, but the wife stated in the presence of Ward that they intended soon to move from Iowa to some other state.

There are some other facts which tend to show that, at the time the action was commenced and the service made upon Ward, he had not then removed from the state of Iowa, and that he was then a resident of that state. The burden is upon the defendants to show that Ward was not a citizen and resident of Iowa when the action was commenced. That he was such citizen and resident in November, 1910, is not and cannot be successfully disputed; and such citizenship and residence is presumed to continue until the contrary is affirmatively shown, and it is not affirmatively shown in this case that Ward ceased to be a resident of Iowa prior to the commencement of this action.

The railroad company is, and was when the suit was commenced, an Illinois corporation operating its railroad in Iowa; but this is not sufficient to warrant the removal of the cause to this court.

[2] The defendant railroad company has filed an amendment to the petition for removal, in which it is alleged that the petition of the plaintiff shows upon its face a separable controversy between the plaintiff and the defendant railroad company. This is not properly an amendment to the original petition for removal, but is the bringing forward of another and different ground of removal, and comes too late. It should have been made at or before the time the defendant was required to answer or plead to the plaintiff's petition in the state court, which was not done.

It follows that the motion to remand must be and is sustained, and it is ordered accordingly.

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In re BRAVERMAN.

Ex parte W. L. DOUGLAS SHOE CO.

(District Court, S. D. New York. August, 1912.)

**BANKRUPTCY (§ 407\*)—DISCHARGE—CREDIT STATEMENT—FALSITY.**

Where a bankrupt, when engaged in the retail shoe business in New York, made a financial statement without filling a blank as to how long the statement might be regarded as continuing, a sale of goods to him 18 months thereafter could not have been the proximate result of the statement, so as to entitle the seller to maintain an objection to the bankrupt's discharge on the ground that the statement was false.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 729-731, 737, 738, 740-751, 758, 760, 761; Dec. Dig. § 407.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of one Braverman. On motion to confirm report of a master recommending the bankrupt's discharge, as against objections of the W. L. Douglas Shoe Company. Report confirmed, and discharge granted.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Louis Rosenberg, of New York City, for bankrupt.

Lesser Brothers, of New York City (William Lesser and Joseph Side, both of New York City, of counsel), for objecting creditor.

HAND, District Judge. The statement of July 30, 1908, was, I think, false in omitting the indebtedness to Miller, just as the objector insists. The statements of the bankrupt at the earlier hearings are too categorical to admit of any such easy explanation as that offered at the end, when he found it necessary to explain away Miller's indebtedness on July 30, 1908. It is quite clear to me that not more than half of it was incurred after the statement was sent. Moreover, the omission of the indebtedness from the statement must have been intentional.

I agree with the learned master that the purchases were too remote from the statement to be the cause of the loss. The rule is this: Was the sale a proximate result of the statement? Here the earliest purchase was 18 months after the statement, and the bankrupt had failed to fill in the blank showing for how long the statement might be regarded as continuing. That failure was equivalent to a refusal to say how long it should last, and left the sellers to their own construction of the facts.

Now, what does such a statement mean? That on a given date the assets and liabilities are as stated. Does that give the seller any right, 18 months thereafter, to assume that the condition remains approximately as then stated? Certainly not, in view of the constantly changing fortunes of such a trade as the bankrupt's. He was a man doing a little retail shoe trade, subject to rent in New York, to the variations in business from causes over which he had no control, to all the vicissitudes which makes so hazardous the commercial life of such traders. It is unreasonable to suppose that such a statement would be any index of his financial condition 18 months after it was made. If the seller relied on it, he had no right to do so. *Morris v. Talcott*, 96 N. Y. 100; *Macullar v. McKinley*, 99 N. Y. 353, 2 N. E. 9.

The second specification is quite unproved, and may be dismissed without further comment.

The third specification was more nearly proved, and the bankrupt's story was rather suspicious; but there is nothing in the testimony to justify me in reversing the master's finding of fact in that regard.

The evidence as to the fourth specification is weaker than that upon the third.

Report confirmed; discharge granted; no costs.

## BAKER v. SWIGART et al.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1912.)

No. 2,125.

## 1. STATUTES (§§ 217, 219, 220\*)—RULES OF CONSTRUCTION.

If the provisions of a statute are uncertain, conflicting, or ambiguous, it becomes the proper subject for construction by the court, in which event, and in aid thereof, resort may be had to any construction put upon it by subsequent acts of the same legislative body, or by the department of the government charged with its execution, and reference may also be had to the legislative debates during the pendency of the enactment.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 293, 296, 297, 298; Dec. Dig. §§ 217, 219, 220.\*]

History and passage of statute and contemporary circumstances as aids to construction, see note to *Mosle v. Bidwell*, 65 C. C. A. 535.]

## 2. WATERS AND WATER COURSES (§ 222\*)—RECLAMATION ACT—CONSTRUCTION—AUTHORITY OF SECRETARY OF INTERIOR—COST OF MAINTENANCE OF WORKS.

Under the provision of Reclamation Act June 17, 1902, c. 1093, § 6, 32 Stat. 389 (U. S. Comp. St. Supp. 1911, p. 666), authorizing and directing the Secretary of the Interior to use the reclamation fund created by the act "for the operation and maintenance of all reservoirs and reclamation works constructed under the provisions of this act, provided that, when the payments required by this act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense," etc., and especially in view of the provision of section 4 that the charges against the land which the Secretary is authorized to fix and collect in annual installments "shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project," the Secretary has no authority to make additional annual assessments for the cost of maintenance prior to the time when the management passes to the landowners.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 222.\*]

Gilbert, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Suit in equity by D. P. Baker against Charles H. Swigart, E. McColloh, and R. K. Tiffany. Decree for defendants, and complainant appeals. Reversed.

For opinion below, see 196 Fed. 569.

W. T. Dovell and Hughes, McMicken, Dovell & Ramsey, all of Seattle, Wash., for appellants.

Oscar Cain, U. S. Atty., and E. C. Macdonald, Asst. U. S. Atty., both of Spokane, Wash., and E. W. Burr, Sp. Asst. Atty. Gen., of North Yakima, Wash., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
199 F.—55

ROSS, Circuit Judge. This appeal is from a decree entered after a hearing upon bill and answer. In his amended bill the complainant alleged that, being the owner of certain lands in Yakima county, state of Washington, he made application for a water right under the Sunnyside Unit of the Yakima Project, the same being a project of the United States Reclamation Service, under the provisions of the act of Congress commonly known as the "Reclamation Act," approved June 17, 1902. The bill alleged a compliance by the complainant with all of the requirements of the act, and an acceptance of his application by the Secretary of the Interior, thus constituting between the United States and himself a contract under its provisions, whereby the government was to furnish, and he was to receive, out of a ditch called the "Sunnyside Ditch," three acre feet of water per acre for his tract of land, paying therefor at the rate of \$52 per acre in 10 annual installments, as provided in the application. The bill further alleged that thereupon, and in reliance upon the contract, the complainant cultivated his land, and that there was furnished him, out of the ditch and the laterals connected therewith, water to irrigate the same, so that at the time of the filing of the bill the complainant had upon his tract a growing crop of alfalfa; that such water was and is necessary for the cultivation of his land and the maturing of his crops, and that there was and is no other source than the Sunnyside Ditch from which to secure water; that in the midst of the irrigating season, to wit, about the month of June, in the year 1911, the defendants to the bill, who are the appellees here, claiming to act as officers of the Reclamation Service of the United States, wrongfully and without warrant of law made an assessment against the complainant to the extent of 95 cents per acre for the use of the water, and demanded payment thereof; that the complainant refused to pay the charge so assessed, and thereupon the defendants, claiming to act as officers of the Reclamation Service, wrongfully and without warrant of law shut off the water from the complainant's land, and threatened to continue to refuse to supply any water therefor, unless the complainant should pay upon demand charges from time to time assessed, in the manner above indicated, against the land of the complainant, as a pretended charge for the maintenance of the said ditch; that the charge was arbitrarily fixed, without authority of law, and without regard to the actual cost of maintaining the ditch, and that the defendants threatened to collect the charge so assessed, and, if the same was not paid upon demand, to refuse the complainant water from the ditch for use upon his land.

The defendants answered the amended bill, and pleaded, among other things, in justification of the allegations of the amended bill in respect to the arbitrary assessment of 95 cents an acre and the coercive attempt to collect the same, as follows:

"For answer unto paragraph VII of the amended bill, defendants say that the Secretary of the Interior on November 18, 1908, fixed a charge for the operation and maintenance under said Sunnyside Unit for the year 1909, and until further notice, at ninety-five (95) cents per acre per annum, which said order has not since been abrogated, modified, or changed, and is now

in full force and effect, and the defendant [plaintiff] has at all times heretofore paid such operation and maintenance fee as required by said order of the Secretary of the Interior."

[1] The sole point presented for decision is whether the act of Congress of June 17, 1902 (32 Stat. 389), requires the cost of operation and maintenance of the ditch in question to be paid by the water users prior to the time when the payments required by the act shall have been made for the major portion of the lands irrigated from the waters of the particular works in question. The first thing to do in such a case is to see just what the lawmaking power has enacted. If the provisions of the statute are plain and unambiguous, the courts must accept the law as there declared; otherwise, they would usurp the function of the legislative department of the government. Of course, if the provisions of the statute in question be uncertain, conflicting, or ambiguous, they become the proper subject for construction, which is a function of the court, in which event, and in aid thereof, resort may be had to any construction put upon it by any subsequent act of the same legislative body, if such there be, and to the construction placed thereon by that department of the government charged with the execution of the law, and, in order that the court may be enlightened in its effort rightly to construe the language employed in the statute, reference may also be had to the legislative debates during the pendency of the enactment. These observations are so well supported by the authorities as to make extended reference to them unnecessary. We therefore cite only, among the many to that effect, *Houghton v. Payne*, 194 U. S. 99, 24 Sup. Ct. 590, 48 L. Ed. 888; *Fairbank v. United States*, 181 U. S. 310, 21 Sup. Ct. 648, 45 L. Ed. 862; *Hamilton v. Rathbone*, 175 U. S. 421, 20 Sup. Ct. 155, 44 L. Ed. 219; *United States v. Goldenberg*, 168 U. S. 102, 18 Sup. Ct. 3, 42 L. Ed. 394; *Lake County v. Rollins*, 130 U. S. 670, 9 Sup. Ct. 651, 32 L. Ed. 1060; *United States v. Tanner*, 147 U. S. 661, 13 Sup. Ct. 436, 37 L. Ed. 321; *United States v. Alger*, 152 U. S. 384, 14 Sup. Ct. 635, 38 L. Ed. 488; *Webster v. Luther*, 163 U. S. 331, 16 Sup. Ct. 963, 41 L. Ed. 179; *Bate Refrigerating Company v. Sulzberger*, 157 U. S. 1, 15 Sup. Ct. 508, 39 L. Ed. 601; *St. Paul, etc., Railway Company v. Phelps*, 137 U. S. 528, 11 Sup. Ct. 168, 34 L. Ed. 767.

[2] Looking at this statute, it is seen that by its first section it is provided that all moneys received from the sale and disposal of public lands in certain named states and territories (Washington among them), and with certain exceptions not important to be mentioned, shall be and are—

"reserved, set aside, and appropriated as a special fund in the treasury to be known as the 'Reclamation Fund' to be used in the examination and survey for and the construction and maintenance of irrigation works, for the storage, diversion and development of waters for the reclamation of arid and semi-arid lands in the said states and territories, and for the payment of all other expenditures provided for in this act; provided," etc.

By the second section of the act the Secretary of the Interior was authorized and directed to make examinations and surveys for, and

to locate and construct, as therein provided, irrigation works for the storage, diversion, and development of waters, including artesian wells, and to report to Congress at the beginning of each regular session the results of such examination and surveys, and other matters not here necessary to state. By the third section the Secretary of the Interior was, among other things, authorized to determine whether or not the particular irrigation project is practicable and advisable; and the fourth, fifth, sixth, and tenth sections of the act are as follows:

"Sec. 4. That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: Provided, that in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon.

"Sec. 5. That the entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the government the charges apportioned against such tract, as provided in section four. No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made. The annual installments shall be paid to the receiver of the local land office of the district in which the land is situated, and a failure to make any two payments when due shall render the entry subject to cancellation with the forfeiture of all rights under this act, as well as of any moneys already paid thereon. All moneys received from the above sources shall be paid into the reclamation fund. Registers and receivers shall be allowed the usual commissions on all moneys paid for lands entered under this act.

"Sec. 6. That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this act: Provided, that when the payments required by this act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: Provided, that the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the government until otherwise provided by Congress."

"Sec. 10. That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations, as may be



necessary and proper for the purpose of carrying the provisions of this act into full force and effect."

It is thus seen that by the first section of the act Congress explicitly declares that the reclamation fund thereby created shall be used not only in the examination, survey, and construction of the irrigation works provided for, but also for their *maintenance*, and for the payment of all other expenses provided for in the act. In the fourth section, in authorizing the Secretary of the Interior to let contracts for the construction of any irrigation project he may have determined to be practicable, "in such portions or sections as it may be practicable to construct and complete as parts of the whole project," Congress expressly made that authority conditional upon the existence in the reclamation fund of available necessary funds for such portions or sections, and, furthermore, expressly declared that:

"The charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project" (public notice of which the Secretary was thereby directed to give) "shall be determined with a view of returning to the reclamation fund the estimated *cost of construction* of the project, and shall be apportioned equitably."

In the case of *United States v. Cantrall* (C. C.) 176 Fed. 949, cited and relied upon by the appellees, the court said that when section 4 of the act—

"empowered the Secretary of the Interior to fix and determine the charges against the land, it must have intended that he should thereby cover the cost of maintenance and operation while in control of the United States, as well as construction. I cannot find," said the learned judge, "anything in the language which makes it unlawful for the Secretary to divide the charges made by him against the land into two parts, one for construction and the other for maintenance and operation. It is true he is authorized by section 6 to use the reclamation fund for the operation and maintenance of the system until the management thereof passes to the landowners, but he is at the same time required by section 4 to levy such a charge against the land as will return to the fund the estimated cost thereof [of the system]. Unless, therefore, he has authority to cover the cost of operation and maintenance by charge upon the lands, the system must lie dormant and unused until the major portion of the entrymen shall pay the charges for cost of construction in full, or in time the fund will be exhausted and depleted, a result evidently not intended by Congress. Such a construction of the act is not required by its language, and would be inconsistent with its general intent and purposes."

Not only do we find nothing in section 4 of the act requiring the Secretary of the Interior to levy such a charge against the land as will return to the reclamation fund the *entire* estimated cost of the system, but we are of the opinion that the express declaration of Congress in the very same section, declaring that "the said charges shall be determined with a view of returning to the reclamation fund the estimated *cost of construction* of the project, and shall be apportioned equitably," precludes the reading into that section the further cost "of operation and maintenance" of the system: First, because to do so would be to legislate, which the court has no power to do; and, second, because it would be to legislate in direct contravention of other provisions of the same act, namely, of that provision of sec-

tion 5 where it is provided that the entryman upon lands to be irrigated by such works "before receiving patent for the lands covered by his entry shall pay to the government *the charges apportioned against such tract, as provided in section four,*" and of that portion of section 1 of the act which expressly declares that the reclamation fund shall be "used in the examination and survey for and the construction and maintenance of irrigation works, for the storage, diversion and development of waters for the reclamation of arid and semi-arid lands in the said states and territories, and for the payment of all other expenditures provided for in this act," and particularly in contravention of this express and explicit provision of section 6 of the act:

*"That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this act: Provided, that when the payments required by this act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: Provided, that the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the government until otherwise provided by Congress."*

We confess ourselves unable to see any ambiguity in the act, and are of the opinion that the intent of Congress is plainly stated in its provisions. We must, therefore, take the law as we find it enacted, and give it effect without regard to the construction adopted by the Department of the Interior, and notwithstanding the opinion of the learned Attorney General (27 Opins. Atty. Gen. 360-374), for both of which we entertain, as we should, the highest respect. That the view we take of the act is in accord with what must have been the understanding of Congress in making the enactment is shown by these proceedings in the Senate and House of Representatives in reference to the measure, as disclosed by the Congressional Record. In the report of the Senate Committee (Cong. Rec. vol. 35, part. 3, page 2276) is the following:

*"It also provides that the cost of operation and maintenance of reservoirs and irrigation works shall be paid from the irrigation fund, but when payments are made on the major portion of the lands irrigated under any project, the management and operation of all works, except reservoirs and the works necessary for their operation and production, shall pass to the owners of the land, to be maintained at their expense under rules prescribed by the Secretary."*

And in the course of the speech of Representative Jones, of the state of Washington, now a Senator of that state, made in advocacy of the measure (Cong. Rec. vol. 35, part 7, p. 6753), is the following:

"\* \* \* In other words, the government gets its money back. This payment, it may be said, however, goes into the reclamation fund to be re-expended. This is true, but whenever the government ceases to construct irrigation works and all the land is taken and paid for, the fund is entire and can be turned back into the general treasury, so that in the end the govern-

ment will receive all of its expenditures, except, probably, such amount as may be expended for maintenance."

And Representative Ray, speaking in opposition to the measure, said at page 6683 of volume 35, part 7, of the Congressional Record:

"It is conceded that the money never can come back, because the cost of maintenance or the cost of the extension and repairs will use all."

For the reasons stated, the judgment of the court below must be and is reversed, and the cause remanded for further proceedings in accordance with the views above expressed.

GILBERT, Circuit Judge (dissenting). Although the question of the construction of one of the provisions of the act here involved is not wholly free from doubt, I am of the opinion that the judgment of the court below should be affirmed for the following reasons:

1. It was clearly the intention of Congress that none of the reclamation fund should be dissipated in the construction or maintenance of reservoirs or of irrigation works, but that all moneys so expended should be returned to the fund, thereafter to be used in other similar projects. In *American Tobacco Co. v. Werckmeister*, 207 U. S. 284, 293, 28 Sup. Ct. 72, 74 (52 L. Ed. 208), the court said:

"But in construing a statute we are not always confined to a literal reading, and may consider its object and purpose, the things with which it is dealing, and the condition of affairs which led to its enactment, so as to effectuate rather than destroy the spirit and force of the law which the Legislature intended to enact."

In the opinion of the majority of this court certain language is quoted from the report of the Senate committee upon the bill when it was under consideration in that body, in which it was stated that the bill "provides that the cost of operation and maintenance of reservoirs and cost of works shall be paid from the irrigation fund." When the remainder of the report is read, however, it will be seen that the meaning of the passage so quoted is that such cost of operation and maintenance shall be paid in the first instance only from the irrigation fund, and that it was the understanding of the committee that the bill required that such expense be repaid to the fund by the entrymen on the irrigated lands, for the report says:

"By this method the fund will constantly be replenished, making irrigation practically a self-supporting enterprise, and, according to estimates by the geological survey, ultimately putting money into the treasury."

All that was said upon the subject in the debate in the Senate is in harmony with this idea. Thus, Senator Patterson expressed his belief that the proposed law was "so framed that the fund it produces will be a constantly accumulating fund." Another Senator said that the fund would "be perpetual," and another said that the bill provides for the "return of the fund." The same view is still more clearly expressed in the report of the committee of the House, which declares that the expenditure of the proceeds of the sales of public lands to be used under the bill was—

"by no means a direct expenditure, but is rather in the nature of a loan, inasmuch as the settler is to pay to the government the cost of the reclama-

tion of his land. \* \* \* It is true that, if the bill becomes a law and works satisfactorily, in the course of time a large sum of money will be spent by the government in the construction of irrigation works; but under the provisions of the bill all of these sums are to be repaid, so that the reclamation fund, instead of decreasing, will constantly increase. The only actual expenditure under the bill not reimbursable would be certain items of administration, surveys, and examinations of projects, the construction of which, for one reason or another, might not be undertaken."

The quotation in the opinion of the majority of this court from the remarks of Mr. Ray is, I submit, misunderstood. When all that he said is considered, it will be seen that his objection to the bill was, not that the money expended in construction and maintenance would not come back to the reclamation fund, but that it would never come back to the "public treasury," for he said:

"Now, whatever comes back from the men who take up these lands is not, under this bill, to come back into the public treasury, and to be used for the benefit of all the people; but that money is to be used in the repair of existing, and in the construction and extension of other, irrigation works, and it is conceded, I may say, by the committee on irrigation, and conceded everywhere, that the public treasury will never get back the cost of construction."

And Mr. Ray predicted that, if the money was ever returned to the public treasury, it would be "away in the far-distant future, when the present generation and its descendants, their great-grandchildren and their great-great-grandchildren, are all gone." Mr. Mondell, in discussing the bill, said that it was the purpose thereof to require the settlers to "pay to the government every dollar of its expenditure in bringing water to their land, and in addition to that the great cost of building laterals, of leveling the land, and preparing it for irrigation." The only discordant note is found in the remarks of Mr. Jones, of Washington, who discovered in the language of the act ground for apprehending that the government would "probably" not get back the money expended for maintenance. Debates in Congress, however, are not appropriate sources from which to discover the meaning of statutes. Appropriate sources are the reports of the committees of either branch of Congress. *Binns v. United States*, 194 U. S. 486, 24 Sup. Ct. 816, 48 L. Ed. 1037; *Holy Trinity Church v. United States*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226.

2. The language of the statute is not repugnant to the evident intention of Congress. Section 1 of the act authorizes the expenditure of the money of the reclamation fund for the "construction and maintenance" of irrigation works. Section 6 directs the Secretary of the Interior to use that fund for the "operation and maintenance" of each of such works until the time when payments shall have been made for the major portion of the lands irrigated from the waters of such works, after which the management and operation shall pass to the owners of the lands irrigated. Section 4 provides for the repayment to the reclamation fund of the moneys so expended by charges equitably assessed against the settler, and it declares that:

"The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project."

I submit that the words "construction of the project" are used in a broad and comprehensive sense, and that they mean the construction, repair, and maintenance of the project, until it shall be turned over to the beneficiaries thereof under the provisions of section 6. The construction of an irrigation system thereafter to be delivered to others may fairly be said to involve the maintenance thereof until the time of delivery. Such maintenance and keeping in repair is included in the construction. The maintenance is the holding together that which is put together in construction. The word "construction," as used in statutes, has often been given such a meaning. Under a statute authorizing the issuance of bonds for "constructing public roads," it was held that the term "constructing" was used in a comprehensive sense, and meant not merely the construction of new roads, but meant the maintenance and betterment of roads already in existence. *Western v. Hancock County*, 98 Miss. 800, 54 South. 307. So it was held, under a statute authorizing cities and towns "to construct waterworks and light plants," that the words conferred authority to purchase waterworks and light plants already constructed by private enterprise. *Seymour v. City of Tacoma*, 6 Wash. 138, 32 Pac. 1077. And in construing an act which authorized the city of Brooklyn to "construct" a sewer, the court said:

"Nor do we think that the phrases 'to construct' and 'to be constructed' are, in the purview of this act, to be confined to the bare cost of building a sewer. Doubtless to construct is primarily to form; to build together; and the power to construct may in many cases end when the work of building is done. But here the power to construct is the power to keep together, as well as the power to put together, the power to maintain, protect, and preserve, as well as the power to erect." *Matter of Application of Fowler*, 53 N. Y. 60.

3. The contemporaneous construction of the statute by the executive officers of the government, whose duty it was to execute it, is in harmony with the legislative intent, as shown by the reports of the committees of the Senate and the House, and such construction should not be overruled "without cogent reasons." *United States v. Moore*, 95 U. S. 760, 24 L. Ed. 588; *Pennoyer v. McConaughy*, 140 U. S. 1, 23, 11 Sup. Ct. 699, 35 L. Ed. 363.

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#### FIRST NAT. BANK OF THOMASVILLE, GA., v. HOPKINS.

(Circuit Court of Appeals, Fifth Circuit. October 28, 1912.)

No. 2,413.

#### BANKRUPTCY (§ 288\*)—OWNERSHIP OF PROPERTY—DETERMINATION—SUMMARY PROCEEDINGS—ADVERSE CLAIM.

A bank, holding notes against a bankrupt for an amount larger than the bankrupt's total deposits, claimed the right to set off the notes against the deposits. The trustee claimed that the deposits had been made under a special arrangement for the benefit of all the bankrupt's creditors, to be paid to them on their debts pro rata, and that the bank had notice thereof. The deposits were entered on the bank's books to the credit of the bankrupt, without anything to show that they were

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

other than ordinary deposits, the greater part of which, at the time of the institution of bankruptcy, consisted of the proceeds of a note given to the bankrupt for the purchase of its goods. *Held*, that the bank's claim was not merely colorable, but was an adversary one, which could be determined only in a plenary suit between the bank and the trustee, and not by summary proceedings in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.\*]

Appeal from the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge.

Summary proceeding by J. S. Hopkins, trustee in bankruptcy of the Montgomery Drug Company, against the First National Bank of Thomasville, Ga. From an order requiring the bank to pay over certain deposits to the trustee, it appeals. Reversed.

W. C. Snodgrass and J. H. Merrill, both of Thomasville, Ga., for appellant.

J. B. Copeland, of Valdosta, Ga., and George S. Jones and Orville A. Park, both of Macon, Ga., for appellee.

Before PARDEE, Circuit Judge, and NEWMAN and MEEK, District Judges.

NEWMAN, District Judge. The judgment of the court which is for review here is a judgment and order made on a summary proceeding instituted by J. S. Hopkins, trustee in bankruptcy of the Montgomery Drug Company, against the First National Bank of Thomasville, Ga. The order, which was the final disposition of the matter then before the court, directed the bank to pay over to Hopkins, trustee, "forthwith," the sum of \$10,298.54, the amount of money in the possession of said bank belonging to the estate of the Montgomery Drug Company, bankrupt, together with interest thereon at the rate of 7 per cent. per annum from the 17th day of November, 1911.

Without reference to the merits of the matter in controversy, we must first consider whether, under the facts, it was a case where a summary proceeding, and an order made therein, was justified, or whether it was a case in which the defendant was entitled to be heard in a plenary proceeding instituted by the trustee, going through the regular course of such proceedings and with the rights incident thereto. The respondent to the rule made in the summary proceeding raised this question by demurrer at the beginning of the proceeding and in response to the trustee's petition, and also by special objection to the petition made when the matter came on for a hearing before the District Judge. These objections to the character of the proceeding were overruled, and the court proceeded to hear the matter upon certain evidence which had been taken by reference to a master, and made the order referred to above.

The amount named in the judge's order, and which the bank was directed to pay over at once to the trustee, was on deposit in the bank to the credit of the Montgomery Drug Company when bank-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ruptcy proceedings were instituted against that company. The bank held notes against the Montgomery Drug Company for a larger amount than the Drug Company's total deposits, and claimed the right to set off the notes against the deposits. The objection to this on the part of the trustee for the Montgomery Drug Company was that nearly all of the deposits standing to the credit of the Montgomery Drug Company in the bank had been deposited under a special arrangement, by which it was put there for the benefit of all the creditors of the Drug Company, to be paid to them on their debts, pro rata, and that the bank officers had notice that such was the character of the deposits.

This was the matter at issue between the parties—that is, between the trustee in bankruptcy and the bank—when this summary proceeding was instituted. The deposits were entered on the books of the bank to the credit of the Montgomery Drug Company, and were ordinary deposits put by the bank on the Drug Company's deposit book. There was nothing whatever on the books of the bank to show that it was anything other than an ordinary deposit. The proceeds of a note given to the Montgomery Drug Company, for the purchase of its goods, amounting to \$10,000, and put to the credit of the Montgomery Drug Company, constituted the greater part of the deposits at the time of the institution of the bankruptcy proceedings.

It is generally understood, of course, that *Mueller v. Nugent*, 184 U. S. 1, 15, 22 Sup. Ct. 269, 275 (46 L. Ed. 405), lays down the rule governing in such cases, which is stated in the opinion by Chief Justice Fuller as follows:

"But suppose that respondent had asserted that he had the right to possession by reason of a claim adverse to the bankrupt, the bankruptcy court had the power to ascertain whether any basis for such a claim actually existed at the time of the filing of the petition. The court would have been bound to enter upon that inquiry, and in doing so would have undoubtedly acted within its jurisdiction, while its conclusion might have been that an adverse claim, not merely colorable, but real, even though fraudulent and voidable, existed in fact, and so that it must decline to finally adjudicate on the merits. If it erred in its ruling either way, its action would be subject to review."

A distinction must be drawn, therefore, between a real adverse claim and a claim merely colorable. In *Mueller v. Nugent*, *supra* (184 U. S., at page 17, 22 Sup. Ct., at page 276 [46 L. Ed. 405]), it is said in the opinion.

"In the case before us, William T. Nugent held this money as the agent of his father, the bankrupt, and without any claim of adverse interest in himself. If it was competent to deal with Davidson, the assignee in the case of *Dryan v. Bernheimer*, by summary proceeding, William T. Nugent could be dealt with in the same way."

The bankrupt's son held money of his father, to which he made no claim whatever, and he was ordered, in the summary proceeding, to turn it over to the trustee.

In the case of *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 25, 22 Sup. Ct. 293, 296 (46 L. Ed. 413), in the opinion of Mr. Chief

Justice Fuller, applying the distinction drawn in *Mueller v. Nugent* above quoted, to the facts of the *Comingor Case*, this is said:

"The proceeding was purely summary. The determination of the merits on the facts was not open to revision by appeal or writ of error under the bankrupt law. If *Comingor* had been entitled to a trial by jury, he could not have obtained it as of right. The collection of the amounts found due would be enforceable, not by execution, but by commitment. 'We think that it could not have been the intention of Congress thus to deprive parties claiming property, of which they were in possession, of the usual processes of the law of defense of their rights.' *Marshall v. Knox*, 16 Wall. 556 [21 L. Ed. 481]; *Smith v. Mason*, 14 Wall. 419 [20 L. Ed. 748]. The question is whether the District Court had jurisdiction to finally adjudicate the merits in this proceeding. We have just held in *Mueller v. Nugent* [184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405] that the District Court has power to ascertain whether in the particular instance the claim asserted is an adverse claim existing at the time the petition was filed, and according to the conclusion reached the court will retain jurisdiction or decline to adjudicate the merits. Jurisdiction as to the subject-matter may be limited in various ways, as to civil and criminal cases, cases at common law or in equity or in admiralty, probate cases or cases under special statutes, to particular classes of persons, to proceedings in particular modes, and so on. In many cases jurisdiction may depend on the ascertainment of facts involving the merits, and in that sense the court exercises jurisdiction in disposing of the preliminary inquiry, although the result may be that it finds that it cannot go farther. And where, in a case like that before us, the court erroneously retains jurisdiction to adjudicate the merits, its action can be corrected on review. We are of the opinion that, even if *Comingor* could have consented to be pursued in this manner, he did not so consent. He was ruled to show cause, and the cause he showed defeated jurisdiction over the subject-matter; that is, jurisdiction to proceed summarily. He did not come in voluntarily; but in obedience to peremptory orders, and, although he participated in the proceeding before the referee, he had pleaded his claims in the outset, and he made his formal protest to the exercise of jurisdiction before the final order was entered. He had been restrained from settling his accounts in the state court in the action pending there, and the District Court, instead of dissolving the injunction, declining jurisdiction, and leaving the litigation to the state court, either in due course, or by plenary suit, adjudicated the merits and entered a peremptory order that he should pay over, disobedience of which order was punishable by commitment. We think that in this there was error, and that the Circuit Court of Appeals was right in its decree of reversal."

In *Jaquith v. Rowley*, 188 U. S. 620, 625, 23 Sup. Ct. 369, 371 (47 L. Ed. 717), in the opinion by Mr. Justice Peckham, this is said, referring to *Mueller v. Nugent*:

"In other words, *Nugent's Case* simply holds that, where the agent held money belonging to the bankrupt, to which he made no claim, but simply refused to give up the property, which he acknowledged belonged to the bankrupt, the bankruptcy court had power, by summary proceedings, to order him to deliver such property to the trustee in bankruptcy. The case before us is wholly different. The surety claims the right to hold the money as against everybody until his liability on the bail bond is satisfied, and that claim is adverse to any claim that the trustee may make upon him for the money which is to indemnify him as stated."

See, also, *Collier on Bankruptcy* (9th Ed.) p. 489 et seq.; *Remington on Bankruptcy*, vol. 1, p. 1019, § 1652 et seq.; *Loveland on Bankruptcy*, vol. 1, p. 123, § 37 et seq.

We must determine, therefore, on the facts of the present case, before going into it further, whether there was a real adverse claim



on the part of the bank, without reference to what its merits might be when heard and determined, or whether it was merely colorable.

It is perfectly clear to us that the claim of the bank in this case was a real adverse claim, and not merely colorable. The result of this is that the bank had the right to object to this summary proceeding which was instituted against it, and that the objection to such a proceeding should have been sustained, without prejudice to the right of the trustee to proceed against it by plenary suit, as he might be advised.

The order and judgment of the District Court is reversed, and the case remanded for further action in accordance with this opinion.

FIRST NAT. BANK OF THOMASVILLE, GA., v. HOPKINS

(Circuit Court of Appeals, Fifth Circuit. October 28, 1912.)

No. 2,395.

Petition to Superintend and Revise Proceedings of the District Court of the United States for the Southern District of Georgia, in Bankruptcy.

In the matter of the Montgomery Drug Company, bankrupt. On petition by the First National Bank of Thomasville, Ga., to superintend and revise an order made in summary proceedings instituted by J. S. Hopkins, trustee, requiring petitioner to pay over certain deposits. Petition dismissed.

W. C. Snodgrass and J. H. Merrill, both of Thomasville, Ga., for petitioner. J. B. Copeland, of Valdosta, Ga., and O. A. Park, of Macon, Ga., for respondent.

Before PARDEE, Circuit Judge, and NEWMAN and MEEK, District Judges.

PER CURIAM. Having disposed of this case pending on appeal in No. 2,413 (199 Fed. 873), opinion filed this day, it is unnecessary to pass upon this petition, even if the same is well brought.

The petition therefore is denied.

In re TWO RIVERS WOODENWARE CO.

FIRST SAVINGS & TRUST CO. v. MANN.

(Circuit Court of Appeals, Seventh Circuit. April 23, 1912.)

No. 1,829.

1. BANKRUPTCY (§ 343\*)—CLAIMS—FILING—ALLOWANCE.

Under Bankr. Act July 1, 1898, c. 541, § 57, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443), providing for proof and allowance of claims, the filing of a proved claim does not necessarily constitute an allowance thereof, since, until a direct or indirect order of allowance is made, objections may be properly filed thereto.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 522; Dec. Dig. § 343.\*]

2. BANKRUPTCY (§ 360\*)—CLAIMS—RECONSIDERATION—RECOVERY OF DIVIDENDS.

Until a direct or indirect order of allowance of claims filed against a bankrupt's estate is made, it is not necessary for the bankrupt's trustee

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to proceed for a reconsideration of the claim to which he desires to object, as authorized by Bankr. Act July 1, 1898, c. 541, § 57k, l. 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444), in order to recover dividends paid.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 547; Dec. Dig. § 360.\*]

**3. BANKRUPTCY (§ 339\*)—CLAIMS—CONTEST—RIGHT OF BANKRUPT'S TRUSTEE.**

While a bankrupt's trustee was operating the property at a loss, C. made a written offer to take the property and business, to pay in full all claims allowed as entitled to priority except as to the claim of M., with reference to which proceedings were then pending. In a separate paragraph of the offer, it was provided that the property claimed by M. as security for his claim should be held by the trustee pending administration of the proceedings, and, in the event the transfer to M. should be held invalid, the whole of the property or proceeds to be turned over to C., less an amount sufficient to pay M. 20 per cent. of his claim as C. had agreed to pay general creditors of the estate, including the trustees' fees and the fees and expenses as adjusted and agreed on up to the date of the offer, and to pay such additional expenses as might be necessary and properly incurred between the date of the offer and the final acceptance of the proposition and that, as soon as practicable after one year from the date of the adjudication, provided all claims previously filed had been adjusted and disposed of, an account should be had between C. and the trustee on the basis provided for. *Held*, that it was contemplated that the trustee should proceed with the determination of the estate, and, the offer having been accepted, the trustee had capacity to resist claims filed against the estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 525, 526; Dec. Dig. § 339.\*]

**4. JUDICIAL SALES (§ 50\*)—PARTIES—PURCHASER.**

A purchaser at a judicial sale becomes a party to the proceedings, and brings himself within the court's jurisdiction in the cause, for the enforcement, not only of the terms of sale against him, but also of terms in his favor against the selling officer.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 90-94, 96; Dec. Dig. § 50.\*]

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

In the matter of bankruptcy proceedings of the Two Rivers Wood-ware Company. From an order allowing the claim of Fred M. Mann as entitled to share in the disposition of money obtained as the result of a sale agreement, the First Savings & Trust Company, successor to the Milwaukee Trust Company, as trustee of the bankrupt, appeals. Reversed, with directions.

Francis Bloodgood, Jackson B. Kemper, Wheeler P. Bloodgood, George P. Miller, Edwin S. Mack, and Arthur W. Fairchild, for appellant.

Elias H. Bottum and Louis A. Lecher, for appellee.

Before BAKER and SEAMAN, Circuit Judges, and CARPENTER, District Judge.

BAKER, Circuit Judge. On April 8, 1910, Two Rivers Woodenware Company was adjudged a bankrupt. Its operations as a going manufacturing concern were continued by the trustee. Its affairs were very badly involved; its plant was mortgaged for about twice what

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

it would probably sell for; its other assets were largely pledged or claimed by preferential creditors; and by September 1, 1910, the trustee was indebted more than \$35,000 in keeping the business going. In a statement to unsecured creditors the trustee explained that their chance of realizing anything would depend materially on the result of his efforts to recover property and set aside alleged preferences. On the other hand, the mortgagees and others who asserted priority might not realize the face of their claims if the business should be disrupted and the dead property burdened with large costs and expenses.

On October 14, 1910, John F. Conant made an offer (shown by the trustee's statement to general creditors to have been on behalf of the bondholders and other claimants of preferences) to take over the property and business on certain terms, among which only the following are material to the present controversy:

"(3) To pay and discharge in full any claims filed against the estate and which have been heretofore, or may hereafter be allowed as entitled to priority, and to payment in full, except as to the claim of Fred M. Mann in reference to which proceedings are pending in the bankruptcy court, and which claim shall be dealt with as provided for in paragraph 5 hereof.

"(4) To pay all other creditors of the Two Rivers Woodenware Company whose claims are by order of court allowed as such in the bankruptcy proceedings at the rate and percentage of twenty (20) per cent. of the amount of the respective claims so allowed, and for that purpose to pay you the sum of eleven thousand dollars (\$11,000.00) in cash, which, it is estimated, is sufficient to pay the claims now filed or likely hereafter to be filed and allowed at the rate of percentage aforesaid, upon the understanding and condition that, in the event there is any surplus after making such payments, such surplus shall be returned to me, and, in the event there is any deficiency, such deficiency to be paid by me. For the payment of any such deficiency I am to furnish bond in the sum of ten thousand dollars (\$10,000.00), with surety satisfactory to you, and to be approved by the court. As soon as practicable after one year from the date of the adjudication, providing all claims theretofore filed have been adjusted and disposed of, an accounting is to be had between us on the basis herein provided for.

"(5) The property claimed by Fred M. Mann as security for the indebtedness alleged to have been due him, as specified in the petition filed by you as trustee in the matter of the Two Rivers Woodenware Company, bankrupt, and the answer of Fred M. Mann thereto, is to be held by you pending the hearing and final determination in said proceedings. (It being understood that the matter shall not be considered as finally determined until the time for taking an appeal to a court of last resort shall have expired.) In the event it is determined that the transfer to said Mann is invalid, the whole of said property, or the proceeds thereof, shall be turned over to me by you less such amount as may be sufficient to pay the said Fred M. Mann at the rate of twenty (20) per cent. on any claim that may be allowed in his favor by the bankruptcy court. The costs and expenses of every nature in connection with further contest or litigation arising or growing out of proceedings in connection with the claim of the said Fred M. Mann to be paid by me.

"(6) To pay all costs and expenses, of every name, nature and description, in the matter of the administration of the estate, including your fees and expenses, the fees and expenses of your counsel and attorneys, the fees and expenses of the referee, as this day adjusted and agreed between us, and to pay such additional expenses as may be necessarily and properly incurred between this date and the final acceptance of this proposition and conveyance of the property thereunder to me."

This offer was accepted by the creditors and by the court; and on November 7, 1910, the assets of the bankrupt were conveyed to Co-nant.

On November 28, 1910, the referee formally allowed certain claims, not including appellee's, and the trustee filed objections to appellee's claim, which had been filed on July 12, 1910. Appellee moved the referee to strike out the objections. The motion was overruled. On May 16, 1911, the District Court reversed the ruling of the referee, and ordered the payment of appellee's claim as filed. The trustee appeals from that order.

Sections of the Bankruptcy Act to be considered in connection with the foregoing facts are these:

Section 2: Courts of bankruptcy are invested with jurisdiction to "(2) allow claims, disallow claims, reconsider allowed or disallowed claims and allow or disallow them against bankrupt estates."

Section 57a:

"Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor."

Section 57c:

"Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending or before the referee if the case has been referred."

Section 57d:

"Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion."

Section 57k:

"Claims which have been allowed may be reconsidered for cause and real-  
lowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed."

Section 57l:

"Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part."

[1] Appellee insists that a "proved" claim on being "filed" is ipso facto "allowed," and that, since his claim was therefore "allowed" on July 12th, its status was definitely fixed within the meaning of Co-nant's subsequent offer and the creditors' acceptance thereof.

[2] Three steps are necessary to complete the allowance of a claim. Section 57a shows how a claim shall be "proved." This is the claimant's act. Section 57c provides that proved claims "may, for the purpose of allowance, be filed." Filing is the ministerial act of the clerk or referee. That filing is not allowance is established by the language

that the claim is filed "for the purpose of allowance." It may be that the command of section 57d, "shall be allowed upon receipt by or upon presentation to the court," would entitle a claimant to an order of allowance instantan unless objections were at once interposed, or unless the court upon its own motion should postpone consideration. But "allowance," different from the party's act of "proving" and the ministerial act of "filing," is a judicial act. This is found, not only by comparing with each other the several provisions of section 57, but also by recurring to section 2 (2), relating to the powers and duties of bankruptcy courts, wherein the acts of allowing, disallowing, and reconsidering claims are all given the same quality. In practice it may be common to forego formal orders of allowance, and to treat as allowed, for purposes of distributing dividends, all claims to which objections have not been filed. But the inclusion of proved and filed claims in an order of distribution may be considered as an indirect order of allowance. Until a direct or indirect order of allowance is made, objections may properly be filed. And, until a direct or indirect order of allowance is made, it is not necessary to proceed under section 57k and l, for a reconsideration of a claim and a recovery of dividends already paid. It was, therefore, error to strike out the trustee's objections to appellee's claim unless Conant's offer was to treat as "allowed" all claims "proved" and "filed," or unless the trustee had no standing to object.

[3] Part of appellee's claim was alleged to be entitled to priority. This is governed by paragraph 3 of Conant's offer. Appellee's contention is that the exclusion of Fred M. Mann's claim meant that all other priority claims then on file should be paid. From paragraph 5 it will be learned that Fred M. Mann was asserting the right of possession of specific property in the trustee's hands, and that the matter was already in litigation. No other priority claim appears to have been in that status. Therefore Fred M. Mann's claim was excepted from the general provision of paragraph 3 for specific treatment in paragraph 5. The general provision of paragraph 3 is for the payment of priority claims "which have been heretofore or may hereafter be allowed as entitled to priority." Claims already filed were given no advantage over claims that might subsequently be filed. If appellee's position is right, Conant intended to bind himself to pay all priority claims that might be presented during the remaining five months of the year for making claims, without any liberty to resist illegal or padded claims. That Conant intended to pay creditors more than was actually due them seems hardly credible, and certainly is not inescapably established by the wording of the offer. Respecting the unsecured part of appellee's claim, the matter is even clearer, for the offer was to pay only those creditors "whose claims are by order of court allowed as such in the bankruptcy proceedings."

[4] Because a payment to appellee beyond what may be justly due would not concern the bankrupt or the other creditors, it is argued that the trustee had no lawful standing to object. But a purchaser at a judicial sale becomes a party to the proceedings, and brings himself

within the court's jurisdiction in the cause for the enforcement, not only of the terms of sale against him, but also of terms in his favor against the officer who has made the sale. Inasmuch as the allowance of claims then or thereafter filed was a judicial act to be had in the bankruptcy proceedings, the bargain necessarily included the keeping open of the estate during the year and the proper action of the trustee on Conant's behalf respecting the judicial allowance of claims. This is explicitly shown by the last sentence in paragraph 4, which provides for an accounting at the end of the year when all claims shall have been adjusted. In paragraph 6 Conant's general undertaking to pay all costs and expenses is not destroyed, in our opinion, by the specific inclusion of the trustee's fees and expenses "as this day adjusted and agreed upon between us" and of additional expenses incurred (as, for example, in keeping the plant running) down to the conveyance of the property to Conant. Nothing in the contract therefore ended the administration of the estate at the time of the sale; but, on the contrary, a due execution thereof required that the administration be continued throughout the year.

As appellee's demand for payment without judicial investigation of his claim is based on the assumed validity of Conant's offer and the creditors' and the court's acceptance, by the present decision neither an approval nor a disapproval of this method of disposing of a bankrupt's assets is intended.

The order of the District Court is reversed, with the direction to restore the trustee's objections, and to proceed further not inconsistently with this opinion.

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### CITY OF MANCHESTER v. LANDRY.

(Circuit Court of Appeals, First Circuit. October 24, 1912.)

No. 980.

#### 1. COURTS (§ 365\*)—FEDERAL COURTS—FOLLOWING STATE DECISIONS.

A decision of a state court of last resort that a municipal corporation, acting through a subordinate statutory organization, may be liable for negligence in the construction of public works, is binding on a federal court in a case subsequently arising, where the circumstances are such as to raise the same question of law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 950, 952, 955, 969-971; Dec. Dig. § 365.\*]

#### 2. MASTER AND SERVANT (§ 125\*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—DEFECTIVE APPLIANCES.

A master is liable for an injury to an employé through the breaking of a hook, furnished for his use, which was made of unsuitable material, where it had been in use for two months, although it was originally put in use through the negligence of a fellow servant of the injured employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243-251; Dec. Dig. § 125.\*]

3. MASTER AND SERVANT (§ 201\*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—CONCURRENT NEGLIGENCE.

A master, through whose negligence a servant is injured, is not relieved from liability because the negligence of a fellow servant concurred in producing the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 515-534; Dec. Dig. § 201.\*]

4. EVIDENCE (§ 514\*)—SUBJECTS OF EXPERT TESTIMONY.

In an action for injuries to a servant by the breaking of a hook made of steel, instead of malleable iron, the difference in practical operation between hooks made of the different materials was a proper subject for expert testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2319-2323; Dec. Dig. § 514.\*]

In Error to the District Court of the United States for the District of New Hampshire.

Action by Joseph Landry against the City of Manchester. Judgment for plaintiff, and defendant brings error. Affirmed.

George F. Morris, of Lancaster, N. H. (Oscar F. Moreau, of Manchester, N. H., and Drew, Shurtleff & Morris, of Lancaster, N. H., on the brief), for plaintiff in error.

Henry F. Hollis, of Concord, N. H. (Alexander Murchie and Robert C. Murchie, both of Concord, N. H., on the brief), for defendant in error.

Before COLT, PUTNAM, and DODGE, Circuit Judges.

PUTNAM, Circuit Judge. This is a writ of error taken from a judgment for the plaintiff in the District Court for the district of New Hampshire. The record shows a very considerable group of alleged errors; but, on the whole, we find only a few that require attention. The declaration, so far as we need recite it, is as follows:

"On \* \* \* the 26th day of October, 1910, said defendant corporation was voluntarily and for its own benefit constructing a certain sewer in the northerly part of said Manchester, on River road near 'Stark Park,' so called, and owned, managed, and operated certain carriers, cables, chains, hoists, mats, and mat hooks in the construction of said sewer, and said plaintiff was then and there in the employ of said defendant as a servant; that said defendant set said plaintiff at the work of handling certain chains or guys to hold a certain steel cable in position over said sewer, whereupon it became and was the duty of said plaintiff to handle said chains or guys so as to hold said cable in position, and to fasten and unfasten said chains or guys as directed, and it thereupon became and was the duty of said defendant then and there to provide and maintain for said plaintiff \* \* \* reasonably safe machinery and appliances, \* \* \* in performing the duties of his employment as aforesaid; \* \* \* that said plaintiff was then and there in the exercise of due care.

"Yet said defendant, carelessly and negligently, and in breach of its duty to said plaintiff, as aforesaid, \* \* \* failed to provide and maintain \* \* \* reasonably safe machinery and appliances, \* \* \* but, on the contrary, then and there carelessly and negligently set said plaintiff to work as a part of his said employment handling said chains or guys, and fastening and unfastening the same, \* \* \* with unsafe and unsuitable machinery and appliances; \* \* \* that while said plaintiff was then and there at

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

work handling one of said chains or guys as aforesaid, and in the exercise of due care, said plaintiff being unaware of the dangers of his employment, and not having been warned or instructed with regard thereto, a certain defective and unsuitable mat hook broke, causing said cable to vibrate, and said chain or guy to whip about violently, and to catch said plaintiff about the body and throw him with great force into said sewer. \* \* \* all on account of said defendant's negligence, carelessness, and breach of duty aforesaid, so that said plaintiff was grievously injured, \* \* \* to the damage of the plaintiff."

The verdict and judgment of the District Court were for the plaintiff, with damages assessed at the sum of \$8,500.

The work of construction in this case was done by a statutory board, known as the, "board of street and park commissioners." Some question arose whether the work of construction was that of building a sewer, with highway work incidental thereto, or in the way of constructing a highway, with the sewage work incidental thereto. We are not clear that this distinction is of any importance in any event, but the jury found specially that the work was for "sewage purposes." This finding involved so largely questions of fact in the broad sense of the expression that it is not in our power to set it aside, and from what we have learned of the case we would not be inclined to if it were.

[1] The main contention is that, inasmuch as the work was done by the board we have named, and the plaintiff was employed by that board, the city could not in law be held responsible for what occurred. Many propositions were submitted to us pro and con as to this; but we have carefully examined the opinion in *Lockwood v. Dover*, 73 N. H. 209, 61 Atl. 32; and the statutory circumstances to which we have referred are, so far as we can discover, the same there as here. In that case the city of Dover was held responsible. Although the decision was by a divided court, we regard it as conclusive on us on this writ of error. Inasmuch as *Lockwood v. Dover* was decided before the rights in the pending case arose, and was strictly local in its character, we are concluded by it; and we are inclined to think, we should not vary from it if we were not thus concluded. We will add that, notwithstanding the suggestions to the contrary, it never has been doubted or modified in any subsequent New Hampshire case.

So far as the alleged fault described in the declaration is concerned, it is claimed to have grown out of the use of a hook made of steel, instead of malleable iron, at a point which was liable to great and sudden strain, and that steel is brittle, and was unsuitable for this purpose. The verdict of the jury necessarily sustained the position of the plaintiff in this particular; and it is so absolutely clear, on a question of this character and on the evidence here, that we have no jurisdiction to disturb the verdict that we give that point no further explanation.

[2] It seems that, some months before the accident happened, the hook in question, which was properly constructed, gave out, and the foreman went to a blacksmith shop on the premises to obtain a new hook. The blacksmith looked about his shop, and, find-



ing nothing else, fashioned out a hook from a piece of steel which he found incidentally at hand. It was the breaking of this hook which brought about the plaintiff's injury. If this substitution had occurred contemporaneously with the accident, or even within a very short time before it, the case would probably have been the usual case arising from the mere negligence of a coemployé, and therefore would have given the plaintiff no right of action against the employer. The fact was, however, that the unsuitable hook had been in place for two months, so that the employer, with the usual inspection which it might have been expected to make, is chargeable with the condition as it existed; and the case, therefore, is one which did not relieve the employer from the duty of furnishing proper tools and appliances which rested directly upon it, as has been settled in the federal courts by a long line of decisions of which we need refer to only two, namely, *Texas & Pacific Railway Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136, and *Stevens v. Chamberlin*, decided by us, and reported in 100 Fed. 378, 382, 40 C. C. A. 421, 51 L. R. A. 513, et seq.

[3] It is said that the engineer, who had charge of operating the hoist to which the hook appertained, applied suddenly the full power of his engine in a way that the employer was not called upon to anticipate, and that the plaintiff was himself in fault; but we find on these propositions no such preponderance of proof as would justify us in interfering as a court of law. In fact, we may say we find no tangible evidence whatever. So far, moreover, as the first proposition is concerned, it is sufficient that the employer was found at fault; as, by well-settled rules of law, the plaintiff would not be barred from recovering merely because the negligence of the engineer concurred with that of the employer.

Neither is there anything to sustain the claim that the assumed or proved knowledge of the plaintiff with reference to the circumstances was such as, in any view of the law, would relieve the defendant. Inconsistently with this point made by the defendant, it insists that there was no probability that a steel hook would break where an iron hook would not; and it claims that the evidence of plaintiff's expert is to this effect. Indeed, this question of difference between an iron hook and a steel hook is not commonly understood, and especially would not be presumed to be understood, by a man of the plaintiff's shown experience and condition of life. This entire question, as well as any possible suggestions with reference to alleged assumption of risk by the plaintiff, which is directly connected with the topic of the extent of his knowledge as to the nature of the hook, is on the record so clearly for the jury that we do not think we should have been asked to pass upon such a proposition.

[4] In this connection an exception was taken to the permission of the court to allow an expert to testify in reference to the practical conditions in operation between the different kinds of hooks. This is clearly a topic outside the common line, and the

case could not properly have been tried to a jury without the assistance of the explanations of witnesses of that character.

It does not seem to us that the other questions raised by the city require that we should pursue this opinion further.

The judgment of the District Court is affirmed, with interest, and the defendant in error recovers his costs of appeal.

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KIRKPATRICK v. HARNESBERGER.

(Circuit Court of Appeals, Fifth Circuit. November 1, 1912.)

No. 2,360.

**BANKRUPTCY (§ 440\*)—RECOVERY OF PROPERTY—PLENARY SUIT—PETITION TO SUPERINTEND AND REVISE.**

Where a plenary suit was brought by a bankrupt's trustee to recover money and property from a third person, the judgment therein was a judgment or decree in a controversy at law or in equity arising in bankruptcy proceedings, reviewable only by appeal, as provided by Bankr. Act July 1, 1898, c. 541, § 24a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3431), and not a proceeding in bankruptcy, reviewable by petition to review, under section 24 b.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. § 440.\*]

Petition to Superintend and Revise Proceedings of the District Court of the United States for the Southern District of Georgia, in Bankruptcy; Wm. B. Sheppard, Judge.

Petition by M. V. Kirkpatrick against Wyatt A. Harnesberger, as trustee in bankruptcy of T. W. Kirkpatrick. Dismissed.

Samuel H. Myers, of Augusta, Ga., for petitioner.

William H. Fleming, of Augusta, Ga., for respondent.

Before PARDEE, Circuit Judge, and NEWMAN and MEEK, District Judges.

NEWMAN, District Judge. This is a petition to superintend and revise the action of the District Court for the Southern District of Georgia, and is brought here under paragraph "b" of section 24 of the Bankruptcy Act of 1898. The matter sought to be reviewed is a final decree in the case of Wyatt A. Harnesberger, Trustee in Bankruptcy, v. M. V. Kirkpatrick, rendered by the District Court on April 17, 1912.

The decree was entered in a plenary suit on the equity side of the court, brought by the trustee in bankruptcy of T. W. Kirkpatrick against M. V. Kirkpatrick, the wife of the bankrupt. The bill alleges that on October 24, 1906, T. W. Kirkpatrick filed his voluntary petition in bankruptcy, and on the same day was adjudged a bankrupt; that on October 17, 1906, Harnesberger was appointed trustee, gave bond, and duly qualified as such trustee; that on November 17, there-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

after, the bankrupt was examined before the referee in bankruptcy, and stated the following facts:

"That for several years prior to April 3, 1906, he was the owner in his own name of certain real estate in the city of Atlanta, Ga., which on or about the 3d day of April, 1906, he sold for \$5,500 in cash; that out of this sum he paid off several debts, and had remaining in his own hands on or about April 3, 1906, as a part of the proceeds of the sale of his said realty, the sum of \$2,400; that on or about April 3, 1906, he delivered over to his wife, M. V. Kirkpatrick, the defendant, the entire sum of \$2,400, and placed the same in her name in the Merchants' Bank of Augusta, Ga.; that the only money he owed his wife was \$325, which she let him have about the year 1900, when he was living in Atlanta; that he delivered the entire \$2,400 over to his wife in settlement of said debt of \$325; that on or about April 24, 1906, his said wife, the defendant, took \$1,500 of said money and bought out the stock of goods at the store of J. H. Echhoff, 732 McIntosh street, Augusta, Ga.; that at said place a grocery store and bar are now being conducted in his wife's name, under his own immediate control and supervision, his said wife taking very little part in conducting said business; that there was still in the Merchants' Bank to the credit of his wife about \$400 more of the \$2,400 deposited there in her name as aforesaid."

After quoting the above facts from the testimony of the bankrupt before the referee, the bill proceeds:

"The debts due the creditors of said T. W. Kirkpatrick as set out in his schedule were in existence, as your orator is informed and believes, prior to April 3, 1906, the date when said T. W. Kirkpatrick delivered over to his wife the said \$2,400 in cash in payment of a debt of \$325, which act was in law a mere voluntary gift of the difference between the \$2,400 and the amount of said debt, and is, therefore, void in law as against the creditors of said T. W. Kirkpatrick, who was at the time made insolvent by said gift, which resulted to the injury of his existing creditors, now represented by your orator.

"On November 19, 1906, your orator, as trustee aforesaid, made demand on the said defendant to pay over to him the balance of said \$2,400, after deducting the amount of said debt due her by her husband; also to pay over to him the balance of said \$2,400 now standing in the Merchants' Bank to defendant's credit; also to deliver over to him the stock of goods and other personal property in the store at 732 McIntosh street, Augusta, Ga., purchased with part of the said \$2,400 as aforesaid, all of which demands were refused.

"The assets of said bankrupt estate in the hands of the trustee are not sufficient to pay the creditors, and, as your orator is informed and believes, the said defendant, M. V. Kirkpatrick, has no property of her own out of which a judgment in this suit could be realized."

The prayers were that the gift by Kirkpatrick to his wife of the difference between the \$2,400 and the debt due her be declared null and void as against the creditors of Kirkpatrick existing at the date of the gift and now represented by the trustee; that the defendant be required to deliver over to the trustee any balance of the money now remaining in the Merchants' Bank of Augusta as part of the original deposit of \$2,400; that she be required to deliver over a certain stock of goods, money, accounts, etc., bought with a part of the original \$2,400 illegally paid by Kirkpatrick to his wife; that judgment be given against the defendant for the sum that should represent the difference between the amount of the gift illegally made to her and the amount of cash and value of property that she may, under the former prayers of the bill, deliver over to the trustee; that the trus-

tee have a writ of injunction restraining the defendant from disposing of certain property; and for such other and further relief as equity may require.

A subpoena, as is usual in equity, was attached to this bill, and an injunction was granted as prayed; the order providing, however, that in the event the defendant should give bond, with good and sufficient security in the sum of \$4,000, which should be approved by the court, conditioned to pay any judgment or decree that might be rendered against her in said cause, the provisions of the restraining order should thereupon be dissolved. A bond dissolving this injunction or restraining order was given on November 20th by M. V. Kirkpatrick, with Paul Heymann as surety.

There was an answer by the defendant, and a replication. The case was referred to the standing master, who made a report. The District Judge rendered an opinion on the question of jurisdiction. The report of the master was confirmed by the District Judge presiding, and a final decree rendered against M. V. Kirkpatrick and Paul Heymann, the surety on the bond, for the sum of \$2,075, with interest. The whole record shows that the proceeding was, as indicated above, a plenary suit, brought by the trustee of the bankrupt against the wife of the bankrupt, to recover certain funds alleged to have been given her by the bankrupt.

This is a case where a petition to superintend and revise is inapplicable. It has been often held by the courts, since the passage of the Bankruptcy Act of 1898 that section 24, par. "a," provides the proper method by which a case of this kind should be brought to the Circuit Court of Appeals, that is, by appeal, and that paragraph "b" of section 24 does not provide the proper method, but that it applies to matters coming within the administration of the bankrupt estate, and not to suits brought by the trustee against adverse claimants by plenary proceedings in equity. In *McCarty v. Coffin*, 150 Fed. 307, 80 C. C. A. 195, this court, in the opinion by Circuit Judge Shelby, said this as pertinent to the question involved here:

"The foregoing statement of the allegations of the petition which began this suit shows it to be in substance one to cancel the title held by McCarty and to decree the title was in Coffin as trustee. The petition is variously called by the parties in the subsequent proceedings a motion, a summary proceeding, and a bill. It is not written with that technical skill and proper formality usually found in a bill to cancel an adverse conveyance and to vest title in the complainant; but we find in the pleadings all the necessary averments, and it concludes, if not with the usual prayer, by asking the court to grant the relief sought. The suit raises a distinct and a separable issue, and is one of those 'controversies arising in bankruptcy proceedings' over which the Circuit Courts of Appeals have appellate jurisdiction under section 24a of the Bankruptcy Act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3431]). The case does not fall within section 25a, which relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings. *Hewit v. Berlin Machine Works*, 194 U. S. 296, 300, 24 Sup. Ct. 690, 48 L. Ed. 986; *Dodge v. Norlin*, 133 Fed. 363, 66 C. C. A. 425. The motion to dismiss the appeal is overruled. We now consider the case on its merits."

In *Doroshow v. Ott*, 134 Fed. 740, 67 C. C. A. 644, a case decided by the Circuit Court of Appeals for the Third Circuit, the substance of the opinion, by Circuit Judge Gray, is probably summed up in the headnote to the case, which is as follows:

"A suit in equity, commenced by a trustee in bankruptcy in a District Court against an adverse claimant of property to litigate the title thereto under authority of Bankr. Act July 1, 1898, § 67e (30 Stat. 564, c. 541 [U. S. Comp. St. 1901, p. 3449]), as amended by Act Feb. 5, 1903 (32 Stat. 860, c. 487 [U. S. Comp. St. Supp. 1903, p. 417]), is not a proceeding in bankruptcy, but an independent suit, and a decree or order therein is not subject to revision by the Circuit Court of Appeals under section 24b of the act (30 Stat. 553 [U. S. Comp. St. 1901, p. 3433]), although the District Court is also the court of bankruptcy administering the estate, and an injunction is also asked to restrain the defendant from prosecuting an action of replevin for the property in a state court."

In the same volume (134 Fed. 778, 67 C. C. A. 500) is the case of *Tallcott v. Friend et al.*, etc., by the Circuit Court of Appeals for the Seventh Circuit. The second headnote in that case will show, also, what was decided by that court in the question under consideration in this case:

"Bankr. Act July 1, 1898, §§ 23, 24, 25 (30 Stat. 552, 553, c. 541 [U. S. Comp. St. 1901, pp. 3431, 3432]), establishes a clear distinction between proceedings in bankruptcy and controversies at law and in equity arising in the course of bankruptcy proceedings, and also, in connection with Act March 3, 1891, creating the Circuit Court of Appeals (26 Stat. 826, c. 517 [U. S. Comp. St. 1901, p. 547]), prescribe the manner in which judgments or orders in each class of cases are reviewable, and such particular mode is exclusive. A judgment or decree in a controversy at law or in equity arising in bankruptcy proceedings is reviewable by the Circuit Court of Appeals, under its organic act, and section 24a, by appeal or on writ of error, as may be appropriate, while a judgment or order in a proceeding in bankruptcy, if one of those specially enumerated in section 25a, is reviewable only by appeal, and, if not within such excepted cases, unless rendered on a jury trial, can only be reviewed on original petition as provided in section 24b."

District Judge Keller, delivering the opinion of the court for the Circuit Court of Appeals, Fourth Circuit, in *Thompson v. Mauzy*, 174 Fed. 611, 98 C. C. A. 457, from prior decisions of the courts, reached, as he states, this conclusion:

"That there is a clear distinction between 'controversies arising in bankruptcy proceedings' as mentioned in section 24a and the 'proceedings in bankruptcy,' which by section 24b, the Circuit Courts of Appeal are given jurisdiction to superintend and revise 'in matter of law'; the former being generally held to embrace questions between the trustee, representing the bankrupt and his creditors, on the one side, and adverse claimants, on the other, and not directly affecting those administrative orders and judgments ordinarily known as 'proceedings in bankruptcy,' and the latter being confined to those questions arising between the bankrupt and his creditors which are the very subject of such administrative orders and judgments, from the petition for adjudication to the discharge, and including the intermediate administrative steps, and such controversies as arise between parties to the bankruptcy proceedings as are involved in the allowance of claims, fixing their priorities, sales, allowances, and other matters to be disposed of summarily."

After thus stating his conclusion from the authorities, Judge Keller proceeds:

"This distinction is emphasized by the provisions of section 23a, prescribing limitations of the Circuit Courts of the United States in controversies at law and in equity between trustees in bankruptcy, as such, and adverse claimants, concerning the property acquired or claimed by such trustees. In *re Friend*, 134 Fed. 778, 67 C. C. A. 500, and cases there cited. The distinction between 'controversies at law and in equity between trustees and adverse claimants,' and 'proceedings in bankruptcy,' is pointed out and dwelt upon in *Bardes, Trustee, v. First National Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175; and, although that case was decided prior to the amendment of 1903 (section 23), it is quite as authoritative upon the question of this fundamental distinction as when it was rendered. In *Holden v. Stratton*, 191 U. S. 119, 24 Sup. Ct. 45, 48 L. Ed. 118, the Supreme Court says: 'The distinction between steps in bankruptcy proceedings proper and controversies arising out of the settlement of the estates of bankrupts is recognized in sections 23, 24, and 25 of the present act, and the provisions as to revision in matter of law and appeals were framed and must be considered in view of that distinction.'"

In *Morehouse v. Pacific Hardware & Steel Co.*, 177 Fed. 337, 100 C. C. A. 647, the Circuit Court of Appeals for the Ninth Circuit, in the opinion by Circuit Judge Gilbert, the following view of this question is expressed:

"It is conceivable that the line or demarcation between 'proceedings in bankruptcy' and controversies at law and in equity arising 'in the course of bankruptcy proceedings' may in some cases be obscure; but, generally speaking, the former include all questions arising in the administration of the bankrupt's estate, such as the appointment of receivers and trustees, orders requiring the bankrupt to surrender property of the estate in bankruptcy, orders requiring the bankrupt's voluntary assignee to surrender property of the estate, orders giving priority to the claim of a creditor, orders directing a set-off of mutual debts, and orders confirming the composition. These are questions which, with a view to the prompt administration and distribution of the assets of the bankrupt, the law permits to be summarily disposed of by revision. The latter include all controversies and questions arising between the trustee and adverse claimants of property as property of the estate, whether the property be in his possession or theirs."

In *Hewit v. Berlin Machine Works*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986, Chief Justice Fuller, in the opinion, to the same general effect as the above decisions, says this.

"If the trustee had carried the case to the Circuit Court of Appeals on petition for supervision and revision under section 24b of the Bankruptcy Law, the case would have fallen within *Holden v. Stratton*, 191 U. S. 115 [24 Sup. Ct. 45, 48 L. Ed. 118], and the appeal to this court would have failed. But he took it there by appeal, though accompanied by some apparent effort to avail himself also of the other method. And as the Berlin Machine Works asserted title to the property in the possession of the trustee by an intervention raising a distinct and separable issue, the controversy may be treated as one of those 'controversies arising in bankruptcy proceedings' over which the Circuit Court of Appeals could, under section 24a, exercise appellate jurisdiction as in other cases. Section 25a relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings, in respect of which special provision therefor was required (*Holden v. Stratton*, supra), while section 24a relates to controversies arising in bankruptcy proceedings in the exercise by the bankruptcy courts of the jurisdiction, vested in them at law and in equity by section 2, to settle the estates of bankrupts and to determine controversies in relation thereto (*Hutchinson v. Otis*, 190 U. S. 552

123 Sup. Ct. 778, 47 L. Ed. 1179]; *Burleigh v. Foreman*, 125 Fed. 217 [60 C. C. A. 109])."

It is unnecessary to cite further decisions of the courts, as they seem to be substantially in accord and to the effect of the foregoing. On this subject see, also, *Collier on Bankruptcy* (9th Ed.) p. 507, et seq., *Remington on Bankruptcy*, vol. 2, p. 1712, et seq. and *Loveland on Bankruptcy*, vol. 2, p. 1414, § 808 et seq., wherein this question is discussed and the authorities cited.

It is perfectly clear, therefore, that this case could only come into this court and be heard on appeal, and not on a petition to superintend and revise. The petition must be dismissed; and it is so ordered.

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GALVESTON, H. & S. A. RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. October 7, 1912.)

No. 1,949.

RAILROADS (§ 229\*)—SAFETY APPLIANCE ACT—CONSTRUCTION—AIR BRAKES—  
DEFECTS IN TRANSIT—REPAIR.

Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), makes it unlawful to use in interstate commerce any locomotive not equipped with a power driving wheel brake and appliances for operating the train brake system, or to run any train in such traffic which has not a sufficient number of cars in it so equipped with power or train brakes that the engineer can control its speed without requiring the brakeman to use the common hand brake for that purpose. Pending suit by the United States for penalties alleged to have been incurred by defendant's operation of a train in interstate commerce on which the power brake system had become disabled in transit, Act Cong. April 14, 1910, c. 160, 36 Stat. 298 (U. S. Comp. St. Supp. 1911, p. 1327), was passed, supplementing the prior act, and providing that where any car shall have been properly equipped, and such equipment shall become defective while the car is being used on the carrier's line of railroad, the car may be hauled from the place where the equipment is first discovered to be defective to the nearest available point where such car can be repaired without liability for the penalties imposed by the act, etc., if such movement is necessary to make such repairs and they cannot be made except at the repair point. *Held*, that the amendment should be considered as a congressional construction of the act of 1893, and hence where the power brake system of a locomotive drawing an interstate train became defective in transit, and there were no facilities for repairs at the place where the break occurred, defendant was not liable for penalties under the act in transporting the locomotive and train to the nearest repair point for the purpose of repair.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 743; Dec. Dig. § 229.\*

Duty of railroad companies to furnish safe appliances, see note to *Felton v. Bullard*, 37 C. C. A. 8.]

*Shelby*, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Western District of Texas.

Action by the United States against the Galveston, Harrisburg & San Antonio Railway Company to recover penalties for violation of

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the Safety Appliance Act. Judgment for the United States, and defendant brings error. Reversed and remanded, with directions.

This action was brought to recover penalties for an alleged violation of the act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), as amended by an act approved April 1, 1896 (29 Stat. 85, c. 87), and as amended by an act approved March 2, 1903 (32 Stat. 943, c. 976 [U. S. Comp. St. Supp. 1911, p. 1314]), and also for violation of the order of November 15, 1905, by the Interstate Commerce Commission. The bill of exceptions shows the following proceedings before the court and jury:

United States v. Galveston, Harrisburg & San Antonio Railway Company.

No. 126.

Be it remembered that on the 12th day of April, A. D. 1909, came on for trial the above styled and numbered cause, and thereupon a jury was impaneled and sworn to try the same, when the following agreed statement of facts and supplementary evidence was read and offered to the jury, and was all the evidence adduced on the trial of the case:

"1. That the defendant railway company is a corporation, duly organized and doing business under the laws of the state of Texas, and having an office and place of business at El Paso, in the county of El Paso, and state of Texas.

"2. That said defendant is a common carrier engaged in interstate commerce among the several states and territories of the United States, and particularly of the state of Texas, and was so engaged in said interstate commerce on April 13, 1909, when it hauled upon and over its line of railroad from a point on said line 1½ miles west of the station of Rosenfeld, into Sanderson, in Pecos county, in the state of Texas, within the jurisdiction of this court, one train, to wit, 'Extra East,' drawn by locomotive engine No. 826, said train containing interstate traffic, and was composed of 41 cars, including the engine drawing said train, all of which were equipped with power and train brakes, and the engine with a power brake wheel, as required by the act of Congress known as the 'Safety Appliance Act,' and the amendments thereto, but that when said train arrived at Sanderson none of the cars in said train had their brakes used and operated by the engine of the locomotive drawing said train.

"3. That when said locomotive engine drawing said train left said defendant's terminal station at El Paso, Texas, the said engine and train were fully equipped with power and train brakes, which were so associated together that said train brakes could be used and operated in the movement of said train, and were so used in the operation of said train by the engineer of the locomotive drawing said train, but that while in transit on its line of railway between its terminal stations of El Paso and Sanderson, Texas, a mile and a half east of the station of Rosenfeld, the low pressure reverse piston and valve in the steam end of the air pump on said engine broke, which rendered it impossible for the engineer on said engine, No. 826, to further use said brakes in the movement of said train.

"This agreement is not intended to cover the issue of fact as to whether repairs could not have been made on said engine short of the terminal station of Sanderson, as alleged in defendant's answer, or that said train could not have been set out on the siding at Rosenfeld, or on either one of the two sidings between Rosenfeld and Sanderson, and as to these two matters above stated evidence will be submitted, nor shall this agreement preclude either plaintiff or defendant from offering evidence on any other issue of fact other than those above specified."

C. J. Hankamer, introduced on behalf of the defendant, being duly sworn, testified as follows:

"On the 13th day of April, 1907, I had charge of the engine, as engineer.



that pulled the 40 cars in question. When we were about a mile and a half east of Rosenfeld the pump broke down; the reversing piston in the air pump, in the steam end of the air brake. I had no facilities for repairing the pump there where the accident occurred. The break stopped the pump from working. It wouldn't make any air. Prior to that time the pump was in first-class condition. Sanderson was the nearest place to the place of the accident at which this break could be repaired. Sanderson is a terminal of the railway, where they have machine shops and mechanics for the purpose of repairing such breaks. From Rosenfeld there was no other place short of Sanderson. I had no appliance with which to make the repairs to the pump, and it had to be taken to Sanderson, the nearest place, to be repaired. I was going east at that time. The distance from Sanderson to Rosenfeld is about 24 miles, I think; somewhere along there. The pump was repaired at Sanderson when I took it in. I carried the train in from the place of the accident to Sanderson by using the hand brakes. The repairs couldn't have been made anywhere else, except at Sanderson, unless they had sent a machinist out there to do the work. I did not have the material out there to make the repairs, and the machinist would have had to bring the material to do the work. It would have taken two hours to repair the pump after they had gotten everything to do it with. There were no facilities at the place of the accident for doing that kind of work, and there were no mechanics there. We were a mile and a half east of Rosenfeld when the pump broke down. Between the place of the accident and Sanderson there were three side tracks that could have accommodated this entire train. The nearest one from where we were when the pump broke was about 7 miles. That was the siding at Longfellow. The next siding was at Emerson, which was about 7 miles from Longfellow, and there was another siding between Emerson and Sanderson, about 3 miles from Emerson. At these three sidings there are no facilities for repairing engines and such breaks as the one that occurred. At the time of this accident there were lots of trains on the road, and we needed all passing tracks. We got an order at Longfellow to hold us out until they got a train out of Sanderson. The Sanderson yard was blocked with trains. The traffic at that time was unusually heavy. We met three trains after the pump broke. They passed us going the other way. My train was a freight. We had means of communicating with Sanderson after we got to Longfellow. As to whether we could communicate with Sanderson at the place where the pump broke, I do not recollect whether our caboose had a phone or not; I am not positive; I do not know. We couldn't communicate from the engine. Sanderson was a repair station, where they kept mechanics and material and shops for doing such repair work as our engine needed, and all other defects and breaks connected with the railroad service, and that was the nearest station where facilities and mechanics could be had."

Cross-examined, the witness testified: "After the air pump on the engine became inoperative, none of the power brakes on any of the cars could be used, except by hand; there was no air on them. The only method after that was by hand brake. We could not have backed the train to the siding at Rosenfeld without sending out a flagman to protect us. If we had adopted that plan, I guess there was nothing to prevent us from backing the train back to the siding at Rosenfeld. I think the siding at Rosenfeld was of sufficient length to have accommodated our entire train. We communicated with Sanderson from the Longfellow telegraph station. There is no telegraph station at Rosenfeld; just a blind siding. The distance from where the accident to the pump occurred to Longfellow was about 7 miles, I think; about 7 or 7½ miles. We took the siding at Longfellow, and remained on that siding, as well as I can remember, about two hours, I think. It would take a locomotive with one car about 40 minutes to make the run from Sanderson to Longfellow; I guess it would take about 35 to 40 minutes, or 50 minutes. There were no repair shops at Longfellow; the repair shops were at Sanderson. As to whether the material could have been brought out there and the pump repaired where the accident occurred, the machinist would have had to come there and examine the pump and see what was the matter, and

then send for the material and fix the pump. As to whether he could not have been informed by wire what the trouble was, so he could bring the material with him, I do not believe two men can take that pump out and see what was the matter with it; two men couldn't take the pump down; the works on the pump are so heavy that two men couldn't have handled it. As to whether we had more men on the train to help in the work, the pump is supposed to be taken apart by mechanics. With the aid of the two brakemen on the train, probably we could have taken it apart; I don't know. I guess I could have taken it apart, if I had had the proper tools to do it with. I guess a mechanic could have made the repairs at the place where the accident occurred, as well as at the shops, if he had had the proper tools to do it with. If the mechanic at Sanderson had been notified by wire what the trouble was with the air pump, and had come up there equipped in a manner so as to repair it on the siding, I guess it could have been done there. The run from Sanderson up there could have been made in about 40 or 45 minutes. It is downgrade all the way from Rosenfeld to Sanderson, and all the way down the hand brakes on the cars had to be used in braking the train when we made the run into Sanderson. At Emerson there was another siding. Emerson is about 8 miles from Sanderson. The siding at Emerson was sufficient to have accommodated our train, if we had desired to take it, if there were no cars on it. I do not recollect whether there were or not. Two trains passed us at Longfellow, a passenger and a freight. We met two trains there. A locomotive, properly equipped, attached to our train after the air pump broke, could have handled the train and operated the power brakes. Accordingly, if an engine had been taken from one of the trains passing us, or if an engine had been sent to us from Sanderson, it could have pulled our train into Sanderson, and could have operated the power brakes."

Redirect examination: "After the accident to the air pump, we didn't have anything but the hand brakes to operate. After the accident, we could go neither forward nor backward and use the air brakes. The engine was all right, but the air brakes were inoperative. The breaking of the pump destroyed the air. We couldn't use anything but the hand brakes."

Recross-examination: "I stated that a passenger and a freight train passed us while we were at the place where the accident occurred. Those trains were going west. We met them there at Longfellow. I also stated that we were detained there on account of the yard being blocked at Sanderson. We couldn't get in on account of the yard being blocked with trains. The conductor told me that he had to stay there until they got a train out of Sanderson on account of the yard being blocked; they held the board on us. We wired the train dispatcher at Sanderson from Longfellow, and he told us to take the train into Sanderson by hand brakes."

It is further agreed between the parties that 17 trains passed the freight train in question on the day that said air pump on the freight train broke.

El Paso, Texas, April 13, 1909.

I hereby certify that the foregoing is a true and correct transcript of all evidence adduced on the trial of the above-entitled cause.

W. H. Long, Official Stenographer.

And thereupon, the evidence being closed, the court instructed the jury to find for the plaintiff in the sum of \$100, and to the action of the court in so instructing the jury to return a verdict for the plaintiff, and in open court before the jury returned their verdict, the defendant then and there excepted, and also excepted to the judgment rendered thereon.

Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

T. J. Beall, of El Paso, Tex., for plaintiff in error.

Chas. A. Boynton, U. S. Atty., of Waco, Tex., and Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C.

PARDEE, Circuit Judge. Involving the construction of the Safety Appliance Acts, two classes of suits, one for injury to employés and the other to penalize the railroads for noncompliance, have been passed upon by the courts. In the first it has been substantially settled that the duty on the railroads was absolute, and noncompliance without excuse. *St. Louis & Iron Mountain R. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061. In the other class, decisions have been conflicting; the Supreme Court not having passed on the precise question involved.

Without reviewing the many cases cited in the briefs, or attempting to distinguish or harmonize them further than to note that in nearly all no distinction is made as to whether the violation was voluntary, or the result of accident, without fault, and the resulting necessities, reference is made to two decisions in the Circuit Courts of Appeal which seem to the writer correctly reasoned and decided:

*Chicago, Northwestern Ry. Co. v. United States*, 168 Fed. 236, 93 C. C. A. 450, 21 L. R. A. (N. S.) 690, where it is said:

"The object of the safety appliance statutes was manifestly to require interstate carriers to maintain their rolling stock in a certain condition of safety. It could not have been the intention of Congress to impose this duty upon carriers, and at the same time deprive them of the only practical method of meeting its requirements. Rolling stock must necessarily become defective, within the terms of these statutes, both by use and by accident. Repair shops cannot be kept on wheels. Such shops cannot be brought to the defective vehicle. The only practical method of railroading requires that such vehicles, when out of repair, shall be taken to the shops; and if they are wholly excluded from commercial use themselves, and from other vehicles which are commercially employed, they do not fall within any of the classes covered by the safety appliance acts. A carrier may move one or more cars by themselves to repair shops, for the purpose of having them placed in condition to conform to the safety appliance acts, without being guilty of a violation of those acts while thus engaged in an honest effort to meet their requirements."

And *United States v. Illinois Central R. Co.*, 170 Fed. 542, 95 C. C. A. 628, holding:

"An interstate railroad is guilty of violating Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), if it starts in transit a car containing interstate commerce with a defective coupling, which could have been discovered by inspection, but not so if the car, when started, had no discoverable defect, but developed one in transit, and there was no subsequent lack of diligence either in discovering or repairing the same."

Pending this suit, Congress passed an act, approved April 14, 1910 (36 Stat. 298, c. 160 [U. S. Comp. St. Supp. 1911, p. 1327]), the title of which is as follows:

"Chap. 160. An act to supplement 'An act to promote the safety of employés and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving wheel brakes, and for other purposes,' and other safety appliances acts, and for other purposes."

The proviso in section 4 of that act is as follows:

"Provided, that where any car shall have been properly equipped, as provided in this act and the other acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by

such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure, to the nearest available point where such car can be repaired, without liability for the penalties imposed by section 4 of this act, or section 6 of the act of March second, eighteen hundred and ninety-three, as amended by the act of April first, eighteen hundred and ninety-six, if such movement is necessary to make such repairs, and such repairs cannot be made except at such repair point."

By incorporating the provision just quoted, and declaring the same as a supplement to the act of 1893, we may safely infer that it was intended by Congress to give the proper construction to the act of 1893.

If this view is correct, then it seems clear that the instant case should be reversed and remanded, with instructions to award a new trial and thereon, on the same evidence being given, to direct a verdict for defendant below, for the case shows that the engine and train were admittedly in perfect condition as required by the statute when started, and that the break occurred suddenly after going at least 300 miles, and that, as there were no facilities for repairs at the point where the break occurred, it was carried to the first and nearest repair point for the purpose of repair.

However this may be, this court is of opinion that on the evidence in this case the question of good faith and proper diligence in clearing the tracks and in moving the train for repairs was one of fact, and should have been submitted to the jury.

The judgment of the District Court is reversed, and the cause is remanded, with instructions to award a new trial.

SHELBY, Circuit Judge, dissents.

GRUBB, District Judge. I concur in the judgment of reversal, and in the opinion of the court, in so far as it holds that the cause should have been submitted by the court below to the jury.

While the language of section 2 of the act of March 2, 1903, might permit of a construction that would impose an absolute duty on the carrier, and absolute liability for the penalty provided for operating its train when not equipped as required, and while some courts have so construed it, I agree with the majority opinion that this would not be a reasonable interpretation of the original statute, and that the amendatory act of April 14, 1910, was intended to be declaratory only of the court's interpretation, to meet the decisions mentioned. Under the act of March 2, 1903, before its amendment, I think the carrier, if its train left a repair point properly equipped, is not compelled, upon discovery of a defect between repair points, to hold its train at the point of discovery until the defect is remedied, in cases where it cannot be remedied at such point with the means at hand, but has the right to move the train in its disabled condition to the nearest repair point, if necessary to accomplish the repairs.

The courts are in conflict as to whether the statute permits this movement in connection with other cars being commercially used.

The original and amendatory statutes prescribe no such limitation, and it does not seem to me that a movement can be said for that reason alone to be inhibited as a matter of law. The question in each case depends upon whether there is shown to exist a reasonable necessity for moving the train to accomplish the repairs, and this is, ordinarily, properly determinable by a jury. It is true the facts in this case are undisputed, but an inference is required to be drawn from them, viz., whether they constituted the reasonable necessity demanded by the statute, or whether the carrier should have sent a mechanic from Sanderson to Longfellow to repair the air pump, or sent the disabled engine to Sanderson for that purpose, to be returned to Longfellow to take in the train with air power, or sent a relief engine to Sanderson for that purpose, instead of hauling the train to Sanderson with the disabled engine by hand brakes.

It seems to me that reasonable minds might reach different conclusions as to the proper inference to be drawn, and for that reason I think the issue should be submitted to the jury.

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FULLER v. NEW YORK LIFE INS. CO.

(Circuit Court of Appeals, Third Circuit. October 29, 1912.)

No. 1,617.

1. DEATH (§ 2\*)—PROOF OF DEATH—PRESUMPTION FROM UNEXPLAINED ABSENCE.

The presumption of death from the unexplained absence of a person for more than seven years is a rule of law, but the presumption is not conclusive, and the ultimate question is one for the jury, where a jury is trier of the facts. One relying on such unexplained absence must prove it, and must prove more than the mere fact of absence. He must also produce evidence to justify the inference that death is the probable reason why nothing is known of the missing person, and many facts are relevant to such inquiry, from all of which the jury must draw the inferences, both intermediate and final.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 1-3; Dec. Dig. § 2.\*]

2. TRIAL (§ 193\*)—INSTRUCTIONS—PROVINCE OF COURT AND JURY—COMMENTS BY JUDGE ON EVIDENCE.

While the judge of a federal court, in charging a jury, may properly comment on the evidence, and may express his opinion freely thereon, the qualification must always be borne in mind that the jury must be left free to determine ultimately all disputed facts and all relevant inferences to be drawn from a fact.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 436-438; Dec. Dig. § 193.\*]

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Action at law by Roberta I. Fuller against the New York Life Insurance Company. Judgment for defendant, and plaintiff brings error. Reversed.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes  
199 F.—57

S. S. Mehard and W. C. Dicken, both of Pittsburgh, Pa., for plaintiff in error.

W. W. Smith, of Pittsburgh, Pa., James H. McIntosh, of New York City, and Gordon & Smith, of Pittsburgh, Pa., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. The beneficiary in a life insurance policy brought this action, but offered no direct evidence of death, relying on the presumption arising from the insured's absence, unheard of, during more than seven years.

[1] In discussing the presumption of death from an unexplained absence during seven years, Prof. Thayer, in his Preliminary Treatise on Evidence (page 319 et seq.), shows clearly that it is, and always has been, a rule of reasoning. Early in its development the jury were advised to follow it, because it probably accorded with the fact. Later, as experience showed its usefulness and strengthened its probability, they were given positive directions to follow it, and it thus became what is often spoken of as a legal presumption or a rule of law. Either phrase is convenient enough, if care be taken to keep in mind that the presumption has never been conclusive or irrebuttable. It is a rule of reasoning, a short cut between evidence and conclusion, although it is now a rule that should be followed by whatever tribunal is obliged to pass upon the facts of a particular absence. The stress is to be put on the word "unexplained." This has become the important question, and it is always a question of fact. What weight is to be given to all the circumstances that attend a particular absence? And, as the final result of the inquiry, should death be inferred? Many circumstances may need consideration; but they must all be submitted to a jury, when that tribunal is the trier of the facts. Cases that disclose a chancellor's opinion concerning the weight of the explanatory evidence only show us how he reasoned upon the evidence that was then before him. They do not furnish a rule that is obligatory upon a jury, or upon another chancellor, in reasoning upon different, or even upon somewhat similar, evidence. He who relies upon an unexplained absence during seven years must prove it, and he must prove more than the mere fact of absence during that period. He must also produce evidence to justify the inference that death is the probable reason why nothing is known about the missing person. In the ordinary trial at law a jury must draw the inferences, both intermediate and final; and it will rarely, if ever, be the case that the facts concerning one absence will so closely resemble the facts concerning another that inferences drawn in the first inquiry will furnish a binding rule for the second. If a dispute exists about any of the facts, the jury must first determine it, and they are then to draw from the facts thus ascertained whatever inferences may be proper. Even if the facts are undisputed, it is the jury that must draw the inferences, save perhaps in exceptional cases. In this class of controversies many questions arise that are peculiarly for that tribunal.

For example: What motive sent the missing person away, or prolonged his absence? What were his domestic relations? Where would he be likely to return? Has he been seen, or heard of? With whom would he probably communicate? How extensive and how careful was the search? What were his habits? Do any facts or circumstances suggest violence or accident? And many other questions might easily be added to the list, the important point being that the answers are relevant, if they throw light on his absence or his silence. They are all matters of fact to be weighed and appraised by the tribunal to whom the inquiry is committed. The general subject is well understood, and it will be sufficient to refer to two recent collections of illustrative cases—one in the note to *Modern Woodmen v. Gerdorn*, 2 L. R. A. (N. S.) 809, and the other in vol. 13 of *Cyc. Law & Proc.* p. 297 et seq. We may also refer to 2 *Greenl. Ev.* (Lewis) § 278; f, and 4 *Wig. Ev.* § 2531.

In the pending controversy, the following facts are apparently not denied: In January, 1885, Ira and Roberta Fuller were married, probably in Brookville, a town in the western part of Pennsylvania. They moved to Dayton, Ohio, before September, 1887, and in that month he insured his life in her favor by a 20-year tontine dividend policy. A year or two afterwards they returned to Pennsylvania, living first in Allegheny, and afterwards in New Kensington, Westmoreland county, a small town, where they kept house and boarded from 1891 until February 21, 1900. A daughter was born in 1888. In the afternoon of February 21st, Fuller went away, telling his wife that he was going by train to Greensburg, a town in the same county, and would be home the next day in time to go with her to the theater. Tickets for the entertainment had been bought and were in her possession. On the train he repeated to a friend that he was going to Greensburg. Whether he did or did not go does not appear; but on the afternoon of the 22d he met another friend at a hotel in Pittsburgh, and said that he was going home. Since that time, so far as we know, he has not been seen or heard of. His wife made immediate efforts to learn what had become of him. She employed a detective agency, who pursued the inquiry for six months; and she asked the local lodges of the Elks and the Masons to help in finding him, hoping that their facilities throughout the country for obtaining information about a missing member might be of service. Nothing came of these efforts, or of some inquiries made by two other persons. He had been prominent in the business and social life of the town. At one time he had been a justice of the peace, and on the date referred to his business was real estate and insurance. He was also borough treasurer, and his official bond had been signed by 15 sureties. It was soon discovered that he had embezzled from \$4,000 to \$6,000 of the borough funds; but no proceedings were taken against him, and his bondsmen paid the money. The community seems to have regarded him with a friendly feeling, even after his defalcation became known. His appearance was likely to arrest attention; his height being more than 6 feet, and his weight 250 pounds. He was of social disposition and agreeable manners. So far as ap-

appears, his relations with his wife and daughter were normal and satisfactory. Apparently he was a kind and loving husband and father.

After he disappeared the plaintiff's own exertions were the sole reliance of herself and her child. She moved to Pittsburgh in April, and began to solicit life insurance, attaining a position of some importance and responsibility in the Reliance Company. She was advised to apply for a divorce, in order to gain a more advantageous status as an unmarried woman, and in April, 1903, she obtained a decree on the ground of desertion. Service of process was made by publication. She kept the insurance alive by borrowing the premiums from the company (except, perhaps, for one year) on the security of lien notes charged against the policy. The company was promptly informed of the disappearance and the defalcation. In the spring of 1907 the plaintiff applied to the orphans' court of Westmoreland county for letters of administration, basing the application on the Pennsylvania act of 1885 (P. L. 155). The object of this statute appears in its title:

"Relating to the grant of letters of administration upon the estates of persons presumed to be dead, by reason of long absence from their former domicile."

Section 1 explains "long absence" to mean "seven or more years from the place of his last domicile within this commonwealth"; and section 2 requires legal proof to establish the presumption of death. On July 31, 1907, a decree was entered granting letters to her nominee on the ground that the presumption of death had been established. In May, 1910, the plaintiff and her daughter removed to California, and at the time of the trial they resided in Los Angeles. When the insured disappeared, his father, brother, and sister may have been living. On this point the evidence is not clear, especially about the father's life. The plaintiff did not try to communicate with these relatives of her husband, testifying that she had not seen the brother and the sister for years, and did not know where they were, and also that she did not know definitely whether the father, who was a very old man, was still residing in Brookville, his former residence. For 25 years, she said, she had not seen any of them. It did not appear whether the defendant had made search or inquiry for the insured.

[2] The case was submitted to the jury and a verdict was rendered for the defendant. Of the numerous assignments of error, a few are to rulings upon testimony; but most of them are to the charge. We shall not consider them all, for we are constrained to believe that material error exists in several particulars. We do not question the valuable and well-established rule that the trial judge in a federal court may comment upon the evidence, and may express his opinion freely thereon. Authorities upon this subject are scarcely needed; but we may refer to the recent decision of this court in Pittsburgh Railway Co. v. Bloomer, 146 Fed. 720, 77 C. C. A. 146, to show our adherence to the federal practice. But the cases agree that one qualification must always be borne in mind: All disputed facts must ultimately be submitted to the determination of the jury. If



a dispute exists concerning a fact, or a relevant inference from a fact, the judge must leave the jury free. He may not himself decide the dispute or draw the inference. If he does, and if this action is prejudicial, he falls into such error as requires the judgment to be set aside. And this, we cannot avoid believing, is what happened in several particulars at the trial of this case. Except in a single clause, the learned judge nowhere in the charge gave the jury to understand that his opinion on the value of the evidence did not bind them, and that they were free to find the facts for themselves. Speaking of the embezzlement, he said:

"I think that that was an excuse, perhaps—well, I shall change that—not an excuse for his leaving, because a man who is in default ought to face the trouble; but that fact, I think (and yet it is for you, no matter what I think), accounts for his failure to return."

Nowhere else, save in this parenthetical expression, is there any instruction to the jury concerning the effect of his expressions of opinion, and, while a definite instruction on this subject may not be always essential, its absence made more emphatic several parts of the charge in which we think the learned judge, probably by inadvertence, drew inferences himself that the jury alone should have been allowed to draw.

For example (eighth assignment), they were told that the insured's embezzlement was an excuse—that is, an explanation—for his absence, and that this excuse was presented by the plaintiff herself in the record and in the testimony. No doubt his embezzlement was a pertinent and important fact, but it was only one fact among others, and with these its effect was for the jury. In two places (ninth and fourteenth assignments) the charge necessarily implied Fuller's knowledge that his wife had obtained a divorce on the ground of willful and malicious desertion, although there was no direct evidence concerning his knowledge, and the indirect evidence (if any existed) was for the jury. It was also said (thirteenth assignment):

"I say to you that the plaintiff, it seems to me, in order to have fulfilled her duty in the ascertainment of whether or not anything had been heard from this absent husband, from whom she procured the divorce, should have made some inquiry of his relatives, or made inquiry or produced the evidence of the daughter that she had never in the slightest way heard from him."

The plaintiff had testified concerning the reasons why she had not communicated with her husband's relatives; but these reasons are not referred to in the charge, although the fact of her failure to communicate should have been considered in connection with her explanation thereof, and, moreover, was a matter for the jury, and not for the court.

Further (fifteenth and sixteenth assignments) it is said:

"It seems to me that the plaintiff has furnished a reason for the insured's absence from her, and it seems to me that there is a reason furnished by the evidence for the insured's absence from New Kensington, where he last resided according to the evidence; but there is no evidence in this case from which you could warrant that he had not been with his father, or with his daughter, or with his sister, or with his brother, during this period, unless it

be evidence of the advertising that was had in Westmoreland county and in one of the Pittsburgh papers, at the time of the divorce and at the time when they had proceedings to have him declared dead."

After hearing so positive an instruction from the judge, the jury could scarcely avoid the conclusion that there was little, if anything, left of the plaintiff's case. In effect, it withdrew the controversy from their consideration. The plaintiff could not recover, if she had failed to prove his absence from these relatives during the whole of the seven years.

Only one other matter calls for attention. The daughter was not in attendance at the trial. To explain her absence, counsel offered to prove the condition of her health, saying that he wished to learn "whether she is in physical condition to be here just at this time." This offer was immediately overruled on the ground, as stated by the court:

"What difference does that make? Her deposition might have been taken."

It would, we think, have been more prudent to wait for light on this subject; for the record does not show that any evidence had yet been given on the subject of her health. But the ruling might have been harmless, if the jury had not been instructed at the end of the charge that:

"There is no evidence that he had not been secretly communicating with the daughter, who was 23 years of age, and without the knowledge of her mother."

This instruction is covered by the sixth exception, on page 141 of the record, and is the subject of the nineteenth assignment. It criticised the plaintiff for failing to prove a fact by the only witness that could prove it, although permission to explain the absence of that witness had been refused. After the previous ruling, we think such an instruction could hardly fail to be prejudicial.

The other assignments of error need not be discussed, although we may be permitted to say that it might have been better to omit that portion of the charge quoted in the seventeenth assignment. Fuller's rights, in the event of his reappearance, were not involved in the suit.

The judgment is reversed, at the costs of the defendant in error, and the case is remanded for another trial.

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#### MERCHANTS' & MINERS' TRANSP. CO. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. April 2, 1912. On Petition for Rehearing, May 16, 1912.)

No. 2,215.

#### 1. CARRIERS (§ 38\*)—INTERSTATE COMMERCE—PROSECUTION FOR GRANTING REBATES—DEFENSES.

Where it was shown that defendant, a transportation company, which had joined with railroad carriers in establishing and filing with the Interstate Commerce Commission a joint through rate on grain from Philadelphia to Jacksonville, Fla., via Savannah, charged and collected less

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

than such rate from certain shippers on grain billed from Philadelphia, defendant could not show, as a defense to a prosecution for allowing a rebate, under Elkins Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 847 (U. S. Comp. St. Supp. 1911, p. 1310), that the rate filed was not intended to apply to shipments originating at certain points further west, when no other or different rate was provided on shipments from such points.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 96, 97; Dec. Dig. § 38.\*]

What constitutes an unlawful preference or discrimination by a carrier under interstate commerce regulations, see note to Gamble-Robinson Commission Co. v. Chicago & N. W. Ry. Co., 94 C. C. A. 230.]

2. JURY (§ 82\*)—JURY LIST—REVISION.

An order of a federal trial judge directing the jury commissioners to place in the jury box a certain number of names from the different counties comprising the district, while not expressly authorized by statute, was not so irregular or erroneous that prejudice to a party can be predicated thereon.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 282, 307-309, 331, 332, 348, 359, 367, 380; Dec. Dig. § 82.\*]

In Error to the Circuit Court of the United States for the Southern District of Georgia.

Prosecution by the United States against the Merchants' & Miners' Transportation Company. From a judgment of conviction, defendant brings error. Affirmed.

Samuel B. Adams and A. Pratt Adams, both of Savannah, Ga., for plaintiff in error.

Alexander Akerman, of Macon, Ga., and W. M. Toomer, of Jacksonville, Fla., for the United States.

Before PARDEE, Circuit Judge, and MAXEY, District Judge.

PER CURIAM. We find no reversible error in the rulings of the court below and the judgment of the court is therefore affirmed.

On Petition for Rehearing.

PARDEE, Circuit Judge. [1] We affirmed the judgment of the court below in this case, because the evidence shows that at the times laid in the indictments the Merchants' & Miners' Transportation Company was engaged in the transportation of property, partly by railroad and partly by water, under a common arrangement with other parties, for a continuous carriage or shipment from the state of Pennsylvania to the state of Florida, and that said Transportation Company filed its concurrence with the Interstate Commerce Commission in a common arrangement and agreement for the continuous shipment of grain from Philadelphia to Jacksonville, Fla., via Savannah, at a rate of 15 cents per 100 pounds, which rate had been filed and lodged with the Interstate Commerce Commission by the Atlantic Coast Line Railroad Company and by the Seaboard Air Line Railway, and which rate was in effect at the time and times as laid in the indictment; that the said rate in terms applied to all grain billed and carried over the said lines from Philadelphia to Jacksonville by way of Savannah, and was not restricted to grain shipments originat-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs, 1907 to date, & Rep'r Indexes

ing in Philadelphia, and the said rate did not refer to shipments on through bills of lading of grain from beyond Philadelphia and over the lines in question, but clearly covered every independent shipment of grain from Philadelphia to Jacksonville, via Savannah, over the said lines. The evidence further shows, without dispute, that, as charged in the indictments, the Transportation Company collected from the millers on grain shipments billed and carried from Philadelphia to Jacksonville, via Savannah, over the lines in question, only 10 cents per 100 pounds, when the only rate on file with the Interstate Commerce Commission and published generally for such and other grain shipments called for 15 cents per 100 pounds.

The Transportation Company contended, and offered evidence to prove, that there was an understanding on its part that the concurred-in rate on grain shipments from Philadelphia to Jacksonville did not apply to grain shipments where the grain originated west of a line from Buffalo to Pittsburg. This evidence was rejected, because there was neither proof nor claim, even, that any such modified or limited rate, or any rate at all, on grain originating west of a line from Buffalo to Pittsburg, was filed and published with the Interstate Commerce Commission, and, therefore, the evidence was properly rejected.

Whether the action of the Transportation Company in departing from the legal and published rate was a willful violation of the Elkins Act was a question for the jury. There was evidence tending to show that the original charges of the Transportation Company on all the grain shipped to the millers were at the rate of 15 cents per 100 pounds, and Lucas, the agent of the Transportation Company at Philadelphia, among other things testified:

"That three shipments covered by indictment 380, shipped from Philadelphia January 3, 7, and 10, 1908, were billed on these dates at 15 cents, and we charged the millers 15 cents on these three shipments, and rendered them bills at the time of the shipments at this rate. The millers paid the Merchants' & Miners' for these three shipments on May 29, 1909, on the basis of 10 cents; the payment being made by them through us in Philadelphia. The company finally accepted 10 cents on these shipments."

[2] The order of the trial judge, instructing the jury commissioners as to a revision of the jury box, and directing the placing therein of a certain number of names from the different counties comprising the Eastern division of the Southern district of Georgia, though strictly unwarranted by law, was not so irregular or erroneous that, in the absence of proof of injury, prejudice can be predicated thereon.

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GALVESTON TOWING CO. et al. v. CUBAN S. S. CO., Limited.

(Circuit Court of Appeals, Fifth Circuit. May 9, 1912.)

No. 2,187.

On petition for rehearing. Decree amended, and petition denied. For former opinion, see 195 Fed. 711.

Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. The decree entered in this case is hereby amended, by adding thereto the words, to wit: "The costs of this court to be paid by the appellee." It is further ordered in this case that the petition for rehearing be denied.

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MONEYWEIGHT SCALE CO. v. TOLEDO COMPUTING SCALE CO.

(Circuit Court of Appeals, Seventh Circuit. June 24, 1912.)

No. 1,710.

PATENTS (§ 315\*)—SUIT FOR INFRINGEMENT—REOPENING DECREE—NEWLY DISCOVERED EVIDENCE—LACHES.

The defendant in a suit for infringement of a patent, who denied complainant's title, but introduced no evidence to meet the prima facie proof of title made by complainant, is not entitled to reopen the case, after a decree for complainant has been affirmed by the appellate court, on the ground of newly discovered evidence showing that complainant had made a mortgage on the patent, which remained uncanceled of record, and was therefore not entitled to maintain a suit thereon, where such facts were shown by the file wrapper introduced in evidence on the hearing, but were not called to the attention of either court.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 554-558; Dec. Dig. § 315.\*]

In Equity. Suit by the Toledo Computing Scale Company against the Moneyweight Scale Company. Decree for complainant, which was affirmed on appeal. 178 Fed. 557, 187 Fed. 826. On petition in the Circuit Court of Appeals for leave to open decree for the introduction of newly discovered evidence. Denied.

Thomas F. Sheridan, for petition.

Edward Rector, opposed.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge. By its petition the Moneyweight Company discloses that it was sued in 1905 in the Circuit Court for the Northern District of Illinois by the Toledo Company on account of infringing reissued patent 12,137; that the bill alleged, and the answer denied, ownership of the patent by the Toledo Company; that in April, 1910, the Circuit Court adjudged that the patent was valid, was owned by complainant, and was infringed by defendant, and entered an injunction, and ordered an accounting; that in October, 1910, the cause on appeal was presented to this court, and that in January, 1911, the decree was affirmed, and the cause was remanded to the Circuit Court for an accounting; that in December, 1911, while petitioner's solicitors were examining the title to another patent, they accidentally discovered what they and petitioner were in fact ignorant of before, namely, that on August 6, 1902, the Toledo Company had mortgaged the reissue patent 12,137, together with other property, to the Security Trust Company of Toledo (a certified copy of the mortgage being attached to the

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

petition), and that the mortgage stands unreleased of record. Thereupon petitioner charges that the Toledo Company at no time since August 6, 1902, has had a right to maintain a suit for infringement of the patent in suit. On this showing petitioner prays that leave be granted to open the case, in order that the issue of ownership of the patent may be tried anew.

At the original trial the record shows that the Toledo Company introduced in evidence a certified copy of the patent in suit issued by the United States to it as assignee of De Vilbiss the inventor. Petitioner introduced no evidence on the question. It is evident that the Circuit Court on that state of evidence committed no error of fact or law in finding a good title in the Toledo Company.

No attempt is made to show diligence prior to the discovery of the mortgage in December, 1911. Such an attempt might, indeed, have been difficult. In contesting the validity and scope of the patent, petitioner introduced in evidence a certified copy of the file wrapper, and this contained an abstract of title in which the mortgage of August 6, 1902, was noted.

Unless something distinguishes this from the usual petition for a retrial on account of newly discovered evidence, it must be denied under the well-settled rule. *Baker v. Whiting*, 1 Story, 218, 2 Fed. Cas. 486, 492; *Jenkins v. Eldredge*, 3 Story, 299, 13 Fed. Cas. 504, 509; *Reeves v. Keystone Co.*, 20 Fed. Cas. 472; *De Florez v. Reynolds*, 7 Fed. Cas. 357; *Page v. Holmes* (C. C.) 2 Fed. 330, 333; *Gillette v. Bate* (C. C.) 12 Fed. 108; *Colgate v. Telegraph Co.* (C. C.) 19 Fed. 829; *Spill v. Celluloid Mfg. Co.* (C. C.) 22 Fed. 94; *Henry v. Insurance Co.* (C. C.) 45 Fed. 299; *City of Omaha v. Redick*, 63 Fed. 1, 11 C. C. A. 1; *Pittsburgh Co. v. Cowles Co.* (C. C.) 64 Fed. 125, 127; *Bissel Co. v. Goshen Co.*, 72 Fed. 545, 19 C. C. A. 25; *In re Gamewell Co.*, 73 Fed. 908, 20 C. C. A. 111; *Bennett v. Schooley* (C. C.) 77 Fed. 352; *Society of Shakers v. Watson*, 77 Fed. 512, 23 C. C. A. 263; *Boston, etc., Ry. Co. v. Bemis Co.*, 98 Fed. 121, 38 C. C. A. 661; *Bresnahan v. Leveller Co.*, 99 Fed. 280, 39 C. C. A. 508; *Brill v. Ry. Co.* (C. C.) 125 Fed. 526; *Merchants Co. v. Afton*, 134 Fed. 727, 731, 67 C. C. A. 618; *Lord v. Staples & Hanford Co.*, 148 Fed. 19, 78 C. C. A. 493; *Novelty Machine Co. v. Buser*, 158 Fed. 83, 85 C. C. A. 413, 14 Ann. Cas. 192; *Southard v. Russell*, 16 How. 547, 14 L. Ed. 1052; *Purcell v. Miner*, 4 Wall. 519, 18 L. Ed. 435; *Rubber Co. v. Goodyear*, 9 Wall. 805, 806, 19 L. Ed. 828; *Craig v. Smith*, 100 U. S. 226, 233, 25 L. Ed. 577; *Gaines v. Rugg*, 148 U. S. 228, 13 Sup. Ct. 611, 37 L. Ed. 432; *In re Sandford Fork & Tool Co.*, 160 U. S. 247, 16 Sup. Ct. 291, 40 L. Ed. 414; *In re Potts et al.*, 166 U. S. 263, 17 Sup. Ct. 520, 41 L. Ed. 994; *Story's Eq. Pleading*, § 414; 1 Barb. Ch. Pr. 363; *Beach, Mod. Eq. Pr.* § 825.

Citing authorities (*Woodworth v. Stone*, 3 Story, 749, Fed. Cas. No. 18,021; *Potter v. Holland*, 1 Fish. 331, Fed. Cas. No. 11,329; *Gayler v. Wilder*, 10 How. 477, 13 L. Ed. 504; *Whitcomb v. Spring Valley* [C. C.] 47 Fed. 652; *Waterman v. Mackenzie*, 138 U. S. 252, 261, 11 Sup. Ct. 334, 34 L. Ed. 923; *Sechler Carriage Co. v. Deere*,

113 Fed. 285, 287, 51 C. C. A. 242; *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 661) to the effect that the mortgagee of a patent is the only person who can lawfully maintain a suit for infringement, petitioner contends that the rule of laches does not apply, because there never was a cause of action before the court, because the present decree is no protection from a suit by the Security Trust Company, and because it would be unconscionable to permit the Toledo Company to hold its decree, while it knew all along that it had no right to sue. But these embarrassments and hardships are the very ones that fall upon every defendant, who, with no attention to facts readily accessible before the trial, suffers judgment to go against him for an alleged debt which never existed, or had been paid, or was counted on by one who had no title, or no right to sue.

At the argument it was further urged that the bar of laches should be lifted, because we were parties to the fault, in that we did not discover the notation of the mortgage in the abstract contained in the file wrapper, and did not thereupon reverse the decree. If it were to be assumed that the duty of this court to a defendant is the same as that of his counsel in respect to looking for facts of possible defenses beyond those presented in the briefs and oral argument, still we do not perceive how the successful complainant, who has been permitted to go from court without day at the close of the term, could have any less right to object to the reopening of the case for the court's oversight than for his opponent's. No higher equity seems to inhere in the situation, even if this move for a retrial be treated as the court's own.

The petition is accordingly denied.

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WESTINGHOUSE MACH. CO. et al. v. GENERAL ELECTRIC CO. et al.

(District Court, N. D. New York. September, 30, 1912.)

1. PATENTS (§ 90\*)—PERSONS ENTITLED TO PATENT—PRIOR USE IN FOREIGN COUNTRY—"KNOWN."

Defendant, a citizen of the United States, conceived an invention, but did not reduce it to practice until some four or five years later, when he applied for and obtained a patent therefor. In the meantime complainant had made the same invention, and reduced it to actual practice and use in a foreign country, but did not patent it, nor was it described in any printed publication. He made a full disclosure of the invention orally to an American, who also saw the device in actual use, and on his return to this country described it, both orally and in writing, to others skilled in the art, who were capable of understanding it, but it was not put into actual use in this country. After defendant's patent had been granted, complainant filed an application for a patent. *Held*, that the knowledge of the invention by persons in this country, obtained from complainant, in the absence of an actual reduction to practice here, did not make it "known," within the meaning of Rev. St. § 4886 (U. S. Comp. St. 1901, p. 3382), which authorizes the granting of a patent to an inventor for an invention "not known or used by others in this country before his invention or discovery thereof," and that, as between com-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plainant and defendant, neither having reduced it to actual practice in this country, defendant, who was the first to conceive it and to constructively reduce it to practice by the filing of his application, under said section and section 4923 (U. S. Comp. St. 1901, p. 3396), took precedence as the original and first inventor, and was entitled to the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 113-120; Dec. Dig. § 90.\*

For other definitions, see Words and Phrases, vol. 5, p. 3943.]

2. PATENTS (§ 29\*)—"INVENTION"—CONCEPTION.

A conception of the mind is not sufficient as an "invention," or a completed "invention," within section 4886, Rev. St. (U. S. Comp. St. 1901, p. 3382), requiring that, to be entitled to a patent, the person must have "invented" or "discovered" some new, etc., thing.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 29.\*

For other definitions, see Words and Phrases, vol. 4, pp. 3749-3754.]

In Equity. Suit by the Westinghouse Machine Company and Coloman De Kando against the General Electric Company and Albert H. Armstrong. Decree for defendants.

Suit in equity under the provisions of section 4915 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3392) for an adjudication and decree that said Coloman De Kando is entitled to receive a patent for his invention as specified in his claim, or for some part thereof as the facts in the case may appear; said De Kando having been denied a patent by the Patent Office and the Supreme Court of the District of Columbia, now Court of Appeals of the District of Columbia, and a patent for the invention claimed by De Kando having been granted to the defendant Albert H. Armstrong.

Gifford & Bull and J. Edgar Bull, all of New York City, for complainants.

Albert G. Davis, of Schenectady, N. Y., Charles Neave, of New York City, and Arthur A. Buck, of Schenectady, N. Y., for defendants.

RAY, District Judge (after stating the facts as above). The complainant, Coloman De Kando, is a foreigner, and at the time he made his invention was an engineer in the employ of Ganz & Co., of Budapest, Hungary. The other complainant, the Westinghouse Machine Company, is the assignee of said De Kando.

June 28, 1905, the defendant Albert H. Armstrong filed his application for a patent for his alleged invention; the claims involved here reading as follows:

"1. In combination with a vehicle, a plurality of induction motors mechanically connected to the driving wheels of said vehicle, means under the control of the motorman for controlling said motors simultaneously, and means for adjusting the relative torques of said motors.

"2. In combination with a vehicle, a plurality of induction motors mechanically connected to the driving wheels of said vehicle, means under the control of the motorman for controlling said motors simultaneously, and means for adjusting independently the relative resistances of the secondary circuits of said motors.

"3. In combination with a vehicle, a plurality of induction motors mechanically connected to the driving wheels of said vehicle, a controlling switch adapted to vary simultaneously the resistances in the secondary circuits of said motors to control the speed of the vehicle, and means for adjusting independently the relative resistances in the secondary circuits of said motors to vary the relative speed torque characteristics of said motors.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



"4. In combination with a vehicle, a plurality of induction motors mechanically connected to the driving wheels of said vehicle, a switch under the control of the motorman for controlling said motors simultaneously, and independent adjustable resistances placed near the several motors and connected in their secondary circuits."

A patent on this application was granted to said Armstrong on the 6th day of February, 1906, No. 811,758. July 3, 1906, said De Kando filed his application for the same invention, and an interference was declared in the Patent Office, which is entitled *De Kando v. Armstrong*, Interference No. 27,264. The various tribunals in the Patent Office decided adversely to De Kando, and the case was taken to the Court of Appeals of the District of Columbia, where the Patent Office was finally affirmed May 24, 1911. See 169 O. G. 1185. The case was submitted to the court prior to April 26, 1911, but on that day such submission was set aside and a reargument ordered on the following propositions, as stated in the order of the court directing such reargument, viz.:

"Assuming that the dates given Armstrong by the Commissioner of Patents are correct, and assuming that Waterman, upon his return to this country, possessed sufficient knowledge of the invention in issue to reduce it to practice, and disclose this information to others skilled in the art and competent to understand it and reduce it to practice, would such knowledge and disclosure amount to a reduction to practice here of the invention in use abroad? Indulging these assumptions, can such knowledge and disclosure in any manner short of reduction to practice constitute an anticipation of Armstrong's invention as would bar his right to a patent?"

The section of the Revised Statutes (section 4915 [U. S. Comp. St. 1901, p. 3392]) under which this suit is brought reads as follows:

"Whenever a patent on application is refused, either by the Commissioner of Patents or by the Supreme Court of the District of Columbia, upon appeal from the Commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the Commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication, and otherwise complying with the requirements of law. In all cases, where there is no opposing party, a copy of the bill shall be served on the Commissioner; and all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not."

The contention seems to be over the proper construction, meaning, and effect of sections 4886 and 4923 of the Revised Statutes of the United States (U. S. Comp. St. 1901, pp. 3382, 3396). Those sections read as follows:

"Sec. 4886. Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than two years prior to his application, and not in public use or on sale in this country for more than two years prior to his application, unless the same is proved to have been abandoned, may,

upon payment of the fees required by law, and other due proceeding had, obtain a patent therefor."

"Sec. 4923. Whenever it appears that a patentee, at the time of making his application for a patent, believed himself to be the original and first inventor or discoverer of the thing patented, the same shall not be held to be void on account of the invention or discovery, or any part thereof, having been known or used in a foreign country, before his invention or discovery thereof, if it had not been patented or described in a printed publication."

By section 4886 it is expressly provided, as applied to this case, that *any person* (Armstrong), who has invented or discovered any new and useful art, machine, manufacture or composition of matter, or any new or useful improvement thereof,

"*not known or used by others* [say Waterman and Leve] in this country [the United States], before his [Armstrong's] invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country [of which patenting and description in a printed publication there is no pretense in this case], before his [Armstrong's] invention or discovery thereof, or more than two years prior to his [Armstrong's] application, and not in public use or on sale in this country for more than two years prior to his [Armstrong's] application [of which sale and use there is no claim], unless the same is proved to have been abandoned [of which there is no pretense], may, upon payment of the fees required by law, and other due proceeding had, obtain a patent therefor."

There is some evidence that the invention covered by the claims quoted was "known" by others in the United States before Armstrong's "invention or discovery thereof." If Armstrong invented the device mentioned in the claims quoted, he was, under the terms of this section, entitled to his patent, unless it (the invention) was "known" to others in the United States before he (Armstrong) made his invention or his discovery of his invention. By section 4923, as applied to this case, Armstrong was entitled to his patent for the said invention, if it was not known to others in the United States as above stated, and if at the time he made his application he believed himself to be the original and first inventor or discoverer of same, the thing actually patented, even if same had been invented or discovered by some other person, and was therefore known to such person, who had used same in some foreign country before the invention or discovery by Armstrong, *provided* such invention had not been patented or described in a printed publication here or abroad. So far as Armstrong's right to his patent is concerned, the actual invention of the same thing by De Kando in Europe prior to the time Armstrong made his invention or discovery, and knowledge of it there, and his (De Kando's) use of same in such foreign country prior to the time Armstrong invented or discovered same, does not affect it, provided such invention had not been *patented* anywhere, when Armstrong made his invention or discovery, or *described* in a printed publication. The statute recognizes that a person in some foreign country (as De Kando) may be at work on some inventive idea which he has conceived and is trying to reduce to an actual invention by creating means for making it effective and beneficial or useful, and that another person in this country (say Armstrong) may have the same precise idea or conception and be at work endeavoring to create means

to make it effective and useful. If the person at work in such foreign country (De Kando) is successful, and he completes his invention and makes it known or puts it into use in such foreign country, but does not take out or apply for a patent, and it is not described in some printed publication, and while matters stand thus with the person in such foreign country (De Kando), the person in the United States (Armstrong) succeeds and completes his invention, he is entitled to his patent, unless such invention made in such foreign country (by De Kando) had become known to others in the United States before the person at work in the United States (Armstrong) had actually made his invention.

It seems clear from the evidence that De Kando did complete and put in operation in Europe his invention (which is the same as Armstrong's) as early as April, 1904, although this was in dispute, and, it seems, a question of fact in the Patent Office, and De Kando did not obtain or apply for a patent, and it was not described in a printed publication. March 22, 1904, a Mr. Waterman and Mr. Leve went to Budapest, Hungary, where they met De Kando, who explained to them the details of the so-called Ganz system, which it is claimed, and the Court of Appeals, District of Columbia, find, included the invention in question, and which had been put in actual operation on the Valtellina road in Italy. Mr. Waterman and Mr. Leve went to the Valtellina road in Italy, and made a study and test of the system as there actually operated. At about this time De Kando wrote out and gave to Waterman a description of the more important details. Mr. Waterman and Mr. Leve then returned to the United States, where they arrived May 5, 1904. Between May 9 and May 12, 1904, Mr. Waterman discussed with a Mr. Stillwell the matters which he had investigated while abroad, and June 7, 1904, he made a written report to Mr. Stillwell, and which it is claimed fully disclosed the invention in question here. The pertinent part of such report reads as follows:

"D. The equal division between motors depends upon the equality of wheel diameter, and this is largely affected by a comparatively small difference of diameters. This is not a peculiarity of three-phase motors, but is true of all others. It is, however, a matter of much more serious consequence with motors operating normally at nearly a constant speed, since a variation of a few per cent. in wheel diameter, and hence in rotative speed, may either constantly rob the motor of load or give it an entirely unsafe overload. The importance of this characteristic in any particular case depends upon the character of the services, and where the runs consist only of acceleration, coasting and braking, it may be of little consequence, since the motors are in general running on the rheostat, and the automatic control device itself adjusts the motor to its work. For locomotives having side-bar drives, where the driving wheels are of necessity kept of the same diameter, this consideration does not enter; but for those having co-axial motors, with driving wheels unconnected, or for operation by multiple unit control on long runs, it is of importance. In such cases it is necessary to provide resistances with each equipment for insertion in the secondaries of the motors, the wheel diameter must be marked upon the truck, and, in making up trains, resistance must be inserted to bring the motor having greatest driving wheels as nearly as possible to the standard of those of smallest diameter. This is an inconvenient and somewhat awkward expedient, and will not perfectly attain the end sought; but it appears practicable. The larger the driving wheel,

the less necessary this will be, since the available thickness of the tire does not increase proportionately to the diameter of the wheel."

This would seem to describe the invention in question, for which a patent was granted to Armstrong. As stated, Armstrong filed his applications for his patent June 28, 1905, but he claims that he had conceived this invention prior to that time. The statute is:

"Any person who has invented \* \* \* not known \* \* \* by others in this country before his invention \* \* \* may obtain a patent therefor."

Therefore two questions are important, both questions of fact, viz.: When did Armstrong make his invention? and, Was such invention (not the mere fact of such invention, or the fact that some other person had made the same invention elsewhere, or in some other country, but knowledge of the patentable conception or idea, and of the means to put it in use, actual knowledge that it had been done), known to others in the United States when Armstrong actually made (not conceived) his invention?

As to what constitutes "invention," Robinson on Patents, § 125, says:

"No mental operation, however definite and valuable may be its result, is a complete inventive act. That which rests in thought only, as a mere theory or intellectual conception, can never be a means producing physical effects. It is not 'a manufacture,' in any sense in which that word has been applied in the industrial arts. It is neither 'a thing made,' nor 'a manner of making.' It improves no trade, confers no public benefit, and can be subject to no protection which the law is able to afford. An invention, therefore, does not exist until the generated idea has been reduced to practice. It is not enough that, as it lies in the inventor's mind, or can be explained to others, it is possible, or even practicable. 'Its possibility must become actuality.' 'Its practicability must be demonstrated by experience.' The means which has been conceived must be made operative and useful in the arts. The spirit that has been created must be clothed with a body, by which it is brought into contact with the exterior world, and through which its energies can act upon material substance. In a word, the invention must be put into the hands of the public in a condition for immediate use, requiring no further speculation or experiment, but fitted, as it is, for the accomplishment of its intended ends."

It is evident, from the opinion of the Court of Appeals of the District of Columbia, found in the record, that the court found:

I. That De Kando actually made his invention in a foreign country, and reduced it to actual practice, and put it in actual use, prior to the spring of 1904, on the Valtellina Railway in Italy.

II. It was, therefore, an invention which could be and was seen, understood, and known to be practical. There was not only the patentable conception, but the idea of means, and means.

III. That on March, 1904, Waterman went from the United States to Europe, and met De Kando at Budapest, where the details of the invention were explained to him, and then, proceeding to Italy, Waterman saw the invention in actual use. In addition, De Kando then furnished Waterman with an elaborate written description of the invention.

IV. It appears from the evidence that Waterman was learned and skilled, and fully capable of fully understanding, and that he did understand, the invention.

V. Waterman, therefore, "knew" that the invention had been conceived, and actually made and reduced to actual and successful practice.

VI. That Waterman not only brought the information he had gained in Europe with him to the United States, when he arrived May 5, 1904, but also the said written description of such invention, and notes which he had made relating to such invention while in Europe.

VII. That Waterman made a written report as to this invention to Stillwell June 7, 1904, and during the year following he described same in the United States to a number of electrical engineers of standing, all capable of understanding same, and June 19, 1905, Waterman explained the invention to the American Institute of Electrical Engineers in the United States.

I quote from said opinion of the court:

"On June 28, 1905, appellee filed an application in the Patent Office for a patent on the invention in issue, which was granted February 6, 1906. Appellant's application was filed July 3, 1906. With the filing dates before us, we will review briefly what the respective parties did prior to entry into the Patent Office. It appears that appellant made his invention abroad, and put it into actual use, prior to the spring of 1904, on what is known as the Valtellina Railway in Italy. It appears that in March, 1904, one Waterman went to Europe, and met the appellant at Budapest, where the details of appellant's invention were explained to him. He also saw the invention in use on the Valtellina road in Italy. In addition, appellant furnished Waterman with an elaborate written description of the invention. That document, together with notes he had made, Waterman brought with him to the United States, where he arrived on May 5, 1904. Within a few days after his arrival he communicated his information in detail to one Stillwell, a distinguished electrician in New York. Waterman made a preliminary written report to Stillwell on June 7, 1904. During the following year Waterman described the invention to a number of electrical engineers, among whom was one De Muralt, now professor of electrical engineering in the University of Michigan. It also appears that Waterman explained the invention to the American Institute of Electrical Engineers on June 19, 1905."

From this it is impossible to say that the fact of this invention in its details, and as a practical, complete, invention in use in a foreign country, was not known by others in the United States as early as June 7, 1904, giving to the words "not known" their ordinary meaning. The fact of the invention and all its details were made known to others in this country, and understood. The Court of Appeals, District of Columbia, proceeds to say:

"It must be conceded that on appellee's [Armstrong's] filing date [June 28, 1905], his date of reduction to practice, appellant's [De Kando's] foreign invention was known in this country. But the date of appellee's [Armstrong's] discovery relates back to his date of conception, which was prior to Waterman's disclosure of appellant's [De Kando's] invention here."

That is, while De Kando had actually made the invention in Europe, and reduced it to actual practical use, and through Waterman had conveyed full knowledge of it in all its details to others, the pub-

lic, in the United States, so that it was in fact known to others here when Armstrong filed his application for a patent, and thereby "constructively" reduced *his* invention to practice here, Armstrong was entitled to his patent, in spite of the provisions of section 4886 to the effect that he was not entitled to a patent for the invention, if it was known by others in this country before he (Armstrong) invented same. The ground of this holding seems to be that, when Armstrong actually filed his application for a patent, it related back to the time he conceived the idea (invented it in his mind merely), and that the date of such conception is the date of "his invention or discovery thereof." The Court of Appeals, District of Columbia, then proceeded:

"It follows, then, that before the knowledge of appellant's [De Kando's] invention here can constitute a bar to appellee's [Armstrong's] right to his patent, it must operate as a reduction to practice in this country. Any knowledge or use of the invention by appellant [De Kando] abroad, in the absence of a patent or description in a printed publication prior to appellee's [Armstrong's] date of invention or discovery, cannot deprive appellee [Armstrong] of his right to a patent. R. S. § 4923."

This is equivalent to holding that, if Waterman had reduced the invention to actual use and practice in the United States before Armstrong filed his application, such reduction to practice would have barred Armstrong's right to a patent, but that full and complete knowledge of same by the public in the United States did not; that is, by virtue of section 4923, as Armstrong, at the time of making his application, believed himself to be the original and first inventor or discoverer of the thing patented, and it had not been patented or described in a printed publication anywhere, he (Armstrong) was and is entitled to his patent, inasmuch as he had conceived it before it became known to the public in the United States through Waterman, and in spite of the fact that, before he (Armstrong) even constructively reduced the invention to practice, same was well known and understood by others—that is, by the public—in the United States. Reducing this to actual practice in granting patents, it comes to this: A. has a patentable conception or idea, and also the idea of means to make it effective and useful. He does nothing more then, but carries the ideas, and ideas and means, with him undisclosed. B., in a foreign country, has the same patentable conception or idea, including means, and he then proceeds to make his invention, and reduce it to actual practice, and make it useful to the public, and does so, and also fully exhibits and discloses same in all its details to persons who understood it, and who bring the information to the United States, and make the knowledge of the entire invention public here as a completed successful thing, but do not reduce it to practice here. Thereupon A. files his application for a patent. He is granted the monopoly, despite the fact that the invention had been conceived, completed, and reduced to practice abroad by B., and full knowledge of all such facts made public here before A. filed his application for a patent.

I understand, from the subsequent parts of the opinion referred to, that it was intended to hold that full knowledge by others here in the

United States of the invention in all its details, and of the fact that De Kando had fully completed the invention in Europe and reduced it to practice in public, is of no account in this case; that such knowledge was no knowledge, unless those obtaining it here reduced it (the invention) to actual practice here; that then, and then only, is the new and useful art, machine, manufacture, or composition of matter, as the case may be, known to others in this country; that before that is done the invention is, in patent law, under the sections of the Revised Statutes quoted, "not known or used by others in this country." It seems to me somewhat inconsistent to say that Armstrong, within the meaning of the statute, had invented the thing patented when he conceived the idea, and had also a mental conception of means for making it operative and useful, although he did nothing more, but that the invention, actually conceived, made, and put in practical operation in Italy, with full knowledge and information of such facts given to the public in the United States, was not known in this country.

Mr. Armstrong places the date of his mental conception of this invention in 1894 and 1895; but he says:

"At that time (1894 and 1895) our work called for a consideration only of a single car operation, and no immediate opportunity of applying my knowledge presented itself."

From his testimony I conclude he does not claim to have put his mental conception and knowledge into practical use or operation until some time in the spring of 1905, and March 28, 1905, he disclosed it to others. In June following he filed his application for a patent. In the meantime De Kando perfected the invention in Europe, and put it in practical operation there, and in May and June, 1904, caused full information regarding it to be taken to the United States in written form, and communicated orally to, we may say, the public, and July 8, 1906, he applied for a patent here. I find nothing in the record disclosing the date of De Kando's conception of this invention. So far as the public in the United States is concerned, De Kando made the invention known to Waterman and others in writing in May and June, 1904, while Armstrong made it known in writing in March, 1905.

Coming to the authorities bearing on the question, we find much that is helpful and much that is confusing. By section 4886, R. S., any person who has *invented or discovered* any new and useful art, machine, manufacture, or composition of matter, or any new or useful improvements thereof, "not known or used by others in this country before his invention or discovery thereof," may obtain a patent therefor. But, taking section 4886 and 4923 together, it is obvious that a patent is not to be defeated or denied because the invention had been known and used in a foreign country before and down to the time of his invention or discovery thereof. But knowledge and use in a foreign country is quite distinct from full knowledge thereof in this country. From the language of section 4886, we assume that to be entitled to a patent the person must have "*invented*" or "*discovered*" some new, etc., thing. It is clear that De Kando

was entitled to a patent for this invention in the United States at any time after April 4, 1904, down to June 28, 1905, when Armstrong filed his application. He had a completed and perfected invention. Had Armstrong invented anything, in the sense of the statute quoted, prior to his written disclosure March 28, 1905, followed by the filing of his application June 28, 1905, and is it material whether he had or not? He was first to file his application for a patent, but not the first to publicly disclose the invention in this country. When De Kando fully described the invention in writing, and gave it to Waterman for public use or disclosure in the United States, and Waterman did use it and publicly disclose same in the United States, it was the same as if De Kando had done the same thing.

[2] A conception of the mind is not an invention, or a completed invention, until represented in some physical form. *Clark Thread Co. v. Willimantic Linen Co.*, 140 U. S. 481, 489, 11 Sup. Ct. 846, 35 L. Ed. 521; *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Coffin v. Ogden*, 18 Wall. 120, 21 L. Ed. 821; *Dashiell v. Grosvenor*, 162 U. S. 425, 16 Sup. Ct. 805, 40 L. Ed. 1025. But in *O'Reilly v. Morse*, 15 How. 62, 109 (14 L. Ed. 601), in a contest as to priority of invention, Morse was awarded priority over Steinheil, Wheatstone, and Davy, although he had only completed the whole process, combination, powers, and machinery in his mind; his delay in bringing it out being due to his "want of means." Speaking of Morse and the date of his invention, the court said:

"The evidence is full and clear that, when he was returning from a visit to Europe in 1832, he was deeply engaged upon this subject during the voyage, and that the process and means were so far developed and arranged in his own mind that he was confident of ultimate success. It is in proof that he pursued these investigations with unremitting ardor and industry, interrupted occasionally by pecuniary embarrassments; and we think that it is established by the testimony of Prof. Gale and others that, early in the spring of 1837, Morse had invented his plan for combining two or more electric or galvanic circuits, with independent batteries, for the purpose of overcoming the diminished force of electromagnetism in long circuits, although it was not disclosed to the witness until afterwards, and that there is reasonable ground for believing that he had so far completed his invention that the whole process, combination, powers, and machinery were arranged in his mind, and that the delay in bringing it out arose from his want of means; for it required the highest order of mechanical skill to execute and adjust the nice and delicate work necessary to put the telegraph into operation, and the slightest error or defect would have been fatal to its success. He had not the means at that time to procure the services of workmen of that character, and without their aid no model could be prepared which would do justice to his invention. And it moreover required a large sum of money to procure proper materials for the work. He, however, filed his caveat on the 6th of October, 1837, and, on the 7th of April, 1838, applied for his patent, accompanying his application with a specification of his invention, and describing the process and means used to produce the effect. It is true that O'Reilly, in his answer, alleges that the plan by which he now combines two or more galvanic or electric currents, with independent batteries, was not contained in that specification, but discovered and interpolated afterwards; but there is no evidence whatever to support this charge. And we are satisfied from the testimony that the plan, as it now appears in his specification, had then been invented, and was actually intended to be described. With this evidence before us, we think it is evident that the invention of Morse was prior to that of Steinheil, Wheatstone, or Davy. The discovery of Stein-



hell, taking the time which he himself gave to the French Academy of Science cannot be understood as carrying it back beyond the months of May or June, 1837; and that of Wheatstone, as exhibited to Professor Henry and Bache, goes back only to April in that year; and there is nothing in the evidence to carry back the invention of Davy beyond the 4th of January, 1839, when his specification was filed, except a publication said to have been made in the London Mechanics' Magazine, January 20, 1838; and the invention of Morse is justly entitled to take date from early in the spring of 1837. And in the description of Davy's invention, as given in the publication of January 20, 1838, there is nothing specified which Morse could have borrowed; and we have no evidence to show that his invention ever was or could be carried into successful operation."

In *Loom Co. v. Higgins*, 105 U. S. 580, 592 (26 L. Ed. 1177), priority of invention was awarded to Webster, although he had only exhibited it in a drawing, and the court held:

"Of the two original inventors, the first will be entitled to letters patent, unless the other puts the invention into public use more than two years before the application for them.

"8. An invention relating to machinery may be exhibited as well in a drawing as in a model, so as to lay the foundation of a claim to priority, if sufficiently plain to enable those skilled in the art to understand it."

Apply the proposition stated that, "of the two original inventors, the first will be entitled to letters patent, unless the other puts the invention into public use more than two years before the application for them" in the United States, meaning we find here two original inventors, one foreign and the other domestic, but neither had put the invention into public use in the United States at all prior to the application for a patent by Armstrong, the domestic inventor. The foreign inventor was first to make knowledge of it public in the United States; but Armstrong was first to apply for a patent, and, so far as appears, the first to conceive the invention. It is clear that, in determining who the first inventor was as between these two, the use of the invention and actual reduction to practice in Italy cannot be considered. Section 4923, *supra*. It had not been patented or described in a printed publication, and it seems to be conceded that Armstrong believed himself to be the original and first inventor thereof. The actual knowledge of the invention, and the actual reduction to practice and public use of same in Italy, is only important as bearing on the question whether or not such invention was known in this country when or before Armstrong made his invention, within the meaning of section 4886.

Section 4923 does not exclude evidence of knowledge and use of the alleged invention in a foreign country on the application for a patent for that invention by one residing here and claiming to have invented it here. Section 4923 does not say or intimate that if A., a resident of this country, applies for a patent here, claiming to be the original and first inventor of the invention for which he seeks a patent, it may not be shown that A. did not invent or discover it at all, but that he saw it in full practical operation and use in a foreign country, studied it, understood it, copied it, and brought his information to this country, and here sought to patent it as his own invention and discovery. I do not understand that a mere visitor to Europe,

who there discovers or sees a new and useful machine in full operation (one not patented or described in a printed publication, and never heard of in the United States), may copy and make a duplicate here, and have a patent therefor as the original and first inventor, because of the provisions of section 4923, R. S. The patent granted to a person here is not void, and is not to be denied to an original inventor here, for the reason merely the invention had been known or used in a foreign country before his invention or discovery thereof; but the inventor here is not entitled to a patent if such invention was or had become publicly known by others in this country before his invention thereof.

It would seem clear enough, from the wording of section 4886, that it was intended to deny a patent to an applicant therefor, even if it appeared such applicant had invented it here—conceived it and put it in operation—when it also appears that such new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof, *was actually known to others or used by others in this country*, before his (applicant's) invention or discovery thereof. And I do not see that the statute makes any distinction as to when, or where, or how, or by what means, such "others in this country" became possessed of their knowledge of it. We come back to the proposition: Does section 4886 mean, by the words "not known or used by others in this country before his invention or discovery thereof," that the invention had not been reduced to actual practice or use in this country, or had not been made known by the application in due form for a patent therefor? If so, why was it not so stated? Why the language used? Did the word "known" have a meaning in the patent law, or our patent statutes, implying reduction to practice? The only case in exact point, to which I am cited, or am able to find, is *Doyle v. Spaulding* (Circuit Court of New Jersey, 1884) 19 Fed. 744, 746. All that Judge Nixon said on the subject, aside from stating the facts, was:

"After a careful consideration of the provisions of the three sections of the patent act which bear upon the subject (sections 4886, 4920, and 4923, Rev. St.), we are of the opinion that the use, or a knowledge of the use, of an invention in a foreign country by persons residing in this country will not defeat a patent which has been here granted to a bona fide patentee, who at the time was ignorant of the existence of the invention or its use abroad."

I do not discover that this case has ever been cited or overruled in any decision or by any court. Walker on Patents, 4th edition, cites the case (Walker on Patents [4th Ed.] § 54, page 52), and says, after quoting from section 4886, R. S.:

"Prior knowledge, possessed in this country, *by some other person than the applicant for a particular patent*, that the subject of that patent was known and used in some foreign country before its invention here, is not such knowledge in this country as will negative the novelty of the patent covering that subject."

I can agree without hesitation that actual and complete knowledge of the actual thing patented, the subject of the patent, and that it had been reduced to practice and successful operation in a foreign

country by *one* person here, who understood it, and was capable of making it and putting it in practice here, would not be such knowledge in this country as would defeat the right of the domestic inventor to a patent; but the facts of this case go much further, and show a public knowledge or publication by oral statements and explanations—that is, knowledge by a great number of persons fully capable of understanding it, and from the information possessed reducing it to actual practice. To hold that this invention (or thing described and claimed in the patent to Armstrong) was “not known” in the United States long prior to the time Armstrong applied for his patent comes dangerously near “judicial legislation”; but we know that some words in our patent laws have a meaning much broader or narrower, as the case may be, than the dictionary definition. As said in Walker on Patents, pp. 51 and 52, §§ 52 and 53:

“The statutes of the United States have always provided that anything to be patentable must be *new*. \* \* \* Many things are new in the eye of the patent statutes in addition to those things which are *really* new.”

In one sense a thing like a machine is “not known” until it is actually made as an article of use—not a model—and put in operation as a practical thing, as until then it cannot be definitely and certainly known that it is operative, and therefore practical and useful, what it purports to be as an invention designed to produce a new practical and useful result. In another sense it is known when the idea is fully evolved or developed, and a machine in accordance therewith is shown by drawings in all its parts, and mechanics skilled in that art see that it must operate as claimed and that it cannot be otherwise, or a working model is made which operates as claimed, and it is a mere question of dimensions; that is, of building an enlarged or full-sized machine. Is it good reasoning to say that A. “*has invented*” a new and useful machine, etc., in the United States when he has only framed it in his mind, but that the same invention made by B. in a foreign country and fully reduced to practice there is “not known” in this country when full knowledge of it as a completed practical thing, including its operation and construction, in writing (not in a printed publication), has become public and known to those skilled in the art and capable of understanding it and reducing it to practice in this country? Can there be “invention” without knowledge of the thing invented, and if there is “invention,” is not the thing invented known to the inventor, in the sense of the patent law, without any reduction to actual practice, or the filing of an application in due form describing it; and, if known to the inventor, is it not known to others to whom it has been so fully described orally and in writing by the inventor that they fully comprehend and understand it and are able to reduce it to practice?

I think there is a distinction between knowledge by others in the United States of the use of a thing or device accomplishing a certain result in a certain way in a foreign country, and knowledge by others in this country, not only of such use, but of the full particulars of such device; knowledge not only that it is and has been in actual operation in the foreign country, but full information as to

the principle on which it operates and of all the details of its construction, as well as its mode of operation and purpose, and the result attained. In 1 Robinson on Patents, § 320, page 438, Doyle v. Spaulding, supra, is cited as sustaining the proposition, stated in the text, that:

"Foreign use, at least under the provisions of our present statutes, does not communicate to the public in this country any knowledge of the invention."

In the notes he cites many cases holding this proposition, and the further proposition "that, if a person claiming a patent derived his knowledge of the invention from such prior foreign use, his claim must be denied on the ground that it is not his own invention," which is, of course, true; and therefore, when the issue is that the alleged inventor did not invent the thing patented or claimed at all, the foreign use and the claimant's knowledge of it may be shown. 1 Robinson on Patents, note, page 439, and section 324, page 445, where it is said:

"That his knowledge of the invention as in foreign use before his own invention is a bar (to a patent), see," etc.—citing cases, including Roemer v. Simons, 95 U. S. 214, 24 L. Ed. 384.

He also says:

"That knowledge in this country of use abroad is not *prior use and knowledge*. See Doyle v. Spaulding (C. C., 1884) 19 Fed. 744, 27 O. G. 300; Illingworth v. Spaulding (C. C., 1881) 9 Fed. 611."

There is no statement in the text or notes that the reduction to practice and use in a foreign country, and full knowledge of such use *and* of the machine or apparatus and mode of its operation and the principle on which it operates, and of its construction and the result obtained, when communicated orally and in writing to and understood by the public in the United States, is not such knowledge of the invention in this country as will defeat the right of the domestic inventor to a patent. There is no claim in this case that Armstrong actually derived his knowledge of this invention from outside sources, or through the information brought to this country by Waterman and made public here in the manner stated. As the record stands, De Kando conceived this invention and reduced it to actual public use and practice in Italy prior to April, 1904, and orally and in writing through Waterman made full disclosure thereof to the public in the United States in May, 1904. He did not apply for a patent. Prior to 1901 or 1902, Armstrong had conceived the same invention, and in March, 1905, for the first time, made a disclosure of it to another; but he did not reduce it to practice or make it public, and in June, 1905, he filed his application for a patent. There is no claim or pretense that Armstrong exercised reasonable diligence, or any diligence, or that he made any effort whatever to reduce his invention to practice prior to filing his application for a patent.

If the statute is construed to mean that such knowledge in this country of the invention as De Kando, through Waterman, gave the public, does not make it known in this country, it will be possible for

persons under similar circumstances in other cases to avail themselves of the information thus gained, allege themselves to be the first inventor, claim they conceived it at a date long anterior to their application, or any disclosure by them, and obtain a patent for inventions they never made, or had any conception of, except through the disclosures here of the actual inventor abroad, who allowed and sanctioned, it may be, full disclosure in this country without filing an application for a patent. It would be impossible to prove, in many cases, at least, that the person alleging himself to be the inventor did not conceive it in his mind, or that he gained his information by hearing statements and descriptions of what had been done abroad. Was it or was it not to guard against such an occurrence that the statute was worded as it is?

It is conceded that date of invention, as between two claimants for a patent for the same invention, may relate back to the date of conception, provided the claimant used due diligence to reduce his invention, his mental conception thereof, to actual practice; that is, to complete his invention. If two persons conceive an invention at the same time, each independently of the other, and both use due diligence, it would seem that the one who completes the inventive act first and files his application should have the patent. If one is lax and the other diligent, clearly the diligent one, if he complies with the law, should take precedence. If one precedes the other in mental conception, but that other is first to complete the inventive act by reducing it to actual and successful practice anywhere, and he then makes it known to the public by full disclosure in this country, so that all skilled in the art may understand and practice it, is he not entitled to his patent, as against the one who did not reduce it to practice until a later period, and then to constructive practice only by filing an application for a patent?

It may be said that in such case the one who takes precedence in mental conception, diligent or not diligent, has preceded the other in filing his application for a patent, which is true, and that, on so filing his application, his date of invention is as of the mental conception, the beginning of the inventive act; but does he not come within the prohibition of section 4886, R. S., which denies him a patent if the invention was in fact *known* (in the full manner referred to) to others in this country before his invention or discovery thereof was completed? Is constructive reduction to practice by filing an application enough to carry his date of invention back to his date of conception, as against one who conceived it at about the same time, it may be later, and actually reduced it to practice and use in public, although not in this country, and then communicated full knowledge of it, its use, its principles, construction, mode of operation, and results, to the public in this country, but not by a printed publication, before such constructive reduction to practice?

The record in this case fails to disclose that De Kando made his disclosure to Mr. Waterman and Mr. Leve, who brought the information to the United States and here gave it to the public, for the purpose of obtaining letters patent for the invention, or for the purpose

of introducing the invention into public use, although that was doubtless contemplated. For this reason, *Thomas v. Reese*, 1880, C. D., 12, is not in exact point. The Commissioner there said:

"If, having conceived it and reduced it to practice abroad, he communicates it to an agent in a foreign country, and sends his agent to the United States to obtain letters patent, or to introduce it to public use, he may, in an interference, fix the date of his invention on the day of his agent's arrival in the United States. If, having conceived it and reduced it to practice in a foreign country, he communicates it to an agent in the United States for the purpose of obtaining letters patent, or of introducing it to public use in the United States, he may, in an interference, carry the date of his invention back to the day on which it was fully disclosed to such agent in the United States."

*Gessner v. Miller*, 1890, C. D., 6, is to the same effect.

In *Hanifen v. Price* (C. C.) 96 Fed. 435, 441, the question was different from the one now before the court; but the language of the learned judge who gave the opinion in that case would seem to favor the contention of the complainant here to some extent.

I have serious doubt as to the soundness of the decision of the Court of Appeals of the District of Columbia in refusing a patent to De Kando; but, in view of the decision of that court and of the District Court of New Jersey, *Doyle v. Spaulding*, *supra*, and the seeming approval of that case by the learned authors of *Robinson and Walker on Patents*, I am constrained to hold that the patent was properly awarded to Armstrong, and not De Kando, on the grounds:

I. That, so far as appears, Armstrong was the first to conceive the patented invention, while De Kando was the first to reduce it to actual practice and use.

II. That Armstrong was first to reduce such invention to constructive practice in the United States, and that he did so by filing his application for a patent, and thereby giving to the public in this country actual and permanent information and knowledge thereof.

III. That, having done so, he was and is entitled to have the date of his invention, for the purpose of determining the question of priority of invention as between himself and De Kando, relate back to at least 1901, or 1902, the date of his conception thereof, while De Kando can only have the date of his invention, for the purpose of a patent in this country, relate back to May 9, 1904, when Waterman made it fully known to the public in this country by oral explanations and statements, and to those capable of understanding it, and who did understand it.

IV. That De Kando might then have filed his application for a patent, and gained priority, but did not, and it is not shown that he furnished the information to Waterman for the purpose of having him file an application for a patent in his (De Kando's) behalf, or for the purpose of putting the invention in actual public use in this country.

V. That as Armstrong filed his application before De Kando filed his, and as neither had reduced the invention to actual practice or use in this country, they stood on an equality, except that, so far as appears, Armstrong was the first to conceive the invention, while De Kando was first to give the invention to the public here, which he did

orally only. That, therefore, Armstrong took precedence as the first inventor.

VI. That the actual knowledge of the invention given to the public by Waterman, which was sufficient to enable man skilled in the art and who received the information from him to reduce it to actual practice and use, was not such knowledge of the invention in this country before Armstrong made his invention or discovery thereof as, in the absence of actual reduction to practice in this country by any one, barred Armstrong's right to a patent.

VII. That in the absence of actual reduction to practice in this country, and of an actual completion of the inventive act in this country by either Armstrong or De Kando, he who first reduced it to constructive practice here took precedence in his right to a patent. That the actual reduction to practice by De Kando in Italy, there being no patent and no printed publication describing it, cannot deprive Armstrong of his rights of priority.

Bill dismissed, with costs.

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WOLLENSAK OPTICAL CO. v. ILEX OPTICAL CO.

(District Court, W. D. New York. October 18, 1912.)

No. 487.

PATENTS (§ 328\*)—INFRINGEMENT—PHOTOGRAPHIC SHUTTERS.

The Wollensak patents, Nos. 679,134 and 700,878, each for improvements in photographic shutters, narrowly construed, and limited to the precise construction shown, as required by the prior art and the proceedings in the Patent Office, *held* not infringed.

In Equity. Suit by the Wollensak Optical Company against the Ilex Optical Company. On final hearing. Decree for defendant.

C. Schuyler Davis, of Rochester, N. Y., for complainant.

Harold H. Simms, of Rochester, N. Y., for defendant.

HAZEL, District Judge. This is an action to enjoin the alleged infringement of letters patent Nos. 679,134 and 700,878, granted to Andrew Wollensak for improvements in photographic shutters. The claim in issue of patent No. 679,134 reads as follows:

"1. In combination with the exposure mechanism of a photographic shutter, a pivotal master-lever formed with two branches at either end, each branch having an operating-terminal, and means for turning said master-lever on its bearing, substantially as shown and described."

The claim is divided into four elements: (1) The exposure mechanism; (2) a pivotal master-lever, with two branches on each end thereof; (3) an operating-terminal on each branch; and (4) means for turning the master-lever. The defenses relied upon are anticipation and noninfringement.

The improvement resides in the form and construction of the master-lever, which has at each end two branches, provided with oper-

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ating-terminals, or projections, which co-operate with other members in the rapid opening and closing of the shutter blades, so as to control or graduate the transmission of light. The positioning of terminals on a master-lever for use in connection with a photographic shutter, in such a way as to permit its operation, with other elements or parts, to in turn open and close the shutter blades, was concededly old in the art, and was common in shutter devices of this description.

In the Wollensak patent under discussion the master-lever is assembled with other parts in a casing, and in operation determines the character of the shutter exposure—that is, as to whether it shall be a so-called time, bulb, or instantaneous exposure—and its movements are actuated by a spring which is normally held in tension by the setting movements of the shutters. The two branches at each end of the master-lever are shaped to form terminals—the first, to engage the operating member; the second, the detaining members; the third, the exposure member; while the fourth abuts the side walls of the casing. All of these elements, however, were old and commonly used in the modern photographic art, and therefore invention, if there is invention, must be found to exist in the shape or configuration of the master-lever, with its branches and terminals operating the shutters.

Several patents claimed by defendant to anticipate the patent in suit have been introduced in evidence. In the prior Wollensak patent, No. 642,861, the master-lever is provided with two branches, one of which carries three projections, and the other only one. The only perceivable difference between the two levers is in the specific form, the earlier one having a smaller number of branches to actuate or operate the shutter blades. By the adaptation of a four-branch master-lever, a minor lever or terminal in the earlier patent could be safely left out. Perhaps in this respect, and in the addition of a stop terminal, an improvement was made in the operation of the exposure mechanism; but the *modus operandi* was upon practically the same principle. The functions of the projections or terminals on the different master-levers are identical; i. e., to move or actuate different parts of the exposure mechanism.

While it is appreciated that mechanism of this description is delicately constructed, and requires exact adjustment of the parts, yet as the operative characteristics and function of the master-lever, with branches and terminals, were fairly well known and understood in the art at the date of the invention, it is not thought that Wollensak's later elaboration of the master-lever required such an exercise of inventive skill and ingenuity in its consummation as to entitle the patent to much latitude. Indeed, the German patent to Prigge & Schlegel, No. 69,227, and the patent to Brueck, No. 749,162, support this view, and require giving the patent in suit a strict construction.

In the German patent are shown two branches at either end of a master-lever, each branch having projections or terminals, practically four in all, to operate the parts; and though the master-lever is without the precise function of the claim in controversy, yet its construction and mode of operation produce merely a different method of actuating the shutter device. True, it is without the projections; but



it requires none, as the master-lever is directly connected with a shutter ring, the movements of which are limited by a tension spring.

In the Brueck patent, which under the proofs concededly antedates the patent in suit, there is also a master-lever, with terminals practically at both ends to actuate the shutter blades, and there is also the stop terminal, which affects or influences the movements of the master member. The terminals appear to be positioned unlike those described in the Wollensak specification, but nevertheless their construction and mode of operation have an important bearing upon the scope of the claim in controversy.

Construing such claim narrowly, and limiting it to a master-lever having four terminals, two at each end, to enable the master-lever, when in operation, to engage other elements, and to afford a stop for the master-lever, it is not thought that the defendant's shutter device is an infringement. True enough, the defendant employs in its shutter device the specified elements to actuate and operate the shutter blades; but the terminal abutting the side wall of the casing to limit the movements of the master-lever as in complainant's is lacking, and the control thereof is apparently upon another principle. A lever and hook connect the master-lever with the exposure ring, and when the shutter is closed the hook and exposure member are held in place by the master-lever, with the result that the latter closes the blades, while in complainant's patent the blades are closed by a spring attachment.

In patent No. 700,878 the claims in controversy are the first, second, sixth, seventh, eighth, tenth, and twenty-third; the twenty-seventh claim having been abandoned. In each of said claims, which are for a combination of elements, is described a shutter mechanism of the type hereinbefore discussed, and like that of the Wollensak patent No. 679,134. Claims 1 and 2 specify that the retarding device and motor mechanism by which the blades are actuated are independent of each other; and claims 6, 7, 8, and 10 specify independent action by such elements, while claim 23 describes the device in detail. It will be enough herein to reproduce claims 1 and 23, which read as follows:

"1. A photographic shutter for making a series of graded exposures, comprising, in combination with shutter-blades, mechanism for determining the duration of said various exposures, and motor mechanism for the shutter-blades, said mechanisms being independent of each other, and a controlling-body common to both, substantially as shown and described."

"23. A photographic shutter adapted to make graded exposures, having shutter-blades and mechanism for operating them, and a retarding device for controlling the exposure mechanism, and a spring for returning the retarding device to its normal place, substantially as shown and described."

In the construction of claims 1 and 2, which are substantially similar, the action of the Patent Office, as disclosed by the file wrapper in evidence, is significant. In the outset claim 1 did not contain the feature of "a controlling-body common to both" mechanisms relating to the operation of exposure and shutter blades, and such inclusion, after rejection of the broader claim, was a distinct limitation upon the feature of independence which must attend said claims to insure

their novelty. The expert witnesses have disagreed upon the question of the meaning of claim 1, as regards whether the retarding mechanisms are independent of each other, or whether such mechanisms act independently of each other.

The rejection of the original claim was on the Vogt patent, No. 668,965, which showed the feature of physical independence of such elements as distinguished from independent action of the mechanisms. Inasmuch as the patentee acquiesced in the disposition by the Patent Office of claim 1, and added an additional feature to the claim, which manifestly was a limitation, he is bound thereby; and it must now be held that the words "being independent of each other" refer to a method by which the retarding element was held out of action while (quoting from the specification) "the twin detents act, and to hold the retarding mechanism and the twin detents all out of action simultaneously." Thus construing claims 1 and 2, there is no infringement of them by the defendant. To omit attaching to claims 1 and 2 the limitation of a "controlling-body common to both" mechanisms would otherwise result in anticipation by the prior patents to Vogt, Wollensak, Dey, and Brueck.

The other claims in controversy specify independent action of the retarding device; but such element is not shown by a fair preponderance of the evidence to be included in the defendant's device. In complainant's shutter, a so-called setting shutter, a spring is used in connection with a lever, by which a pump piston *h'* is normally held down, and when the shutter blades are closed the piston of the pump acts independently of any other element; that is, it is caused by the spring to descend to its normal position. This mode of operation is essentially different from defendant's construction, which contains a toothed wheel coacting with the master-lever, which arrests the movements of the wheel on the instant that the movement of the master-lever has ceased. There is no independent action of the wheel unconnected with the movement of the shutter mechanism. That the words "acting independently" have a narrow signification is indicated by the language of the specification, wherein it is said:

"Also the retarding mechanism and the shutter mechanism act independently of each other, either acting at times without the other."

I quite agree with the expert witness for the defendant that the quoted excerpt from the specification is not susceptible of an interpretation which would fairly include the defendant's retardation by the master-lever of the toothed wheel or the boot-shaped projection.

In view of the prior art, it was a question whether complainant's device disclosed a patentable invention. The employment of springs to actuate or control retarding mechanism to move instrumentalities in one direction or another was very old. For instance, in the British patent to Gotz, No. 7,650, there is shown a spring within an air cylinder, by which the retarding piston is shifted to make connection with a master element which is actuated by a shutter. In the patent to Furnell of 1844, No. 7,746, a brake shoe is moved in one direction by a spring and in another direction by an eccentric. Thus is shown

a retarding mechanism moved by a spring to the point where the retardation is initiated. So, also, in the French patent to Coninck is shown a wheel similar to the retarding wheel of defendant's device, capable of rotating in one direction, and connected to a master member, and moved by an arm actuated by a spring. Such construction bears on the novelty of patent No. 700,878, in that it shows that at the date thereof photographic shutters having a master-lever positioned to move in one direction without interfering with the movements of the retarding device were familiar to the art. In the patent to Turner & Clark and in the patent to Dey are also shown springs for use in actuating a retarding device independently of the shutter mechanism.

The defendant has not a setting or release lever possessing the characteristics of the levers described in claims 7 and 8. It is unnecessary to dwell further upon the various elements of the claims in controversy, or upon the contradictory evidence of the expert witnesses, both of which I have carefully considered in connection with my examination of the physical exhibits. As the novelty of the various claims is thought of doubtful validity, the doctrine of equivalency of the defendant's elements and mode of operation should not be applied, even though the defendant substantially achieves the same result as complainant. Such I conceive is the rule, when, as here, the claims contain the words "substantially as described." *Hobbs v. Beach*, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586.

As in my judgment the defendant has not appropriated the essentials of claim 1 of patent No. 679,134, nor of the claims in controversy of patent No. 700,878, the bill should be dismissed, with costs.

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LEMON et al. v. IMPERIAL WINDOW GLASS CO.

(District Court, N. D. West Virginia. October 28, 1912.)

1. COURTS (§ 314\*)—FEDERAL COURTS—DIVERSE CITIZENSHIP—CORPORATIONS —"CITIZENS."

A corporation is a mere creature of local law, incapable of having legal existence beyond the limits of the sovereignty creating it, and must be treated as a citizen of the state creating it, within the meaning of the provision of the federal Constitution extending judicial power in federal courts to controversies between citizens of different states.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 860; Dec. Dig. § 314.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1164-1174; vol. 8, pp. 7602, 7603.

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

2. CORPORATIONS (§ 52\*)—LOCATION—RESIDENCE.

A corporation's residence is fixed by artificial conditions, such as the location of its principal place of business, or the personal residence of its duly appointed attorney in fact, on whom service of process may be made.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 140-150; Dec. Dig. § 52.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

### 3. COURTS (§ 344\*)—FEDERAL COURTS—WHAT LAW GOVERNS—PROCESS.

Congress not having fixed any rule with regard to the mode of serving mesne process on corporations in suits in the federal courts, the state law and practice will be followed.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 917; Dec. Dig. § 344.\*]

Conformity of practice in common-law actions to that of state court, see notes to *O'Connell v. Reed*, 5 C. C. A. 594; *Nederland Life Ins. Co. v. Hall*, 27 C. C. A. 392.]

### 4. COURTS (§ 274\*)—JURISDICTION—FEDERAL COURTS—CORPORATIONS—ATTORNEY TO ACCEPT SERVICE—RESIDENCE.

Under Code W. Va. § 2313, requiring all domestic corporations, resident and nonresident, to execute and record a power of attorney designating some person within the state as its attorney upon whom process against it may be served, the residence of such an attorney, selected by a nonresident corporation, fixes the county of the attorney's residence as that of the corporation, for the purpose of determining the district in which suit against the corporation in a federal court must be brought.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 814; Dec. Dig. § 274.\*]

Jurisdiction of federal courts over corporations, see note to *St. Louis, I. M. & S. Ry. Co. v. Newcom*, 6 C. C. A. 174.]

### 5. CORPORATIONS (§ 500\*)—PARI MATERIA—REPEAL.

Code W. Va. § 2313, requires every resident domestic corporation to appoint some person, resident in the county where its principal business is conducted, to accept service, and declares that every nonresident domestic corporation shall appoint a resident of the state its attorney for a like purpose; the attorneys appointed by both resident and nonresident corporations being also empowered to make return of the corporation's property in the state for taxation. Acts 1905, c. 39 (Code, §§ 3805-3810), declares that the State Auditor shall be the attorney in fact for and on behalf of every foreign corporation doing business in the state and of every nonresident domestic corporation for the acceptance of service, and also that, in addition to the Auditor, any such company may designate any other person in the state as its attorney in fact to receive service. *Held*, that the act of 1905 did not repeal section 2313, but that the two should be construed in *pari materia*, since section 2313 authorizes the attorney in fact, not only to accept service of process, but also to make return of the corporation's property for taxation, and relates solely to corporations formed under the state laws, while the act of 1905 includes both nonresident domestic corporations and foreign corporations, doing business within the state, and restricts the power of the Auditor to the acceptance of service.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1912, 1940, 1941; Dec. Dig. § 500.\*]

### 6. CORPORATIONS (§ 507\*)—FEDERAL COURTS—JURISDICTION—RESIDENCE OF PARTIES—NONRESIDENT DOMESTIC CORPORATION.

Code W. Va. § 2313, requires domestic corporations, resident and nonresident, to fix the county of their residence within the state by the execution and record of a power of attorney designating some person within the state as attorney on whom process may be served; and Acts 1905, c. 39 (Code, §§ 3805-3810), provides that the State Auditor shall be the attorney in fact for and on behalf of every foreign corporation doing business, within the state and of every nonresident domestic corporation, and requires the filing of a power of attorney appointing the Auditor and his successors in office attorney in fact to accept service. *Held* that, where a nonresident domestic corporation filed a power of attorney appointing the State Auditor its attorney to accept service, but did not appoint any other local person its attorney in fact for a similar pur-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pose under section 2313, the corporation's residence for the purpose of suit, either in the state or federal courts, was not limited to the county wherein the seat of government was located, or where the Auditor had his residence, but service on the Auditor for such corporation rendered it liable to suit in any county or federal district in the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1971-1974, 1976-2000; Dec. Dig. § 507.\*]

Action by Monro Lemon, as trustee, and the Columbia Window Glass Company, against the Imperial Window Glass Company. On motion to quash and set aside the service of the summons, accepted for defendant by the Auditor, on the grounds that neither it nor the plaintiffs are or were citizens of the district at the time of the commencement of the suit. Motion denied.

Linn & Byrne, of Charleston, W. Va., for plaintiffs.

Samuel V. Woods, of Philippi, W. Va., and Arnold & Game, of Columbus, Ohio, for defendant.

DAYTON, District Judge. The question here involved is one of jurisdiction arising under local law. So far as known, it has not been determined by any of the courts of last resort, state or federal. At the same time it is one that is of importance and should have an authoritative determination. The undisputed facts involved are:

The state of West Virginia authorizes the issuance by its Secretary of State of charters to two classes of private corporations: First, resident domestic ones, defined to be (section 124, c. 32, Code, § 1046) those "whose principal place of business and chief works (if it have chief works) are located within this state"; and, second, nonresident domestic ones, defined to be those "whose principal place of business or chief works are located without this state."

By section 24, c. 54, § 2313, of the Code, every resident domestic corporation is required within 30 days after organization, by power of attorney, duly executed, to appoint some person, *resident in the county* of the state wherein its business is to be conducted, to accept service, and upon whom process may be served for and on behalf of such corporation. By the same section, every nonresident domestic corporation is required, within 30 days after organization, to appoint by such power of attorney some person *resident in the state* to accept and upon whom service of process may be had on its behalf. This power of attorney is to be recorded in the county where such person appointed attorney resides and is also to be filed with the Secretary of State. These provisions are incorporated into our Code from the Legislative Act of 1887, c. 73. It is to be noted that by this act attorneys appointed by both resident and nonresident domestic corporations are empowered, not only to accept service for and have process legally served upon them on behalf of such corporations, but they are further empowered to *make return of its (the corporation's) property in the state*.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r. Indexes

*for taxation.* By subsequent legislation (chapter 39, Acts 1905, incorporated in the Code of 1906 as sections 3805-3810, inclusive) it was enacted that:

"The Auditor of this state shall be, and he is hereby constituted, the attorney in fact for and on behalf of every foreign corporation doing business in this state, and of every nonresident domestic corporation. Every such corporation shall, by power of attorney, duly executed, acknowledged and filed in the Auditor's office of this state, appoint said Auditor and his successors in office, attorney in fact to accept service of process and notice in this state for such corporations, and by the same instrument it shall declare its consent that service of any process or notice in this state on said attorney in fact, or his acceptance thereof endorsed thereon, shall be equivalent for all purposes to, and shall be and constitute, due and legal service upon said corporation."

Subsequent sections of the act relate to fees to be paid, how the Auditor shall notify the corporation of his acceptance of process, and the penalties to be incurred by the corporations failing to comply with the requirements. It is further provided:

"In addition to the Auditor, any such company may designate any other person in this state as its attorney in fact upon whom service of process or notice may be made or who may accept such service. And when such local attorney is appointed, process in any suit or proceeding may be served on him to the same effect as if the same were served on the Auditor."

By article 7, § 1,<sup>1</sup> of the Constitution of the state, it is provided, that the Executive Department shall consist of a Governor, Secretary of State, Superintendent of Free Schools, Auditor, Treasurer, and Attorney General, and that:

"They shall, except the Attorney General, reside at the seat of government during their terms of office, and keep there the public records, books and papers pertaining to their respective offices and shall perform such duties as may be prescribed by law."

The seat of government for the state is Charleston, situate in Kanawha county, in the Southern federal judicial district of the state. This suit was brought in this Northern district by the plaintiffs, Lemon, trustee, a citizen of the state of Pennsylvania, and the Columbia Window Glass Company, a corporation under the laws of Pennsylvania, against the defendant, a nonresident domestic corporation, organized under the laws of West Virginia, having its "principal place of business" in Pittsburg, Pa. It has complied with the requirements of the act of 1905 and appointed the Auditor its attorney in fact to accept process in its behalf. It does not appear to have complied with the act of 1887 in the appointment of any private individual in the state as its attorney and having the power of attorney so appointing him recorded in the county of his residence. It now appears to this suit specially and moves to quash and set aside the service of summons accepted for it by the Auditor, on the grounds that neither it nor the plaintiffs are or were citizens of this district at the time of the commencement of the suit.

[1] In considering this question, it is well for us to remember that a corporation is a mere creature of local law, incapable of

<sup>1</sup> Code 1906, p. 1217.

having legal existence beyond the limits of the sovereignty creating it, and that it must be treated as a citizen of the state creating it, within the meaning of that clause of the Constitution extending judicial power in federal courts to controversies between citizens of different states. *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357.

[2] Its residence in the state, unlike that of the individual, must by the law be fixed by artificial conditions, such as the location of its principal place of business or the personal residence of its duly appointed attorney in fact.

[3] Further, we are to remember that, Congress not having laid down any rule with regard to the mode of serving mesne process upon corporations, the state law and practice must be followed. *Amy v. Watertown*, 130 U. S. 301, 9 Sup. Ct. 530, 32 L. Ed. 946.

[4] The act of 1887 (section 2313, Code) clearly requires any domestic corporation, resident or nonresident, to fix and determine the county of its residence, by the execution and recordation of its power of attorney designating some one within the state as its attorney upon whom process against it could be served. In the case of resident domestic corporations, such attorney has to be resident in the county of the state wherein the corporation had its principal place of business. In the case of a nonresident corporation, having no principal place of business in the state, it can select such attorney from the citizenship of the state; but his selection, and the required recordation of the power of attorney appointing him in the county of his residence, unquestionably fixed the county of *his* residence to be that of the corporation, and whether or not such county was within or without this district would determine this court's jurisdiction. It is to be noted that penalties are provided for noncompliance with this act and the right to proceed by attachment and publication as against foreign corporations is given.

[5] The question here at once arises: What effect did the passage of the act of 1905, requiring foreign and nonresident domestic corporations to appoint the State Auditor attorney to accept process have upon the act of 1887? Did it in effect repeal it? I think not, for the very pertinent reason, if for no other, that the two acts were designed to accomplish different purposes. The act of 1887 related solely to corporations formed under this state's laws. It provides, not alone that the corporation by its power of attorney shall empower the attorney appointed thereby to accept process, but also "to make return of its property in this state for taxation." On the other hand, the act of 1905 includes in its provisions, not only nonresident domestic corporations, but also foreign corporations doing business in the state, and restricts the power of the Auditor to accepting process only. Therefore I conclude that the act of 1887 must be held to be in full force in this state, and that the act of 1905 must be held merely supplemental thereto, providing an additional way by which process may be served upon nonresident domestic corporations.

[6] The duty and obligation of such corporations, by the appointment of attorneys resident in some one or other of the counties,

thereby fixing and determining its residence in the state, remains. But, if it does not comply with this statute, does the official residence of the Auditor at the seat of government under the act of 1905 fix such nonresident corporation's residence in the county of Kanawha, wherein such seat of government is, thereby requiring all actions to be brought either in the state courts of Kanawha or the Southern federal district of this state? I think not. The Auditor is an official of the state. The functions of his office are defined and fixed specifically by law, and relate to every county of the state equally and alike, regardless of his residence. He has his official residence by law at Charleston; but his residence as a citizen may be elsewhere in the state, where his property may be situate and his right to vote exists. His acting as attorney in fact to accept process for these corporations is purely a ministerial act required by law of him, and is to be exercised alike in the whole state. The fees derived from his so acting are fixed by the statute, and go to the treasury of the state, not to him individually. He simply acts in the premises as the law's agent or ministerial officer, and his residence, official or private, becomes wholly immaterial. While there has been no known decision of the question by the Supreme Court of Appeals of this state, it is common understanding that the inferior courts of this state have, universally so far as known, adopted this view, and have entertained jurisdiction, and this court has heretofore done likewise.

It is therefore my conclusion that the act of 1887 is in full force; that under it these nonresident domestic corporations are required to fix the place of their residence in the state by appointing an attorney resident in some one of its counties, wherein the power of his appointment must be recorded; that in case of failure to comply with such statute they are liable to be sued in the courts of any of the counties of the state, or in either of the federal districts thereof; and that the person so suing may proceed at his option, either by attachment and publication, or by serving process upon the Auditor, as was done in this case.

The motion must be overruled.

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UNITED STATES v. THIRTY CASES PURPORTING TO BE  
GRENADINE SYRUP.

(District Court, D. Massachusetts. August 22, 1912.)

No. 650.

FOOD (§ 15\*)—ADULTERATION—MISBRANDING—"GRENADINE SYRUP"—"GRENADINE."

Claimant shipped in interstate commerce a compound labeled "Grenadine Syrup," composed of sugar, citric and tartaric acid, and the juices of certain fruits. *Held* that, since the word "grenadine" in its common acceptation does not mean a syrup made from pomegranates, but the term "grenadine syrup" is used in commerce to designate, not a syrup so made, but a syrup possessing a certain characteristic flavor and color, a purchaser of syrup so labeled was not entitled to expect to receive a

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



syrup actually made from pomegranates, and that the syrup libeled was therefore not subject to forfeiture because of adulteration or misbranding.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 14; Dec. Dig. § 15.\*

What constitutes a violation of pure food regulations, see note to *Brina v. United States*, 105 C. C. A. 559.]

Libel by the United States for condemnation of 30 cases purporting to be grenadine syrup. Dismissed.

E. Mark Sullivan, Asst. U. S. Atty., of Boston, Mass.

Arthur L. Strasser, of New York City, Whipple, Sears & Ogden, of Boston, Mass., and Levi Cooke, of Washington, D. C., for claimant.

DODGE, District Judge. The 30 cases were transported from New York to Boston for delivery to a consignee. The consignee has filed a waiver of its rights in favor of the shipper. The shipper has appeared as claimant and answered the information.

The bottles contained in the cases seized are labeled "Grenadine Syrup."

The first count of the information charges that the liquor in the bottles is adulterated within the meaning of the Food and Drugs Act of June 30, 1906, in that a compound sugar syrup has been substituted wholly or in part for the food named. The second count charges misbranding within the meaning of said act, in that the label would deceive and mislead the purchaser into the belief that the food consisted of grenadine syrup, where as in truth and in fact it was not grenadine syrup. The claimant denies that there has been any adulteration within the meaning of the act, and, denying also that there has been any misbranding within the meaning of the act, expressly says and avers "that said food was in truth and in fact 'Grenadine Syrup.'"

The government's contention is that "Grenadine Syrup" means only syrup composed of sugar and the juice of the pomegranate. This the claimant denies, and contends that according to the accepted meaning of the words they signify only a sugar syrup having a certain color and flavor. The claimant is the manufacturer of the syrup seized, and concedes that in its manufacture no pomegranates are used. According to the claimant's evidence, the syrup is composed of sugar, citric and tartaric acid, and the juices of certain fruits not disclosed. There is no evidence to the contrary, and I find this to be the fact. That the syrup contains anything which may render it injurious to health the government does not claim.

The government has proved adulteration and misbranding, if it has proved that "Grenadine Syrup" has, in common acceptance, the limited meaning it asserts. If this is the fact, a purchaser relying on the label has the right to expect to get a syrup made with pomegranate juice, and is cheated if he gets a syrup from which such juice is absent. But unless the government has sustained the burden of proving that the words of the label carry with them the meaning claimed, according to an understanding so general as to

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

give any purchaser the right to believe that syrup so composed is what he is buying, neither charge has been established.

"Orange Syrup" or "Lemon Syrup" are words which, if used as labels, would no doubt give a purchaser the right to expect the syrup so labeled to have been made from the familiar fruits named. The pomegranate is a less familiar fruit, nor is "grenade," its French name, the name by which it is commonly known among us. "Grenadine" is nowhere used as the name of a fruit. The word is no doubt derived from "grenade," and among its meanings, in French, as the dictionaries of that language referred to show, is a syrup made of sugar and pomegranate juice. It does not necessarily follow, however, that the same meaning of the word is commonly used and accepted in this country. The question is one not to be settled by derivation or by dictionaries, except so far as these may tend to show the meaning of the word in common acceptance here. And whatever might otherwise be the force of the French definitions of "grenadine" as tending to establish the government's contention, I must regard it as greatly diminished by the fact that there is shown to be in force in France, since April 3, 1909, a decree of the French government, made in pursuance of legislation in 1905, for the suppression of fraud in the sale of goods and of food adulteration, which expressly provides that "the name 'Syrup of Grenadine' is limited to syrup of sugar with the addition of citric acid or of tartaric acid and flavored with vegetable substances."

Many English dictionaries have been referred to by counsel, but in only one of them is "grenadine" defined as a syrup made from pomegranates. This is Webster's New International Dictionary, published by Merriam & Co. (Eds. 1910 and 1912). Two other meanings are also given, having no relation to any kind of syrup, and the meaning first referred to is, as I understand it, given as a French meaning, rather than as a commonly accepted English meaning. No such meaning is given in Webster's International Dictionary, published by the same firm in 1904. The Century Dictionary and Cyclopedia Supplement, Ed. 1911, gives as one definition "a syrup, used for colds," and for this Larousse, one of the French dictionaries above referred to, is cited; but nothing is said about the syrup being made from pomegranates. I do not find "grenadine" defined in any other English dictionary as a syrup of any kind. The other wholly different meanings of the word are the only ones given.

According to the evidence at the trial "Grenadine Syrup" has been an article of commerce in this country only during the last 10 or 15 years. Some of the syrup dealt in under that name appears to have been imported chiefly, if not wholly, from France, and some of it to have been of domestic manufacture. No evidence was offered by the government tending to show that any of it, whether imported or made here, has been actually made from pomegranates, or has actually contained any pomegranate juice. The evidence satisfies me, on the other hand, that, speaking gen-

erally, no pomegranates or pomegranate juice are or have been used in making either the imported or domestic syrup, and that the imported syrup has been and is made as indicated in the decree of the French government above referred to.

The evidence fails also to satisfy me that "Grenadine Syrup" has, in common acceptation, the limited meaning claimed by the government. While it may be true that the names under which similar syrups are known and sold are generally taken from the source of the materials used, they are also sometimes indications only of the flavor or color, and are sometimes merely fanciful, as was admitted by one of the government witnesses. It appears to be true that, in France, whatever the definitions found in French dictionaries, syrup actually made from pomegranates would more properly be called "sirop de grenade" than "grenadine," "sirop grenadine," or "sirop de grenadine." To my mind, the fair conclusion from the evidence in the case is that the claimant's label, in common acceptation, means not that the syrup labeled is actually made from pomegranates, but that it possesses a certain characteristic flavor and color desired by consumers. That the purchaser of such syrup has the right, according to common understanding, to expect a syrup actually made from pomegranates, I am unable to regard as sufficiently proved. Indeed, it seems to me by no means proved that a syrup actually made from pomegranates would possess the flavor and color which purchasers of "Grenadine Syrup" have learned to desire and expect. A witness for the government testified that he had made syrup from pomegranates, and he produced samples of the result; but it did not appear that he had ever tried to sell any of it as "Grenadine Syrup." A witness for the defense who had tried the same experiment in manufacture testified that the results were unsatisfactory both as to color and flavor.

By consent of both parties, the case has been heard before the court without a jury. My views of the law and the evidence being as above stated, I must find for the claimant, and dismiss the information.

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In re GROEZINGER.

(District Court, M. D. Pennsylvania. October 30, 1912.)

No. 2,223.

**BANKRUPTCY (§ 178\*)—BILL OF SALE—PLEDGE.**

A bankrupt, being indebted to claimant, executed a judgment note payable one day after date for the amount of the indebtedness, and also a bill of sale to certain machinery. In connection therewith, claimant executed a defeasance agreeing to resell and transfer to the bankrupt such machinery whenever the amount of the note was paid, provided that such defeasance should not affect claimant's right to enforce collection of the note by legal proceedings. There was no change of possession or other act of ownership exercised by claimant after the execution of the bill of sale, except his act in insuring the machinery. *Held*, that

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the transaction constituted a pledge in the guise of a sale, and was invalid as a legal fraud as against the bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 221, 264-274, 283, 284; Dec. Dig. § 178.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of Charles Groezinger. Petition by M. M. Ruddy to reclaim certain machinery under a bill of sale. Petition denied.

Warren, Knapp & O'Malley, of Scranton, Pa., for petitioner.  
Ralph W. Rymer, of Scranton, Pa., for trustee.

WITMER, District Judge. The petitioner, M. M. Ruddy, claims title to certain machinery, enumerated in a bill of sale, dated August 2, 1910, from the bankrupt to the claimant as follows:

"260 sewing machines, 3 electric motors, tables, shelving, and all other machinery, fixtures and furniture now contained in the 3rd and 4th floors of the buildings numbered and known as 6 and 8 Lackawanna avenue, in the city of Scranton, Pennsylvania."

At the time of the alleged sale or transfer of the property mentioned, and for many years previous, the bankrupt was engaged in the business of manufacturing underwear in two adjoining buildings, one of which was owned and leased to the bankrupt by the claimant; the machinery in the two contiguous buildings being used and constituting a single manufacturing plant operated by the bankrupt. It appears that at the time Groezinger owed Ruddy, the claimant, \$3,699, the consideration mentioned in the writing, and that upon delivery of the paper Groezinger executed and delivered to Ruddy his judgment note for a like sum, payable one day after date, and Ruddy, in turn, signed and delivered to Groezinger the following option or agreement:

"Scranton, Pa., August 2, 1910.

"Whereas Charles Groezinger, of Scranton, Pa., has this day executed and delivered to me a judgment note for three thousand six hundred and ninety nine dollars (\$3699.00) payable one day after date, and has also executed and delivered to me, a bill of sale of certain machinery, fixtures and furniture now contained in the 3rd and 4th floors of the buildings Nos. 6 and 8 Lackawanna Avenue, Scranton, Pa., for the consideration of \$3699.00; Now in consideration of the premises and the further sum of one dollar to me in hand paid, I hereby agree to sell and transfer to said Charles Groezinger, the said machinery, fixtures and furniture whenever the amount of said note is paid to me, provided however that this agreement shall not affect my right to enforce the collection of said note by legal procedure.

"Witness my hand and seal this 2nd day of August 1910.

"M. M. Ruddy. [Seal.]

"In presence of: \_\_\_\_\_."

Ruddy did not take manual possession of the machinery, nor was it by him tagged, or marked in any way as his property. He had, however, before and afterwards access to all parts of Groezinger's plant, being himself engaged in business in another portion of the building leased to him. It does, however, not appear that he exercised any acts of ownership over it except that of insuring it, nor did he receive any benefit for its use other than the rental for the

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

building as before. The transaction was not published and was known only to a few in the confidence of the parties. The bankrupt was then indebted to some of those who are now his creditors, and his trustee, standing in the place of a judgment creditor whose debt existed at the time of the transfer, is to be regarded here as the holder of a lien by legal or equitable proceedings under section 47 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3438]), as amended (Act June 25, 1910, c. 412, 36 Stat. 840 [U. S. Comp. St. Supp. 1911, p. 1501]).

That it was not the intention of the parties that there should be an actual sale is not to be doubted. The property was only pledged as security for a debt. It was to be retransferred by Ruddy to Groezinger upon payment of the amount due on the judgment note. However, this cannot be regarded of much importance in the absence of actual fraud, which is not here present. That the machinery, in a measure, became security for a debt, would not impair the validity of Ruddy's title if otherwise complete. *McCullough v. Willey*, 200 Pa. 168, 49 Atl. 944.

Was the transaction followed by transfer of possession, either by delivery or assumption of control by the purchaser indicating to the public that a change of ownership of the property was contemplated? If not, while it may not be regarded as fraudulent in fact, it would constitute a fraud per se as against creditors and subsequent bona fide purchasers without notice. This has been held as a rule of policy for the prevention of fraud in an unbroken line of decisions from *Clow v. Woods*, 5 Serg. & R. (Pa.) 275, 9 Am. Dec. 346, to the latest case upon the subject. While it is true that delivery may be actual or constructive, it must in any case be evidenced by acts honestly intended to transfer the possession, as well as the title. Having due regard for the character of the property and its location and use at the time of the pretended transfer, we discover nothing from which to infer intent of delivery by Groezinger to Ruddy. In fact, there was no such delivery, nor was there such assumption of control by Ruddy, over the property in question, following the exchange of papers, as would reasonably indicate a change of ownership. The only act appearing as indicating assumption of ownership by Ruddy rests in the placing of insurance upon the property in question. To hold that such constitutes sufficient evidence of transfer of possession of personal property would encourage all kind of secret liens, resulting in interminable fraud. Disregarding the insurance, the parties to the alleged transfer have not done a thing to which they can point as indicating an intention to effect a change of ownership, and it becomes the duty of the court to pronounce the sale void for legal fraud. In the case of *McCullough v. Willey*, supra, so much relied upon by the petitioner, where the tenant firm gave to the landlord to secure a debt an absolute bill of sale of the machinery in the building rented, the machinery was of a heavy character and bolted to the floor of the mill. After the bill of sale was executed, the landlord tagged all the machinery with tags bearing his name. Subsequently the machinery

was levied upon under an execution issued by an execution creditor of the firm. Held that the case was for the jury.

When by the action of the parties there has been a separation of the title and possession of personal property, courts will scrutinize the transaction to determine the real intention, and but little regard will be given to the form which it has taken or the name by which it is called. The law is liberal in not requiring an actual change of possession when it will defeat the lawful purpose of the parties, but there has been no deviation from the general rule that delivery of possession is indispensable to transfer a title by the act of the owner that shall be valid against creditors. The rule applies, not only to absolute sales, but to contingent sales and mortgages. *Barlow v. Fox*, 203 Pa. 114, 52 Atl. 57.

The transaction being a pledge in the guise of a sale wherein the title was separated from the possession, it is invalid as against execution creditors of the bankrupt, and so is invalid against his trustee in this proceeding, to which the amendment of the 25th day of June, 1910, applies.

The petition is therefore denied.

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#### THE ATKINS HUGHES. THE CADDO. THE BAYAMO.

(District Court, S. D. New York. October 25, 1912.)

##### 1. COLLISION (§§ 69, 76\*)—STEAMSHIP AND TUG WITH TOW—MUTUAL FAULTS —“VESSELS IN SIGHT OF ONE ANOTHER.”

As a tug, with a barge in tow on a hawser, was passing out to sea through the main ship channel from New York Bay in the daytime, the barge came into collision with the steamship Bayamo off the quarantine anchorage. The Bayamo had been anchored, and was going astern into the channel to get on her course up the harbor. As the tug passed the stern of another anchored steamship, she saw the Bayamo a quarter of a mile away on her starboard bow moving astern, and gave a signal of two blasts and starboarded, going close under the stern of the steamship, which had nearly stopped; but the barge was unable to turn so quickly, and struck the Bayamo's starboard quarter. *Held*, that the barge was not in fault, it appearing that she followed the course of the tug as closely as possible; that the tug was in fault for being too close to the anchorage line without necessity; that the Bayamo was also in fault for violation of article 28 of the Inland Rules (Act June 7, 1897, c. 4, § 1, 30 Stat. 102 [U. S. Comp. St. 1901, p. 2884]), which required her, on going astern, to indicate that fact by three short blasts on the whistle, since, although there was an intervening vessel, the tug could have been seen from her stern, and the vessels were “in sight of one another,” within the meaning of the rule.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 87-90, 124-137; Dec. Dig. §§ 69, 76.\*]

Collision with or between towing vessels and vessels in tow, see note to *The John Englis*, 100 C. C. A. 581.]

##### 2. COLLISION (§ 69\*)—CARE TO PREVENT—VESSELS PASSING QUARANTINE ANCHORAGE.

Vessels passing quarantine anchorage in New York Harbor, where ships customarily stay but a short time, are in much the same position as those going down a narrow channel in front of slips out of which

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

vessels are likely to emerge, and are required to exercise the same high degree of care.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 87-90; Dec. Dig. § 69.\*]

**3. COLLISION (§ 76\*)—RULES FOR PREVENTING—REVERSING SIGNALS—VESSELS LEAVING ANCHORAGE.**

Article 28 of the Inland Rules (Act June 7, 1897, c. 4, § 1, 30 Stat. 102 [U. S. Comp. St. 1901, p. 2884]), which requires that "when vessels are in sight of another a steam vessel under way whose engines are going at full speed astern shall indicate that fact by three short blasts on the whistle," applies to a steam vessel going astern on leaving anchorage preparatory to laying her course.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 124-137; Dec. Dig. § 76.\*]

**4. COLLISION (§ 69\*)—CARE TO PREVENT—VESSEL LEAVING ANCHORAGE.**

A vessel leaving anchorage grounds and backing into a channel in the way of other vessels navigating it is bound to exercise extreme care to notify them, and to that end to maintain a very careful lookout; and she is not relieved from liability for a collision because no other vessel was seen from a portion of the ship admittedly obscured by another vessel in proximity.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 87-90; Dec. Dig. § 69.\*]

In Admiralty. Libels for collision by the Compania Cubana de Navegacion, owner of the steamship Bayamo, against the steamtug Atkins Hughes and barge Caddo, and by the Texas Company, owner of the Caddo, against the Bayamo and Atkins Hughes. Decree for the Texas Company against both the Bayamo and Hughes.

On the morning of February 27, 1911, in clear weather, with a light wind and flood tide, the barge Caddo, owned by the Texas Company and in tow of the tug Atkins Hughes, came in collision with the steamship Bayamo off Quarantine Anchorage, New York Harbor.

The Bayamo had just left her anchorage at Quarantine, was engaged in straightening out on her course to go up the harbor, and was struck by the Caddo before she had accomplished this maneuver, and while she was athwart the channel at an angle which will be considered in the opinion herewith.

The Atkins Hughes and her tow were bound to sea, and the tug herself escaped collision only by putting her wheel hard astarboard and passing under the Bayamo's stern. The Caddo did not succeed in turning so quickly, and the bluff of her starboard bow came in contact with the extreme starboard quarter of the Bayamo, to the injury of both vessels.

The owners of the Bayamo sued both the Atkins Hughes and the Caddo, and the owners of the Caddo sued both the Atkins Hughes and the Bayamo. The actions were tried together.

Chas. C. Burlingham, of New York City, for the Bayamo,  
Samuel Park, of New York City, for the Atkins Hughes.  
John W. Griffin, of New York City, for the Caddo.

HOUGH, District Judge (after stating the facts as above). [1] Of the claim against the Caddo, it is enough to say that the only fault alleged against that barge is that she failed to follow, or attempt to follow, her tug, and thereby caused or contributed to the damage. There is no evidence worthy the name that the Caddo did

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

not do her best to steer after her tug, and it follows that the libel as against her must be dismissed, and that she is plainly entitled to recover for her injuries against one or both of the steam vessels.

The vital and salient point of difference between the navigators of the Hughes and those of the Bayamo is on the apparently simple question whether, as the Hughes came down the Main Ship Channel, bound to sea and steering a straight course, she had the Bayamo on her port or starboard bow; and before any application of legal principles can be made to the facts this question must be answered.

Before its solution is attempted, the evidence shows some facts which are of assistance and are not (I think) open to doubt.

On the morning in question, and before the Hughes started down the bay, there were two vessels at anchor off Quarantine, and another one somewhat north of them. With the most northerly of these anchored vessels this case is not concerned; but it is important to ascertain the positions of the other two, whereof the Atlanta was furthest up the bay, and the Bayamo to the south of her.

Most of the witnesses testified in court, the good intent of none of them was impeached, and all seemed to me to be trying to tell the truth as they saw it.

Under such circumstances, the greater weight must be given to those witnesses whose experience is most useful, and whose business especially required them to take note of that to which they testified.

Applying this rule, the Sandy Hook pilot (Butler) who had the Bayamo in charge gives, in my judgment, convincing testimony as to where he anchored that vessel. He says she lay off Pennsylvania avenue, Staten Island, and was distant about 1,000 feet therefrom. The steamship is 350 feet long, and under the influence of the tide was tailing "about northeast," and "toward Bay Ridge." Tailing to the northeast gives a direction somewhat to the north of Bay Ridge, but the two statements are not wholly inconsistent. When this location is tested by the chart, and the other evidence, it is persuasive that the Bayamo was at anchor in such manner that, as she swung to the tide, her stern was just about on the line of Quarantine Anchorage, and she lay not quite southwest and northeast; i. e., with her stern pointing between northeast by east and east-northeast.

The Austrian steamship Atlanta was similarly anchored a quarter of a mile north of her. The Atlanta's stern likewise was substantially on the line of Quarantine Anchorage, and she was about the same distance from the shore as was the Bayamo.

The testimony as to the distance between the Bayamo and Atlanta is not altogether harmonious; but here, again, I prefer the estimate of Butler, whose business it was to anchor the Bayamo, and to see that she had a safe berth; and his estimate is confirmed by Capt. Futch of the Hughes, whose estimates of distance are not always the same, but he finally settled upon a quarter of a mile as the distance between the two steamships.

The line of Quarantine Anchorage is not a prolongation of the eastward boundary of General and Man of War Anchorages. It changes to the eastward by 20 degrees. From this it follows that,



to an observer coming down the Main Channel and near to the line of General Anchorage, the Bayamo's stern would be projecting beyond that of the Atlanta, although both the vessels were well within lawful Anchorage grounds. This is due to the change in compass direction of the boundaries of General and Quarantine Anchorage as above noted.

That, as matter of fact, those on the Atkins Hughes (or some of them) did see the stern only of the Bayamo at first, is shown by the testimony of the mate, Collins, and his evidence is also confirmation of that from the Bayamo that the Atlanta, having much greater free-board than the Bayamo, obscured the view up the bay from the Bayamo's bridge; but it follows, also, from this evidence that a competent observer on the stern of the Bayamo would have had a view of affairs up the bay which might have been of great service to safe navigation.

While the two steamships lay at anchor as above stated, the Hughes, with the Caddo in tow upon a hawser, came out of the Kill van Kull, and, rounding the Anchorage Buoys, steered down the harbor. Her crew insist that they took the middle of the channel. This statement rests principally upon the evidence of Capt. Fitcher, not because others have not spoken, but because he was at the wheel of his boat, and was the man presumed to have knowledge of local conditions. His acquaintance therewith seems to me very imperfect. Of the land he knew little, and the impossible place which he marked as the spot of collision on the chart does not encourage confidence in the accuracy of his observations. On this point the master of the Caddo has given a deposition, and his estimates of courses and distances may fairly be characterized as absurd.

It is believed that the Hughes came down the harbor on or very near the line of General Anchorage. The largest estimate of the distance by which she cleared the Anchorage Buoys (at the Kills) is from 300 to 400 feet, and the Caddo's master declares that he cleared it by 40 feet only. He would naturally pass nearer than did his tug. It was his especial business to keep away from such obstacles as buoys, and I am of opinion that in this respect he is nearly right. But whatever the course of the Hughes was, when she rounded into the Main Ship Channel her navigators are positive that they laid a straight course, and kept to it until they were under the stern of the Atlanta. There being no doubt on the evidence that the Hughes passed the Atlanta's stern within 200 or 300 feet, it follows that she must have come down the bay very near the Anchorage line.

Before the Hughes got abeam of the Atlanta, the Bayamo had started full speed astern to execute the maneuver first above stated. She had moved backwards "300 feet," or "about a length," when those on her bridge saw the Hughes emerging from under the stern of the Atlanta. Immediately (according to the Bayamo's evidence) the Hughes blew two whistles and starboarded her wheel, whereupon the Bayamo instantly put her engines full speed ahead, but continued, however, to go astern approximately two lengths more, being still in the water, but having gained no headway before collision.

The Hughes passed within a distance variously estimated from 40 to 125 feet of the Bayamo's stern, and the Caddo fell into collision.

Admittedly the Bayamo never blew any whistles. The reason given therefor is that whistles would have done no good, for, as soon as the Hughes blew two whistles and starboarded, collision was almost inevitable.

The only variant from this story (so far as yet related) on the part of the Hughes is that she had gotten below the Atlanta, and within perhaps 700 or 800 feet of the Bayamo, when she observed the steamship's sternward movement, and then it was that she blew two whistles and starboarded.

Although there is this much agreement between them, each set of navigators avers that the other solely caused the collision; because Capt. Futchter and his crew maintain that, when they were under the stern of the Atlanta, the Bayamo, apparently at rest in the water, bore from two to three points on their starboard bow, while the Bayamo's witnesses declare that at the same time the tug had the steamer (then actually making sternway) nearly, if not quite, as much on her port bow.

Even in collision cases this difference is astonishing, and when, as above noted, all the witnesses seem to be trying to tell what they saw, correctness must be tested by the rule of probability. If a diagram be made according to the evidence of Capt. Futchter, and the Bayamo be placed  $2\frac{1}{2}$  points on his starboard bow when he was about 200 feet off the Atlanta's stern, the Bayamo is found to be such a distance from the course of the Atkins Hughes as to make collision under all the rest of the evidence impossible, and she is likewise placed at a distance to the westward of the line of Quarantine Anchorage inconsistent with all the other evidence. Indeed, this testimony puts her so far westward that she ought to have been seen across the Atlanta's bow long before the Atkins Hughes got abeam of that ship.

As to the Bayamo's story, it is obviously quite difficult for observers on the Bayamo's bridge to accurately state the bearing of their own ship from the pilot house of the Atkins Hughes. Therefore Pilot Butler was asked to give the bearing of the Hughes in points off his own bow when she was first seen. He answered slowly, and examined the chart, and finally said that, when the Hughes came in sight, she was 6 points off the Bayamo's starboard bow. To this position he adhered. This statement likewise is impossible, for it places the Hughes far to the westward of the Atlanta.

It may be noted here that the Hughes was progressing at about  $5\frac{1}{2}$  miles, so that from the time she was abeam of the Atlanta until the collision happened could not have been more than  $2\frac{1}{2}$  minutes, and was probably considerably less.

The inference from the foregoing is that the apparition of danger was so sudden that both sets of observers are more than usually inaccurate. From all the evidence I deduce the following: Though the Hughes may have seen, and probably did see, the stern of the Bayamo while some distance up the bay, no attention was paid to her until the tug was abeam of the Atlanta. Before that time the

Bayamo had begun to move astern, and was continuing so to do when the vessels were a quarter of a mile apart. At that time the Hughes was heading for the Bayamo, and probably for her starboard quarter. Then, or a few seconds later, the Hughes blew two whistles and starboarded steadily until she had a hard astarboard wheel. By this manœuvre she changed her own course at least five points and barely escaped collision. The Caddo changed her course about two points, a finding substantiated by the angle of collision as stated by Capt. Seeley of the Bayamo.

On these facts the Hughes is plainly liable. Her master acted under an erroneous view of the law. When he saw the Bayamo moving astern, and on his own starboard bow, he considered that the vessels were on crossing courses, that the Bayamo was the privileged vessel, and he therefore blew two whistles. *The Servia* (D. C.) 30 Fed. 503; *Id.*, 149 U. S. at 156, 13 Sup. Ct. 877, 37 L. Ed. 681.

That a mariner wrongly interprets the rules of the road does not put his vessel in fault, if what he actually did was careful and prudent. This captain had presented to him a case of special circumstances. He had seen at least the stern of the Bayamo. He ought to have known that she was at Quarantine Anchorage, and to have appreciated the fact that vessels lying there stay but a short time, and are likely to move at any moment. There was nothing to prevent him from going farther out in the channel, instead of which he pursued a course (as I believe) which produced danger of collision if the Bayamo had remained still, and then, when he saw her moving, he deliberately got in her way.

[2] Vessels passing Quarantine Anchorage are in much the same position as those going down a narrow channel in front of slips out of which vessels are likely to emerge. Cases like *The American Eagle* (D. C.) 29 Fed. 302, are applicable.

[3] Nor is it possible to absolve the Bayamo from fault. Article 28 of the Inland Rules requires that:

"When vessels are in sight of one another a steam vessel under way whose engines are going at full speed astern shall indicate that fact by three short blasts on the whistle."

The difference between this and the corresponding International Rule is significant, in that this regulation does not require a vessel under way to be upon a course.

The Bayamo was under way when she hove up her anchor and started astern, because she was neither "at anchor, nor moored fast to the shore, nor aground." Therefore she was bound to sound three whistles for the benefit of vessels who were in sight of her.

It is believed that the Atkins Hughes was not in sight of those on the Bayamo's bridge. Their view was obstructed by the Atlanta; but it is also found that the Hughes was in sight of any lookout stationed at the steamship's stern.

[4] The obligation of maintaining a very careful lookout on leaving anchorage or mooring is elementary, and navigators cannot take refuge in the proposition that they have no vessel in sight, because

nothing is seen from a portion of the ship admittedly obscured by another vessel in proximity.

Within the meaning of the statute, therefore, the Bayamo and the Hughes were in sight of each other when the steamship started backing. The steamship should therefore have sounded three whistles, and, not having done so, the burden of proof is on her to show that failure to comply with the statute did not cause or contribute to collision. So far from doing this, the evidence is thought to show affirmatively that, had she blown, and had the Atkins Hughes heard, there was plenty of time and ample room for the Hughes and her tow to pass across the bow of the steamship. I think the language of *The Sicilian Prince* (D. C.) 128 Fed. 136, is applicable, viz.:

"Any vessel backing across a channel in the way of other vessels navigating it is bound to exercise extreme care to notify the other vessels of her maneuver."

Damages and costs will be divided between the Hughes and the Bayamo.

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In re SAM Z. LORCH & CO.

(District Court, W. D. Kentucky. November 6, 1912.)

**BANKRUPTCY (§ 166\*)—MORTGAGE—VALIDITY AS AGAINST TRUSTEE.**

The provisions of Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), as amended by Act June 25, 1910, c. 412, § 11, 36 Stat. 842 (U. S. Comp. St. Supp. 1911, p. 1506), defining preferences which are voidable, are applicable in case of objections by a trustee to proof of a debt by which priority is claimed under a mortgage, and furnish the rules by which the validity of the mortgage as against the trustee is to be determined; and a mortgage, although given or recorded within four months, to secure a prior debt, and when the bankrupt was insolvent, cannot be denied proof, unless, at the time it was so given or recorded, the creditor knew or had reasonable cause to believe the fact of such insolvency.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-258; Dec. Dig. § 166.\*]

In the matter of Sam Z. Lorch & Co., a corporation, bankrupt. On petition by trustee to review the referee's order refusing to reconsider claim of the Louisville Stove Fixture Company, proved as a secured claim. Affirmed.

Kohn, Bingham, Sloss & Spindle, of Louisville, Ky., for trustee.  
Lawrence S. Leopold, of Louisville, Ky., for creditor.

EVANS, District Judge. Three creditors of this bankrupt on April 18, 1912, filed a petition against it, in which, showing it to be a corporation organized under the laws of the state of Kentucky, they alleged that it had committed certain acts of bankruptcy, and thereupon prayed that it might be adjudicated a bankrupt. After some delay an adjudication was accordingly made on May 17th. In due course A. R. Cooper was appointed its trustee. One of its creditors

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was the Louisville Store Fixture Company, which we shall call the Fixture Company. It proved a debt against the bankrupt for \$600 as one secured by a mortgage upon certain articles of personal property described therein. The mortgage, though, for certain reasons given in the testimony, dated August 11, 1911, was not, in fact, executed until some time in January, 1912, and was not recorded until April 15th—three days before the petition in bankruptcy was filed. Other facts respecting it may be stated further along. The claim was allowed by the referee as one entitled to priority of payment out of the proceeds of the sale of the property covered by the mortgage. Subsequently Cooper, the trustee, filed a petition before the referee in which he prayed for a reconsideration of the claim. This petition we shall treat as his pleading in the case. The grounds upon which such reconsideration was asked are alleged by the trustee in this language, namely:

"Your petitioner refers to the original chattel mortgage filed herein with the claim of said Louisville Store Fixture Company, and makes same a part hereof. That said claim should not be allowed as a lien upon the fixtures belonging to the bankrupt herein, because said mortgage was not recorded prior to the 15th day of April, 1912, until after each and every debt due to each and every creditor of the bankrupt as shown herein by the schedules of said bankrupt, and the proofs of claims filed herein by the various creditors, and because said creditors had no notice thereof. That said lien is claimed upon property in the custody of this court. That no previous application has been made for the order asked for herein. Wherefore your petitioner prays that the said proof of debt be reconsidered, and that the claim of said creditor be allowed as a general claim against the estate of the bankrupt herein."

The referee, after a full hearing of the testimony offered in support of the trustee's petition, denied the reconsideration, affirmed the allowance of the claim as one secured by a mortgage, and directed its payment out of the proceeds of a sale of the mortgaged property which had been made by the trustee. The latter by his petition has sought a review by the court of those orders upon the ground that the referee's rulings were erroneous. We have stated somewhat specifically the facts relating to the issues, because at the hearing there was much effort to enlarge the scope of the controversy. This was notably so, first, in respect to the fact that the bankrupt was a corporation, of which the trustee's counsel claimed to have been ignorant; and, second, in respect to the fact that the bankrupt's name was signed to the mortgage, without showing on the face of that instrument that this was done by its president. However, the mortgage was executed and delivered by the president in the name of the corporation. The fact that the original petition in bankruptcy stated on its face that the bankrupt was a corporation effectually disposes of any claim of ignorance of the corporate character of the bankrupt. Besides, the validity of the mortgage was not assailed in the trustee's pleading on either of those grounds, and we do not doubt in this instance that the questions before us on the petition for a review should be limited to those involved in the issues made before the referee.

1. Section 47a, cls. 1 and 2, of the Bankruptcy Act (Act July 1,

1898, c. 541, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3439]), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1501), is as follows:

"Sec. 47. Duties of Trustees. *a* Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them upon property of such estates; (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

We shall assume that the trustee, as expressly provided in the section, has, if he asserts it, the same right that a creditor holding a lien by legal or equitable proceedings would have to the bankrupt's property, and that he has the same right any such creditor would have to contest the proof of debt of the Fixture Company under its mortgage. This will bring us to the direct question of whether the right of the Fixture Company, under its mortgage, is, in this case, shown to be superior to that of the trustee occupying the position given him by the statute, or whether the converse of the proposition is true.

By section 1, cl. 25, of the Bankruptcy Act, it is provided that the word—

"'transfer' shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security."

Section 60, "a" and "b," as amended on June 25, 1910, so far as necessary to be now considered, is as follows:

"Sec. 60. Preferred Creditors. *a* A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, \* \* \* made a transfer of any of his property, and the effect of the enforcement of such \* \* \* transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.

"*b* If a bankrupt shall have \* \* \* made a transfer of any of his property, and if, at the time of the transfer, \* \* \* or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months of the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."

While these provisions relate more specifically to the right of the trustee "to recover the property," yet as they afford the trustee the right to avoid any preference coming within them, and as trying the question before the referee at this stage is available and efficient, we do not doubt their applicability to the case of objections made by

the trustee to any proof of debt by which priority is claimed under a mortgage. And, as we construe those provisions, a transfer by way of mortgage made by a bankrupt is "voidable by the trustee," provided the following facts concur, namely: First, if the transfer is made within four months before the filing of the petition; second, if the bankrupt is insolvent when the transfer is made; third, if the effect of the enforcement of the transfer will enable any one of the bankrupt's creditors to obtain a greater percentage on his debt than any other creditor of the same class; and fourth, if at the time of making the transfer, or if at the time it was recorded, the person receiving it, or his agent acting therein, had at either of those times reasonable cause to believe that the enforcement of the transfer would effect a "preference"—that is, to say, that its enforcement would give him a larger percentage on his debt than other creditors would receive. As no greater percentage could be received under the transfer if the debtor be solvent and all his debts be paid in full, a creditor cannot be said to have reasonable cause to believe the enforcement of the transfer would effect a preference, unless either at the time the transfer was made or at the time it was recorded he had reasonable cause to believe that his debtor was then insolvent. Hence we conclude that that is what the act must be construed to mean.

We may assume that the transfer or mortgage in this case was made within four months of the filing of the petition in bankruptcy, that at that time the bankrupt was in fact insolvent, and consequently that, if a division of the debtor's assets had then taken place, the Fixture Company would have received a greater percentage on its debt than would other creditors. But this does not dispose of the case, nor entitle the trustee to avoid the transfer, unless either when the transfer was made in January, 1912, or when it was recorded on April 15, 1912, the Fixture Company or its agent had reasonable cause to believe that the enforcement of the transfer would yield it a greater percentage on its debt than the other creditors would receive. Of course, the Fixture Company got security; but that is not the same thing as a "preference" within the statute. Indeed, it is not unusual for a perfectly solvent debtor to give a creditor security.

The vital question of fact in this connection, and which question we have sufficiently indicated, must be determined upon the pleadings and the testimony. We have already set out in full the trustee's pleading in the case, and we do not find that he has alleged the facts necessary to bring his opposition to the claim of the Fixture Company within the grounds upon which the statute permits him to avoid the transfer. His failure to do this becomes entirely manifest when his pleading is compared with the provisions of section 47 as amended. Besides, when we carefully consider the testimony offered in support of the trustee's objection to the transfer, we find nothing to indicate that the Fixture Company or its agent had reasonable ground to believe that the bankrupt was insolvent, or that the enforcement of the transfer would give it a "preference," either when the transfer was made or when it was recorded. Indeed, the testimony is clearly and

explicitly the other way, and it would be unfair to charge the Fixture Company with knowing then what all of us know now. So that there was neither allegation by the trustee in his pleading, nor was proof adduced by him at the hearing, to sustain his right to avoid the transfer upon the grounds for so doing prescribed by the statute, namely, that the Fixture Company, either when the transfer was made or when it was recorded, had reasonable ground to believe that the enforcement of the transfer would effect a preference. It would be quite out of due order to grant relief when the facts upon which it must depend are neither asserted nor proved.

We think the referee was right in refusing to reconsider the claim, and the order sought to be reviewed will be affirmed.

The referee in some measure seems to have based his decision upon the opinion of this court in *Re Lausman*, 183 Fed. 647, 25 Am. Bankr. Rep. 186. That was a very different case, though the facts were not fully stated in the opinion. A creditor of that bankrupt, having an unrecorded mortgage to secure a debt of \$75, tendered his proof thereof as a secured claim. The referee, without objection to the claim being made by anybody, supposing that on its face the proof of debt did not show a right to priority, disallowed it as a secured debt, but allowed it as a general claim. Of this ruling the creditor complained, and sought its review by the court. The trustee never in any way intervened or objected, nor did he make any claim to the mortgaged property under section 47 of the Bankruptcy Act as amended (which provides for gathering in the assets), and a construction of its provisions was neither called for nor made. No creditor appears to have opposed the claim to priority, nor had any creditor fastened a lien upon the mortgage property by attachment or otherwise. Under those circumstances, under section 64 (which regulates the distribution of assets), there was nothing for the court to do but follow the ruling of the Circuit Court of Appeals in *Crucible Steel Co. v. Holt, Trustee*, 174 Fed. 127, 98 C. C. A. 101, which finally construed the Kentucky statute and perfectly covered the case. As we have stated, the facts were not fully set forth in the opinion in the *Lausman* Case. This is much to be regretted, as doing so might have saved two or three of my learned brethren from a misconception of it, notably in *In re Williamsburg Knitting Co.* (D. C.) 190 Fed. 871, *In re Bazemore* (D. C.) 189 Fed. 236, *In re Calhoun Supply Co.* (D. C.) 189 Fed. 537, *In re Dancy Hardware & Furniture Co.* (D. C.) 198 Fed. 336, and *In re Kreuger* (D. C.) 199 Fed. 367.

The referee's orders are affirmed.

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#### In re WEEDMAN STAVE CO.

(District Court, E. D. Arkansas, W. D. November 8, 1912.)

#### 1. BANKRUPTCY (§ 9\*)—STATE INSOLVENCY LAWS—SUSPENSION BY BANKRUPTCY ACT—JURISDICTION OF STATE COURT.

The provisions of Kirby's Dig. Ark. §§ 949-952, authorizing a court of the state to take possession of the assets of an insolvent corporation and

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



distribute the same through its receiver pro rata among its creditors after payment of wages and salaries, which constitute preferred claims, requiring all creditors to prove their claims within a stated time, or be barred, and dissolving all preferences obtained within 90 days, constitute a state insolvency law, which was suspended by Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418); and the appointment of a receiver from a corporation thereunder is absolutely void for want of jurisdiction, and such a receiver may be required to turn over the assets of the corporation to a receiver or trustee appointed by a bankruptcy court at any time thereafter, whether within four months or not.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 7-9; Dec. Dig. § 9.\*]

Effect of national bankruptcy act on state insolvency laws and on assignments for benefit of creditors, see note to *Carling v. Seymour Lumber Co.*, 51 C. C. A. 11.]

2. BANKRUPTCY (§ 76\*)—INVOLUNTARY PROCEEDINGS—ELIGIBILITY OF PETITIONERS—ESTOPPEL.

Participation by a creditor in insolvency proceedings against his debtor in a state court, which was without jurisdiction, does not estop him from afterward joining in a petition to have the debtor adjudged a bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 50, 56, 97, 99, 100; Dec. Dig. § 76.\*]

In the matter of the Weedman Stave Company, bankrupt. On motion for dissolution of restraining order, and to set aside an order requiring a receiver of a state court to turn over property to receiver in bankruptcy. Motion denied.

Proceedings of involuntary bankruptcy were instituted by a creditor in this cause; the act of bankruptcy alleged being that within four months the bankrupt admitted in writing its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground. On the same day the petitioner asked for the appointment of a receiver to take charge of the assets of the bankrupt, which, it was alleged in the application for the receiver, were in the hands of J. N. Doughty, who had been appointed as receiver by the chancery court of Prairie county, Ark., in an action pending in said court instituted under the insolvency laws of the state of Arkansas for the purpose of distributing the assets of said corporation as an insolvent, that the said receiver is about to dispose of the funds in his hands unless restrained by this court from doing so, and that the court require him to pay all the funds in his possession belonging to the Stave Company to the receiver in bankruptcy, to be administered as prescribed by the Bankruptcy Act. Upon the execution of a bond by the petitioner, the court appointed a receiver and granted a temporary restraining order to restrain the receiver of the state court from distributing or disposing of any of the assets which came to his hands as the property of the bankrupt, and requiring him to turn the same over to the receiver of this court, and, in conformity with the usual practice of this court, directed its receiver to apply to the chancellor of the state court for an order directing its receiver to turn over the assets of the bankrupt to him. The receiver of the state court has now moved this court to set aside the order to turn the property over to the receiver in bankruptcy and to dissolve the temporary injunction. There are two grounds alleged for the motion: First, that the insolvency proceedings in the chancery court and his appointment as receiver occurred more than four months prior to the institution of the proceedings in bankruptcy in this court; second, that the petitioner in the bankruptcy proceedings intervened in said cause pending in the chancery court, and is therefore estopped from attacking those proceedings.

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

J. H. Harrod, of Little Rock, Ark., for receiver of state court.  
H. M. Trieber, of Little Rock, Ark., for receiver in bankruptcy.

TRIEBER, District Judge (after stating the facts as above). Does the fact that the proceedings in the state court and the appointment of the receiver by that court were consummated more than four months prior to the institution of the bankruptcy proceedings prevent this court from taking charge of the assets of the bankrupt and require him to deliver them to the officer of this court, when the proceedings in the state court which resulted in the appointment of the receiver were under the insolvency laws of the state of Arkansas?

Counsel for the receiver of the state court relies upon the general statements, found in all the text-books on bankruptcy and in many of the decisions, that:

"If no proceedings in bankruptcy are instituted within four months after the appointment of a receiver by the state court, the proceedings cannot be successfully assailed by a trustee in bankruptcy, subsequently appointed, or by creditors."

On the other hand, counsel in the bankruptcy proceedings contends that:

"While this is the correct rule of law when applied to proceedings in the state court of which that court has jurisdiction, it is inapplicable when that court is wholly without jurisdiction and its decrees, therefore, subject to collateral attack."

And it is claimed that:

"The proceedings in the state court under the insolvency laws of the state of Arkansas are void, because these laws are suspended by the Bankruptcy Act [Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3420)] as to all subjects which are covered by that statute."

An examination of the authorities cited to sustain the rule of law advanced by counsel for the receiver of the state court, as found in the text-books on which he relies, shows that in none of these cases was the jurisdiction of the court questioned; the only question involved in those cases being whether the appointment of a receiver was an act of bankruptcy, a preference, or a lien voidable under sections 67c and 67f of the Bankruptcy Act, and therefore they are inapplicable to the instant case. Are the acts of the state court appointing the receiver absolutely void?

[1] The first question to be determined is whether the Arkansas statute, under which the proceedings in the state court were had, is an insolvency law. What constitutes an insolvency law? The elements of an insolvency law are insolvency, surrender of property, its administration by a receiver or trustee, distribution of the assets among the creditors, and a provision for priorities or other matters not permissible in the absence of such a statute. A provision for the discharge of the debtor from the unpaid balances of his debts is not essential to make it an insolvency law. In *re Curtis* (D. C.) 91 Fed. 737; In *re F. A. Hall Co.* (D. C.) 121 Fed. 992; In *re Salmon* (D. C.) 143 Fed. 395; *Harbaugh v. Costello*, 184 Ill. 110, 56 N. E. 363, 75 Am. St. Rep. 147. By reference to the statutes of Arkansas (sections 949

to 952, inclusive, Kirby's Digest of the Statutes of Arkansas), it will be found that this act contains every one of these essentials. Section 949 provides for preferences for wages and salaries of laborers and employés and prohibits all others; section 950 authorizes the court to take charge of all assets of the insolvent corporation and distribute them pro rata among the creditors after paying the wages and salaries due laborers and employés; section 951 directs all preferences obtained within 90 days, whether by attachment, confession of judgment, or otherwise, to be set aside by the chancery court, and the creditor be required to release his preference and accept his pro rata share in the distribution of the assets of the insolvent corporation; and section 952 requires notice to be given to the creditors to present their claims within 90 days or be barred.

That this act is an insolvency act has been practically determined by the Supreme Court of this state in *Roberts Cotton Oil Co. v. F. E. Morse Co.*, 97 Ark. 513, 135 S. W. 334. Being an insolvency law, it is no longer open to contention that as, since the enactment of the amendatory act of June 25, 1910 (36 Stat. 839, c. 412 [Supp. of 1911 to U. S. Comp. Stat. 1901, p. 1494]), this corporation could have become a voluntary bankrupt or be proceeded against in insolvency proceedings; it suspended the state insolvency law as to this cause. This has been the well-settled rule in the national courts ever since the decisions in *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529, and *Ogden v. Saunders*, 12 Wheat. 213, 6 L. Ed. 606, and has been followed under the present Bankruptcy Act. It would serve no useful purpose to cite the numerous cases of the national courts under the present act. It is sufficient to refer to what was said in *Re Watts & Sachs*, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933.

This rule has been recognized and followed with approval by the highest courts of practically all the states which had the question before them. *Martin v. Berry*, 37 Cal. 208; *Ketcham v. McNamara*, 72 Conn. 709, 46 Atl. 146, 50 L. R. A. 641; *Corner v. Coates*, 69 Ga. 491; *Harbaugh v. Costello*, 184 Ill. 110, 56 N. E. 363, 75 Am. St. Rep. 147; *Littlefield v. Gay*, 96 Me. 422, 52 Atl. 925; *Moody v. Port Clyde Dev. Co.*, 102 Me. 365, 66 Atl. 967; *Lavender v. Gosnell*, 43 Md. 153; *Parmenter Mfg. Co. v. Hamilton*, 172 Mass. 178, 51 N. E. 529, 70 Am. St. Rep. 258; *Foley-Bean Lumber Co. v. Sawyer*, 76 Minn. 118, 78 N. W. 1038; *Sadler v. Immel*, 15 Nev. 265; *Westcott v. Berry*, 69 N. H. 507, 45 Atl. 352; *Potts v. Smith Mfg. Co.*, 25 Pa. Super. Ct. 206; *Id.*, 12 Am. Bankr. R. 392; *Peckham's Assigned Estate*, 35 Pa. Super. Ct. 330; *Mauran v. Crown Carpet Lining Co.*, 23 R. I. 324, 50 Atl. 331; *Second Ward Bank v. Schranck*, 97 Wis. 258, 73 N. W. 31, 39 L. R. A. 569; *Duryea v. Muse*, 117 Wis. 399, 94 N. W. 365; *Steelman v. Maddix*, 36 N. J. Law, 344; *Appeal of Geery*, 43 Conn. 289, 21 Am. Rep. 653; *Orr v. Lisso*, 33 La. Ann. 476; *Barber v. Mexico International Co.*, 73 Conn. 587, 48 Atl. 758. And the Supreme Court of this state has expressly recognized this rule in *Hickman v. Parlin-Orendorff Co.*, 88 Ark. 519, 115 S. W. 371. In that case the question of jurisdiction of the chancery court was not raised in the trial court, nor upon appeal in the Su-

preme Court by either party; but the court, of its own motion, took notice of it, and held the decree of the chancery court absolutely void for want of jurisdiction.

[2] The proceedings of the chancery court being *coram non judice*, and therefore absolutely void, and subject to collateral attack, the petitioner in the bankruptcy proceedings cannot be estopped by presenting its claim to that court. It requires no elaborate citation of authorities to sustain the proposition that consent cannot confer jurisdiction. *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 24 Sup. Ct. 598, 48 L. Ed. 870. In *Hickman v. Parlin-Orendorff Co.*, *supra*, the party had intervened. The chancery court of Prairie county having acted in this proceeding without jurisdiction, the possession of the receiver is wrongful, as much so as if the chancery court should see proper to appoint an administrator, although under the Constitution of this state the probate court alone is authorized to do that. The possession by a receiver thus appointed by a court without jurisdiction makes him a trustee for the benefit of the true owner, the bankrupt corporation in this case, before the appointment of a receiver by this court, and now for the receiver of the bankrupt estate.

The motion of the receiver, asking for a dissolution of the restraining order and the setting aside of the order directing the receiver of the state court to surrender the property to the bankruptcy court, is denied. All expenses incurred by the receiver for the preservation of the property, and compensation for his services to the extent they were beneficial to the estate, will be allowed, when presented to this court, in conformity with the rule laid down in *Randolph v. Scruggs*, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165.

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In re COX.

(District Court, D. New Mexico. June 1, 1912.)

1. BANKRUPTCY (§ 228\*)—REFEREE'S DECISION—REVIEW.

On an application to review a referee's decision in bankruptcy proceedings, all presumptions are in favor of the correctness of the referee's decision as to the facts on conflicting evidence.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig. § 228.\*]

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

2. HUSBAND AND WIFE (§ 40\*)—AGREEMENT TO PAY FOR SERVICES—HUSBAND AND WIFE.

Where a bankrupt, operating a business, placed on his wife the duty of keeping the books and accounts, such act was sufficient to raise an implied promise to compensate her therefor, in the absence of an express contract to do so.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 222; Dec. Dig. § 40.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

**3. BANKRUPTCY (§ 340\*)—CLAIMS—SERVICES.**

Evidence *held* to sustain a referee's finding of a contract by the bankrupt to pay his wife a salary for her services as bookkeeper and accountant in his business.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. § 340.\*]

**4. BANKRUPTCY (§ 116\*)—WIFE'S SEPARATE PROPERTY—EVIDENCE.**

Evidence *held* to sustain a referee's decision that certain real property was the separate property of the bankrupt's wife.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 116.\*]

**5. BANKRUPTCY (§§ 116, 314\*)—OWNERSHIP OF PROPERTY—ESTOPPEL.**

Where a statement of a bankrupt's assets, made to a bank as a basis for credit, did not show that the bankrupt was indebted to his wife for services rendered as his bookkeeper, and included certain real property as belonging to him, but no credit was extended on the faith of the statement, whereupon the husband became a bankrupt, the wife was not estopped by the statement to claim salary unpaid, and also that she owned the real property as her separate estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 469-473, 478, 483-487, 489, 490; Dec. Dig. §§ 116, 314.\*]

In Bankruptcy. In the matter of bankruptcy proceedings of Isaac H. Cox. On petition to review a referee's order allowing two claims for wages filed by Cora E. Cox, the bankrupt's wife, and to review an order declaring certain real property to be the separate property of said claimant. Affirmed.

Summers Burkhart, of Albuquerque, N. M., for trustee.  
M. E. Hickey, of Albuquerque, N. M., for claimant.

POPE, District Judge. This review complains of the finding of the referee upon two matters, each one purely of fact. The first complaint is because of the finding of the referee in favor of a claim of Mrs. Cox, the wife of the bankrupt, for wages as bookkeeper for her husband. This is composed of two items, one a preferred claim for \$255, for the three months immediately preceding the adjudication, and the other a general claim for \$3,605 for services to the bankrupt for several years prior to that time at the rate of \$85 per month. The other complaint is against the decision of the referee declaring Mrs. Cox to hold as her separate property an undivided one-half interest to lots 7, 8, 9, 10, 11, and 12, in block 3, Brownwell & Lail addition to the city of Albuquerque.

[1] As these matters turn upon decisions purely of fact, all presumptions must, of course, as stated in Collier on Bankruptcy (8th Ed.) page 504, exist in favor of the correctness of the referee's decision. Under such circumstances the duty of a reviewing court is very similar to that of an appellate court in reviewing the verdict of a jury or the decision of a trial judge, where the evidence is conflicting. The reports frequently contain expressions showing the deference paid by reviewing courts to the findings of a referee, who has heard the testimony of the witnesses, and has thus been able to judge, from their conduct and demeanor on the stand, and from other cir-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cumstances before him, and not before the reviewing court, the weight to be given such testimony. Thus in *Coder v. McPherson*, 152 Fed. 951, 82 C. C. A. 99, decided by the Circuit Court of Appeals for this Circuit, the Circuit Court of Appeals reversed the District Judge and sustained the referee, remarking that the opportunities of the latter for weighing the testimony were superior to those of the District Judge. Giving to the referee's findings in this case, therefore, all of the presumptions which should attach to them, are the two findings complained of to be sustained?

[2, 3] As to the first of these, allowing the claim of the wife of the bankrupt for services, it is undisputed that during all the time for which charges were made she acted as bookkeeper, collector, and assistant in the business for her husband. This situation, placing upon the wife business duties, would, independent of proof of any express contract, raise an implication of compensation. The wife testifies that there was an express agreement that she was to be paid \$85 per month. There is no direct testimony contradicting this. It is said, however, that the circumstances are sufficient to overcome this direct testimony on her behalf. It is said that the books of account, containing her account for compensation bear earmarks of fraud, in that they, although covering a period of several years, are all written in the same ink, and with apparently the same pen, and thus bear evidence of having been made up for the occasion. It is also said that this account is not indexed, as are the other accounts in the book, thus indicating it to be an afterthought. It is also pointed out that in a statement made by the bankrupt to one of the Albuquerque bankers, shortly before the adjudication, no mention is made of this indebtedness to the wife, although this statement was made up by the wife in her capacity as bookkeeper.

A careful examination of the book does not lead to the conclusion that the account was fraudulently entered. The penmanship and ink are similar to that utilized in other accounts of about the same date, and the failure to index it cannot, under the circumstances, be given the weight contended for. It was Mrs. Cox's purpose evidently not to insist upon the payment of this money from her husband, unless business should justify it. Indeed, during the entire period she drew only \$250 on account. Under such circumstances, the keeping of her account was more in the nature of a memorandum than as a live account, for frequent reference, as in the case of other creditors. While the indexing of these latter was a matter of practical importance, the indexing of her account was not. The same observations apply to the circumstance, upon which the trustee has commented, that part of a page is utilized for her account. The failure of Mrs. Cox to include her account in the statement made to Mr. Strickler is explained by her on the ground that it was not her purpose to insist upon the payment from her husband, had Mr. Strickler given them a further line of credit, enabling them to continue the business. This explanation does not seem unreasonable, and the circumstances do not impress me as precluding the assertion of her claim, when, after a failure to secure an extension of credit, her husband went into bank-

ruptcy. It does not appear that Mr. Strickler or any one else was misled, to act to his injury, by the contents of the statement from Mrs. Cox either in the respect just mentioned or in that to be presently considered. There is, therefore, no element of estoppel operating against the assertion by Mrs. Cox of her claim.

[4] As to the claim that the referee erred in declaring the real estate above mentioned to be the separate property of Mrs. Cox, the facts may be briefly stated. This property was bought the early part of 1905. The record shows that the purchase price was \$575, \$300 cash, and the balance represented by a note for \$275, due June 16, 1905. The initial \$300 was contributed by a person other than Mr. Cox, who, according to the testimony of Mrs. Cox, was joining with her in the purchase of the property. The note for \$275, above mentioned, was signed by Mrs. Cox and her husband; but Mrs. Cox signed first, and it is testified both by her and her husband that his signature was required only by way of security. When the note became due in June, 1905, it was taken up, Mrs. Cox testifies, with money sent her by her father. There are several circumstances which go to sustain the testimony of Mrs. Cox and her husband, to the effect that this property was being acquired by her individually. The receipt given for the first payment ran to her, and not to her husband. She is the first signer on the note for \$275. The deed, when made out, while not in the record, was, as we understand from the argument, made out to her.

As against this it is urged that her father was a mining prospector, who had never upon any other occasion given her anything, and who died not long thereafter, leaving absolutely no estate. It is argued that it is extremely improbable that he could or would have sent her \$275 for this purpose. Combatting this, however, there is the improbability that her husband, who likewise seems at all times to have operated upon little capital, would have been able to let her have the money for this purpose. It is also pointed out that in the statement to Mr. Strickler this real estate is listed as the property of Mr. Cox, rather than of the claimant. It is explained by Mrs. Cox, however, that this listing was purely to assist her husband's credit, and with the intention, had Mr. Strickler extended further credit, that this property should go in with the bulk of her husband's estate in securing a restoration of his financial status.

[5] There being, as above pointed out, no element of estoppel, these circumstances do not impress me as throwing effective doubt upon the truth of the testimony of Mrs. Cox. The referee saw and heard her and her husband upon the stand, and in believing them the court cannot say he was wrong.

The orders appealed from will be accordingly affirmed.

## THE CITY OF MILFORD.

(District Court, D. Maryland. October 9, 1912.)

## 1. MARITIME LIENS (§ 21\*)—REPAIRS AND SUPPLIES—CONSTRUCTION OF STATUTE—"PERSON INTRUSTED WITH MANAGEMENT."

A corporation of Baltimore, which was in possession of a steamer, registered elsewhere, under a contract of purchase, although it had not paid the purchase price, and the title was retained by the vendor, was a "person intrusted with management," within Act June 23, 1910, c. 373, § 2, 36 Stat. 604 (U. S. Comp. St. Supp. 1911, p. 1192), and presumptively authorized to order repairs and supplies; and persons furnishing the same were entitled to a lien on the vessel therefor, in the absence of knowledge on their part, or anything to put them on inquiry, as to the terms of the contract, as required by section 3 of the act.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 26; Dec. Dig. § 21.\*]

## 2. MARITIME LIENS (§ 24\*)—REPAIRS AND SUPPLIES—CONSTRUCTION OF STATUTE.

The provision of Act June 23, 1910, c. 373, § 1, 36 Stat. 604 (U. S. Comp. St. Supp. 1911, p. 1192), that, to entitle one furnishing repairs and supplies to a vessel to a maritime lien therefor, it shall not be necessary to allege or prove that credit was given to the vessel, in the absence of any agreement on the subject, renders it immaterial whether or not the furnisher intended to give credit to the vessel.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 30; Dec. Dig. § 24.\*]

Maritime lien for supplies and services, presumption as to credit to vessel, see note to the *George Dumois*, 15 C. C. A. 679.]

In Admiralty. Suit to enforce maritime liens against the steamer *City of Milford*; Stephen C. Puckette, claimant. Decree for libelants.

Arthur D. Foster and John Henry Skeen, both of Baltimore, Md., for libellant.

J. Craig McLanahan, of Baltimore, Md., for intervening petitioner. Wells & McCormick, of Baltimore, Md., for respondent.

ROSE, District Judge. The original libelants, and those who subsequently filed intervening petitions or libels, will be referred to collectively as the libelants. For repairs made, supplies furnished, or services rendered they claim maritime liens upon the *City of Milford*, a steamboat enrolled at the custom house of the port of Georgetown, in the District of Columbia. It will be called the ship. Stephen C. Puckette, a resident of the state of Tennessee, is the claimant. He will be referred to as such. The Maryland Steamboat Company is a Delaware corporation. It will be called the company.

[1] When the indebtedness to the libelants arose, the company was an agreed purchaser of the ship. As such it was intrusted with the management thereof at the port of supply; that is, at Baltimore. There is no question that it is liable to the libelants for the amount of their claims. Orders for supplies, repairs, and services were given sometimes by the master of the ship, sometimes by its officers or members of its crew, by direction or with the knowledge and approval of the master, and sometimes by the company itself. At the time these

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



debts were contracted the company's possession of the ship was neither tortious nor unlawful. If these facts stood alone, under the express provisions of the act of June 23, 1910 (36 Statutes at Large, 604), the libelants would have maritime liens upon the ship. The claimant says, however, there is another side to the story. He produces the written instrument by which the company was given possession and management of the ship. It is dated the 24th of June, 1912. It recites that the claimant had that day sold the ship to the company for \$26,500, of which \$1,000 was paid in cash. For the remainder the company had given the claimant its promissory notes, one of which, for \$1,000, was payable on the 9th day of July, 1912, and four others, for \$6,125 each, were payable, respectively, on the 24th day of July, August, September, and October, 1912. The \$1,000 note was paid. Nothing was paid on any of the others.

The original libel in this case was filed on the 30th of July. At about that time the company went into receivers' hands. The agreement between the company and the claimant provided that until the notes were fully paid the latter was to retain title to the ship. As further security the company assigned to him subscriptions to its stock to the amount of upwards of \$26,000. Until default the company was to have the use of the ship for operations on the Chesapeake Bay. So long as any of the purchase money remained unpaid it was to remain under the control and management of the engineer of the claimant. Such engineer continued to hold that position on board the ship during the time it was in the company's possession. So far as the libelants were concerned, he appeared to be the ship's engineer and nothing more. There was nothing to suggest to them that he was not, like the other officers and the crew, a mere employé of the company.

On or before the 1st of July, 1912, the company was required to furnish good bond in the sum of \$5,000, conditioned to protect the claimant against suit or damage by reason of liens or other claims against the ship arising through or under it. The bond was given. The amount of the claims proved in this case does not reach \$2,500. The real parties in interest to this controversy are the libelants and the surety on this bond. The latter is carrying on the litigation in the name of the claimant. It is clearly entitled so to do. The claimant says that the libelants cannot hold the ship. He contends that by the exercise of reasonable diligence they could have ascertained that, because of the terms of the agreement for sale of the ship, the company was without authority to bind it.

There is nothing in the evidence to suggest that any of the libelants had notice that the company was not the sole owner of the ship. A number of them proved that, before extending credit, they were told that the company owned the ship. These statements were made by its agents, acting for it in the premises. Only one witness was produced on behalf of the claimant. He is the gentleman, who during the short business life of the company, was its vice president and general manager. Some of the libelants had testified that he told them that the company owned the ship. He says that in so testifying some of them

are mistaken. He is not prepared to deny that he may have made such a statement to the representative of one of the libelants. He does not remember whether he did or did not. It is quite possible that he does not accurately recall everything that in this connection he said to some of the others. I am persuaded that those witnesses who have testified that he and the other agents of the company led them to believe that it was the owner of the ship have testified truthfully and accurately.

The claimant's engineer in person gave the orders for some of the supplies, repairs, or services. He approved the bills for others. He was not produced as a witness, nor was the claimant, or any agent or employé of the claimant, put upon the stand. The latter says that, had the libelants exercised the reasonable diligence required by the statute, they would have made further inquiry before extending credit. He points out that the company's business office was in Baltimore. That was the port of supply. It would have been easy for the libelants, who were all Baltimoreans, to have made inquiries at its office. If they had, the person to whom they would have addressed their questions presumably would have been the gentleman who told several of them that the company owned the ship.

It does not appear that any inquiries made at the company's office would have given the libelants any other or different information from that which they received. Doubtless, had the libelants cross-examined the general manager of the company as to whether his company had fully paid for the ship, and, if it had not, what rights the vendor had retained therein, they would have received truthful answers. They could have had the records of the Georgetown custom house searched. They could have there learned who appeared to be its owner. They might or might not have been able to find him, or some agent of his. If they had come up with either, they could have learned the true state of the case.

Did the act require them to do all this? Its purpose was to simplify the law. There was need for it. The battle as to the liability of a ship for materials and services furnished it has been going on for centuries. Judge Lowell, in that wonderfully learned and exhaustive opinion of his in *The Underwriter* (D. C.) 119 Fed. 713, tells the story of the long struggle. He shows how the questions of substantive law and of policy involved had in the course of hundreds of years become confused and complicated, by being mixed up with differences as to rules of procedure and with disputes as to jurisdiction between the courts of admiralty and those of common law. Rights of materialmen might depend upon whether, when they furnished supplies, the ship was in a foreign or in a domestic port. In this country a port of another state was a foreign port. A materialman at Buffalo, who there put supplies on board of a ship owned in New York City, might not have a lien. If like supplies were furnished the ship when she was lying in Jersey City, within sight of the owner's office in Manhattan, the ship would be bound for them. The distinction between foreign and domestic ports had come to be without substantial reason. Congress, in the act referred to, has abolished it.

As the law stood before Congress spoke, a materialman would under some circumstances have a lien, if he could prove that he had given credit to the ship, while he would not have it, if it appeared that he had trusted the owner. When it became necessary to go into an inquiry as to whether he had furnished the supplies on the credit of the ship or of the owner, the less scrupulous he was the better the chance of his getting his money. Congress said that for the future it should not be necessary to allege or prove that credit was given to the vessel.

Compliance with the requirement of a state statute was in many cases a necessary condition precedent to the successful assertion of a lien against the ship. Those statutes differed. Many, if not most, of them required lien claims to be filed in some state office, yet the liens were not enforceable in the state courts. Such requirements had ceased to serve any useful purpose. The act in terms superseded the provisions of all such state statutes.

Under some circumstances, as the law formerly was, a supply man might have a lien, had he made his bargain with the master, and not with the owner. It is possible that under some other states of fact the reverse might have been true. The act declares that the lien shall exist when the supplies had been furnished upon the order of the owner or owners of a vessel, or of a person by him or them authorized. It says that authority from the owner to procure supplies shall be presumed to have been given to the managing owner, the ship's husband, the master, or any person to whom the management of the vessel at the port of supply is intrusted, including therein such officers and agents, when appointed by a charterer, by an owner *pro hac vice*, or by an agreed purchaser in possession of the vessel.

The general purpose of this enactment is plain. Hereafter, when supplies are furnished for a ship to one lawfully having the management of the ship, the presumption is that the ship is liable for them. If the materialman knows nothing about the authority of the person in possession of the ship, except that he visibly has the management of it, he may furnish the supplies, and the ship will be bound for them. But he may know something more. He may have knowledge that the person intrusted with the management of the ship has, by agreement with the real owner of the ship, no right to subject it to liens. If, under such circumstances, a materialman furnishes supplies, he cannot hold the ship. If he could, he would profit by his own wrong. Even when he does not know certainly that the person having the management of the ship has no authority to bind it, he may have learned such facts or circumstances as will suggest to him the probability that such may be the case. If so, he may not shut his eyes and his ears to further inquiry. He cannot say:

"I admit that I heard something which, if true, indicated that the person who was ordering the supplies had no right to bind the ship for them; but I did not know whether that which I had heard was true or not. I could easily have made inquiries, and, if I had inquired, I would have found out the truth; but I did not do so."

He who is so careless of other men's rights will find that his own will be determined, not by what he absolutely knew, but by what it was in his power to find out, if he had acted with ordinary and reasonable care. And so the act provides that nothing in it shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of the charter party, or agreement for sale of the vessel or for any other reason, the person ordering the repairs, supplies, or other necessities was without authority to bind the vessel therefor.

Before this proviso can have any application, something must have occurred to put the furnisher of the supplies upon inquiry. The proviso is a proviso. It is to be understood in such sense as will harmonize it with the general purpose of the act. That purpose was to make the management of a vessel at its port of supply presumptive evidence of the right to bind it for supplies there furnished. That purpose prevails unless it shall be shown that the person so managing the vessel was unlawfully or tortiously in possession or charge of it, or unless something has been brought to the knowledge or attention of the person furnishing the supplies which in honesty and good conscience puts upon him the duty of inquiry as to whether the person who has the management of the ship has the right to pledge its credit. *The Iola* (D. C.) 189 Fed. 979; *The Ha Ha* (D. C.) 195 Fed. 1013; *The Thomas W. Rodgers* (D. C.) 197 Fed. 772.

The cases cited by the learned advocates for the claimant have been carefully considered. Those of them in which the facts are at all similar were decided before the radical change of law brought about by the enactment of the act of 1910.

It is neither necessary nor appropriate to attempt to suggest what circumstances will be sufficient to put a supply man upon inquiry. In this case it is not contended that there were any. Moreover, the agent of the claimant was on the vessel, knew that all these supplies were being furnished to it, himself ordered an appreciable portion of them, and did nothing to warn those who were supplying them that the ship was not to be bound for them.

[2] It is contended that in any event the intervening libel of *Minton & Denton* must be dismissed. One of the firm had testified that the amount of their claim was the correct amount due by the ship; that the bill had been made out to the ship in accordance with what he said was the custom. He was then asked:

"Whom did you trust, to whose credit did you sell these goods—the steamer's credit, or the Maryland Steamboat Company's credit?"

He answered:

"The Maryland Steamboat Company, as owners."

He subsequently said that he had given credit to the ship. The larger part of his bill was actually ordered by the engineer, who was the actual, although, so far as the libelants were concerned, the undisclosed, agent of the claimant.

The provision of the act which says that it shall not be necessary to allege or to prove that credit was given to the vessel was intended in part to render irrelevant inquiries made of the witness as to his state of mind at the time he furnished the supplies.

Taking into account the whole testimony of the witness and all the circumstances, the reasonable conclusion is that his firm, like the rest of the supply men, have a maritime lien upon the ship for the amount of their claim.

A decree will be entered in accordance with the conclusions stated in this opinion.

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In re DURAN MERCANTILE CO.

(District Court, D. New Mexico. October 5, 1912.)

No. 12.

(*Syllabus by the Court.*)

1. BANKRUPTCY (§ 482\*)—FEES OF ATTORNEYS—"COST OF ADMINISTRATION."

Whether fees claimed by the attorney for the bankrupt are allowable depends upon whether the services rendered were for "cost of administration"; that is, whether as rendered they conduced to the benefit of the estate and its prompt administration.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874-876, 897; Dec. Dig. § 482.\*]

For other definitions, see Words and Phrases, vol. 2, p. 1640.]

2. BANKRUPTCY (§ 317\*)—FEES OF ATTORNEYS—REDUCTION IN TAXES.

Under this rule services by the attorney for the bankrupt in securing a reduction in the taxes charged against the estate are properly for compensation out of the estate, where rendered just before bankruptcy proceedings and with the view thereto, and where the effect was to reduce considerably what would otherwise have been a paramount lien upon the estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 493-495; Dec. Dig. § 317.\*]

3. BANKRUPTCY (§ 482\*)—FEES OF ATTORNEYS—SECURING STAY ORDER—DRAWING PAPERS—ATTENDING BANKRUPT BEFORE REFEREE.

Under this rule, and for reasons similar to those last given, services in securing a stay order against the prosecution of an attachment suit in the state court, pending at the date of adjudication, are properly considered in fixing the fee, as are services in drawing the schedules and other papers necessary to the adjudication, and services necessarily performed in attending the bankrupt before the referee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874-876, 897; Dec. Dig. § 482.\*]

4. BANKRUPTCY (§ 482\*)—FEES OF ATTORNEYS—SECURING DISCHARGE.

Services rendered the bankrupt in securing his discharge are no part of the "cost of adjudication," and may not be allowed for in fixing attorney's fees.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874-876, 897; Dec. Dig. § 482.\*]

5. BANKRUPTCY (§ 482\*)—FEES OF ATTORNEYS—AMOUNT.

In the present case, *held*, that \$50 was ample compensation for preparing and filing schedules and other papers necessary to the adjudication, \$25 for attending the bankrupt before the referee, and \$25 for se-

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\*For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes 199 F.—61

curing the stay order against the prosecution of the case in the state court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874-876, 897; Dec. Dig. § 482.\*]

In the matter of bankruptcy of the Duran Mercantile Company.  
On motion to fix fees of attorney for bankrupt.

Renehan & Wright, of Santa Fé, N. M., for attorney.

Frances C. Wilson, of Santa Fé, N. M., for trustee.

POPE, District Judge. This is a matter perhaps of importance as a precedent, as there will be from time to time this question of attorney's fees for bankrupts coming before the court. The court will therefore commit to record its views as to this particular fee.

It is, of course, realized that charges in any particular case are regulated by its peculiar facts, yet there are general considerations which affect the matter of compensation to bankrupt's attorneys in all cases. The bankruptcy law, of course, is framed with the idea of administration with the greatest possible economy, and, as expressed in some authorities, the purpose of the act is to administer so that allowances shall be made sparingly and with great caution. The fee here claimed is \$250 in an estate involving some \$4,500.

[2] The first service which the court has to deal with is that in connection with the reduction of taxes. While this appears to have been rendered prior to the adjudication, yet, according to the undisputed testimony, it was rendered as a part of the consultation with the bankrupt, and with the view to these bankruptcy proceedings. It involved a trip to Estancia, a point some 50 miles away, with a view to examining the records, in order that this charge, which, being for taxes, would be a preferred claim upon the assets, might be reduced, and thus leave more available to the general creditors.

Now, while it is true that counsel fees incurred by the parties who subsequently became bankrupt, and not tending in any way to the advantage of the future estate, cannot be deemed a proper charge, in cases such as this, as a part of counsel fees allowable under the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), this particular service was for the benefit of the estate, and was given looking towards a bankruptcy proceeding, and in order that there might be available greater assets applicable to general as distinguished from preferred creditors. It would thus seem that that class of services is properly included in the compensation allowed the attorney of the bankrupt under the Bankruptcy Act. For this service it is my view that a reasonable fee would be \$75. This is not too much, for counsel was necessarily absent from his office for a couple of days on the trip to Estancia. In addition, the benefit accruing to the estate was considerable. The trip and the subsequent consultations with the district attorney resulted in a tax charge of \$600 or \$700 being reduced probably a half, thus benefiting this estate some \$350. For this it would seem that \$75, even on the basis of

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

allowing these claims sparingly and with great caution, is not improper.

[3] The next service was for drawing and filing the schedules and other court papers. Ordinarily the court would feel in these bankruptcy cases that for this class of service, which is largely clerical, a fee of \$25 would be sufficient. These schedules, as a rule, can be made out by the debtors themselves, if they have reasonable intelligence, and the utmost that can be required is perhaps an occasional consultation with their attorney as to what is a just claim, and his assistance in entering the schedules upon the proper printed forms.

This case, perhaps, calls for larger compensation, in that it was a partnership matter, and in that these bankrupts lived at a great distance from Santa Fé, entailing some correspondence. The testimony also is that it took some four or five days to complete the schedules. While this amount of time may seem excessive, yet, after all, the undisputed testimony shows that this amount of time was taken. There may have been other circumstances that required it. The court, therefore, in view of the facts alleged and shown, will in this case allow \$50 as a reasonable charge for the preparation and filing of these schedules.

The next claim is for attending the bankrupt on several days before the referee. The court deems this attendance, if really for any great length of time, as largely unnecessary. There is nothing to show, either from the record or from the oral testimony, that there was any attack made upon the good faith of these bankrupts. Their presence before the referee was purely for the information of creditors. Presence of their counsel was hardly necessary, unless, perhaps, for the first day, because all they had to do was to tell what they knew about the business, and, if their failure was an honest one, no advice was necessary as to how to tell the truth. In this class of cases the court will consider, unless exceptional circumstances are shown, that an allowance of \$25 for assistance by the attorney to the bankrupt rendered before the referee is reasonable, and that will be allowed in this case.

Now, as to the next item, the matter of the stay order secured against the attachment proceedings brought by one of the creditors in the district court of Torrance county, the court's view is that this is compensated properly out of the estate. It goes to the administration of the estate that this suit should be arrested; otherwise, the assets of the estate will be diverted, and not applicable to this proceeding. The work thus involved, however, was very small. The files show that there was a petition presented and a stay order granted the same day, with leave to the attachment creditor to move to vacate it later, if so advised. This was never attempted, and therefore it stood. The court would think that the securing of such an order, which is ordinarily granted ex parte and as a matter of course, would be so formal a service as ordinarily to call for not more compensation than \$25. That will be allowed here.

[1, 4] The only remaining item of service is for securing the discharge of the defendant, which involved the filing of the petition,

giving the proper notice, and securing of an order of discharge. The authorities seem to differ as to whether this is a proper charge against the estate. In *re Brundin* (D. C.) 112 Fed. 306; In *re Christianson* (D. C.) 175 Fed. 867. The wording of the statute—Bankruptcy Act, § 64b (3)—is “for cost of administration,” including an attorney’s fee for one attorney for the bankrupt in voluntary cases. When, therefore, we look at the attorney’s fee, we must look at it in the light of the question as to whether or not it is “cost of administration”; that is, whether the services rendered went to the benefit of the estate or the progress of the administration of the estate. Now, the discharge of a bankrupt is a collateral matter. If he does not care to be discharged, he need never be, and in that event the estate will nevertheless be closed. His discharge is of no relevancy to the creditors. It is a matter that concerns him and his future, not the estate. I think, therefore, that the cost for this is not to be allowed as part of the compensation of the attorney for the bankrupt, and it will be accordingly disallowed.

[5] The total amount allowed in this case, in view of two unusual elements of expense, to wit, the trip to Estancia and this application for a stay order in the state court, will therefore be \$175. Relieved of these two items, the compensation would be only about \$75, and the court’s view is that in these cases an allowance of \$75 or \$100 is ordinarily quite ample for the services, largely formal, which attorneys for bankrupts will be called upon to render as a part of the cost of administration.

It will be noted that this is perhaps twice as much as is allowed in some jurisdictions. In *re Covington* (D. C.) 132 Fed. 884; In *re Talton* (D. C.) 137 Fed. 178; In *re Brundin* (D. C.) 112 Fed. 306; In *re Kross* (D. C.) 96 Fed. 816; In *re Carolina Cooperage Co.* (D. C.) 96 Fed. 950. It thus leaves a considerable margin for what has been said on the hearing as to the difference in the cost of personal and professional maintenance as between this and other sections.

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#### CONSTANTINE & PICKERING S. S. CO. v. WEST INDIA S. S. CO.

(District Court, S. D. New York. October 30, 1912.)

##### 1. SHIPPING (§ 54\*)—CHARTERER’S LIABILITY FOR INJURY TO VESSEL—MOORING TO PRIVATE BUOYS.

A charterer, under a charter requiring the vessel to discharge at any dock designated by the consignee, but where she could “lie always afloat,” who directs her to moor for discharge to private buoys, where she is injured by taking bottom because of the shallowness of the water or the dragging of the buoys, is not liable as a wharfinger, who is bound only to exercise reasonable care and diligence for the safety of his berths, but for breach of the express terms of the charter, which required him to furnish a place where the vessel could lie afloat under any conditions reasonably to be anticipated.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 219-221; Dec. Dig. § 54.\*]

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep’r Indexes



2. SHIPPING (§ 54\*)—LIABILITY OF CHARTERER FOR INJURY TO VESSEL—CONTRIBUTORY NEGLIGENCE.

In such case, however, the charterer may lessen the amount of damages for which he is liable, by showing that the navigators of the vessel, after knowledge of the danger, negligently failed to take any measures to prevent the injury.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 219-221; Dec. Dig. § 54.\*]

In Admiralty. Suit by the Constantine & Pickering Steamship Company, owner of the steamship Kingswood, against the West India Steamship Company, for breach of charter party. The S. W. Bonsall Timber Properties, Limited, was impleaded by respondent. On final hearing. Decree for libellant for half damages.

The libel (for breach of charter party of steamship Kingswood) was brought by owners to recover from charterers (a) compensation at a rate higher than the charter rate for detention and use of the vessel after expiration of time charter, and during a period when the market for vessels of the class had risen; and (b) damages caused by the steamer's taking the ground while moored to two buoys in the vicinity of Bergen Point, Newark Bay, where she had been directed to moor and unload while under the charter party, which contract contained the proviso that at the port of discharge steamer should proceed "to such anchorage or safe dock to discharge cargo as ordered by consignees. Steamer, however, to lie always afloat." The respondent, admitting itself to be the charterer of the Kingswood, alleged that the vessel moored off Bergen Point by order of the subcharterers and for the purpose of discharging the subcharterers' cargo, and accordingly by petition brought into the suit the above-named Bonsall Timber Properties, Limited. At the trial respondent admitted its liability for the detention and use of the vessel at a rate of compensation above that provided for in the charter, and on this question agreed to go to a reference. The second item of libellant's alleged damages was therefore the only matter litigated.

John M. Woolsey, of New York City, for libellant.

Clarence B. Smith, of New York City, for respondent.

Adam K. Stricker, of New York City, for Bonsall Timber Properties, Limited.

HOUGH, District Judge (after stating the facts as above). The Kingswood came to the mooring place complained of on October 31, 1911. During the preceding summer the Bonsalls had at their own expense established two buoys in front of their place of business at Bergen Point and on Newark Bay, a short distance below the railway bridge of the New Jersey Central Road. It is shown that the buoys were located under the direction of the supervisor of anchorages, and on June 23, 1911, mariners were officially notified that two "first-class can white" mooring buoys had been established "in about 19 feet of water," and were to be "maintained continuously by the S. W. Bonsall Timber Properties, Limited, of New York City and Bergen, New Jersey."

According to the charts in evidence, the buoys were actually situated in about the depth of water given (and perhaps a little more) at mean low tide, but very near much shoaler water. The buoys lay in a line approximately north and south, with the channel to the west-

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ward, and I think it evident, according to the chart soundings, that a vessel drawing 11 feet would take the ground on her easterly side, if she drifted or moved 100 feet easterly from the line of buoys. It would seem that soundings in a place like Newark Bay could not long remain reliable; but there is no better evidence before the court.

The Kingswood is a vessel of 1,205 tons net, and the only craft of her size which down to the time of trial ever moored to these buoys. Pursuant to orders given by the subcharterers (Bonsalls) the Kingswood moored head and stern, pointing northerly, on October 31st. The first mate declares that:

"As soon as we tied up, we dropped the lead over, and found it was 10 feet just inside of the ship on the shore (i. e., easterly) side of the vessel."

It is alleged in the libel that on—

"November 1st, while the vessel was moored to these buoys, they dragged, and the vessel took the ground, doing certain damage to her hull, shaft, and machinery."

The depositions of the master and mate of the Kingswood satisfy me that the first dragging did occur on November 1st, although the witnesses sometimes say that it happened on the day of their arrival, and at other times on the day alleged in the libel. The matter is only important in ascertaining when the officers of the Kingswood took their first additional measure of precaution. It is believed that they did nothing until November 1st, when, having observed that the "buoys began dragging home" when we "commenced wheeling on the head mooring," they dropped the port anchor. Any investigation would have shown that the danger to be anticipated (if any) was a soft mud bank very near the vessel's starboard side, and the anchor on a short cable dropped perpendicularly from her hawse pipe was useless to prevent stranding under the combined influence of a northerly or westerly wind and the ebb tide.

As matter of fact, the wind shifted (according to the record) to northwest about midnight of October 31st, and blew mostly from the north and northwest during all of November 1st. On that day the Kingswood's master notified his charterers, not that he was aground, but that he had been informed that his "steamer is lying on a line of pipes communicating with" certain oil works on the adjacent shore. The captain testifies that his vessel got aground on the morning of November 1st, but that did not prevent his leaving the ship and staying away most of the day, and he admits that she was "lightly on ground." The weather record shows no wind on November 1st above 34 miles per hour, and that only for a brief period. From all the testimony hitherto considered, I am not persuaded that any damage resulted from the grounding of the Kingswood on November 1st, if such grounding occurred.

For the succeeding six days the wind was prevailing from west to north, and on November 7th it blew all afternoon and evening quite strongly from those directions, rising as high as 64 miles per hour. It is testified that this wind blew the vessel "further ashore," and, while no physical injuries were discovered at the time, it is asserted

that later (without having been on ground in the meantime) it was discovered that certain pipes were broken and the cement in the neighborhood of the ballast tanks displaced.

When the master was examined (by deposition), he was shown what purported to be "a copy of letter dated November 8, 1911, addressed to" Bonsalls. He identified the copy letter, and it was marked "Exhibit No. 10." But this exhibit, when shown to the court, bears date November 1st, and contains a notification that the steamer "is lying aground, and I am informed resting on a line of pipes from the oil works." During all this time the Kingswood was being rapidly unloaded, the representatives of Bonsalls were on board daily, and they all depose that no oral complaint was made to them, or any of them, by the master or mate.

That these mooring buoys were capable of being moved by the action of the elements alone appears from what occurred during the last winter, when they were admittedly shifted from their position by the action of ice. Considering, therefore, the high wind of November 7th, and the size of the Kingswood, and the subsequent history of the buoys, I am satisfied that she did on that day take the ground. That under such circumstances contact with the bottom would cause injury is probable, but the only definite piece of damage sworn to at this hearing is given by the engineer; but this is enough to warrant an interlocutory decree, without expressing any final opinion as to whether such grounding as occurred caused any substantial injury. Obviously, for whatever damages the Kingswood sustained by reason of an unsafe place to discharge the subcharterer (Bonsalls) is responsible.

[1] By analogy, the liability of a wharfinger has been invoked in favor of libellant; but this does not go far enough, for a wharfinger—"does not guarantee the safety of vessels coming to his wharf, but is bound to exercise reasonable diligence in ascertaining the conditions of the berths thereat, and if there is any dangerous obstruction to remove it, or give due notice of its existence to vessels about to use the berths." *Smith v. Burnett*, 173 U. S. 430, 19 Sup. Ct. 442, 43 L. Ed. 756.

See, to the same effect, *Smith v. Havemeyer* (C. C.) 36 Fed. 927; *Heissenbuttel v. Mayor*, etc. (D. C.) 30 Fed. 456.

The charterer's liability does not rest on an implied contract, as does that of the wharfinger, but on the express terms of his charter party, which is to furnish, not only a place which he believes to be safe, but a place where the chartered vessel can discharge "always afloat." It is, I think, proven that with a wind of 64 miles and an ebb tide these mooring buoys could not sustain the Kingswood any more than they did the next winter's ice. In this harbor and in the month of November such winds are to be expected, and it follows that the charter obligation was not fulfilled by tendering a berth where the steamer could not lie afloat under conditions reasonably to be anticipated.

[2] Upon this breach of contract libellant rests, and up to a certain point rightly; but even a tort-feasor may lessen the amount of damages for which he is responsible by showing negligence, or even lack

of diligence, on the part of the person wronged, in failing to take steps to lessen certain or even probable damages. The Antonio Zambrana (D. C.) 70 Fed. 320; Scott v. Cornell Steamboat Co. (D. C.) 59 Fed. 638; Pennsylvania R. Co. v. Washburn (D. C.) 50 Fed. 335. The same principle applies here. If the mate's testimony is accepted, he knew before anything happened that there were but 10 feet of water on his starboard side. Both master and mate knew within 24 hours of arrival that the mooring buoys did not hold firm. It was perfectly possible, by moving the ship, to put out an anchor ahead, so that it would hold; but nothing was done for seven days of pleasant weather, until they were caught in a very ordinary gale of wind for the time of year. In my judgment the conduct of those in charge of the Kingswood invited disaster.

The libellant is entitled on this branch of the case to recover but half damages, for which a decree will pass against both the respondent and the Bonsall Timber Properties, Limited; execution to proceed in the first instance against the Bonsall Properties, and any unrecovered balance to be paid by respondent. No disposition is made of the question of costs at present, until it shall appear whether libellant is able to prove any substantial damage proximately caused by the grounding of November 7th.

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#### THE NEWPORT NEWS.

(District Court, S. D. New York. October 31, 1912.)

##### 1. SHIPPING (§ 141\*)—DAMAGE TO CARGO—"PERILS OF THE SEA."

Rough seas, although not extraordinary, are sea perils, and, if sufficient to account for damage to cargo properly stowed, the loss is within the exception of such perils in bills of lading.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 493, 497-499; Dec. Dig. § 141.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5295-5302.

Loss by perils of the sea, see notes to The Dunbritton, 19 C. C. A. 465; Southerland-Innes Co. v. Thynas, 64 C. C. A. 118.]

##### 2. SHIPPING (§ 138\*)—DAMAGE TO CARGO—HARTER ACT—ERROR IN MANAGEMENT OF VESSEL.

Cargo of iron and wire, stowed in the hold of a steamship on a voyage from New York to Buenos Ayres, on arrival was badly rusted by sea water, which entered the hold through sounding pipes extending from the deck to the bilges, normally closed at the top by brass caps screwed into the pipes. During several days of very rough seas, which washed over the deck and carried away a part of the deck load, these caps became displaced and lost, and water entered the hold to the depth of several feet. The evidence showed that the deck cargo was properly stowed, and did not cause the displacement of the caps, but that they probably became loosened by the straining of the vessel. This, the officers testified, would tend to loosen them, yet it appeared that no inspection was made of them, except when the soundings were taken each morning. There was no doubt that the vessel was seaworthy when the voyage commenced. *Held*, that the damage was proximately caused by the failure of those in charge to make more frequent inspection during the stormy weather, which was an error in the management of the vessel,

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and for which she was exonerated from liability under section 3 of the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]).

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 492; Dec. Dig. § 138.\*

Statutory exemption of shipowners from liability, see notes to *Nord-Deutscher Lloyd v. President, etc. of Insurance Co. of North America*, 49 C. C. A. 11; *Ralli v. New York & T. S. S. Co.*, 83 C. C. A. 294.]

In Admiralty. Suit by the Sea Insurance Company and others against the steamship *Newport News* for injury to cargo. On final hearing. Decree for claimant.

William Harrison, of New York City, for libelants.

J. Parker Kirlin, of New York City, for claimant.

HOUGH, District Judge. On a voyage from New York to Buenos Ayres, beginning on February 7th, the *Newport News* carried in one of her holds a considerable quantity of manufactured iron and wire. This cargo was on the bottom, and on arrival at destination was found badly rusted, while both cargo and ship's sides showed traces of water rising, it is said, as high as six feet above the bottom.

On this voyage there was deck cargo of between 500 and 600 barrels of rosin, immediately above the hold containing the injured iron. It is admitted that during the voyage the caps or plugs of the sounding pipes, communicating between bilges below the cargo and the main deck on which the rosin was stored, had become displaced, and water had poured down these pipes, carrying with it rosin. In result the water was sufficient to cause the injury complained of, and the rosin prevented timely removal by clogging the pipes and the approaches thereto.

The caps or plugs of the sounding pipes are of brass, formed to be screwed into the top of the pipes by means of a key. When in place they are flush with a flange, which is substantially the top of the pipe, and the flange itself rises perhaps an eighth to a quarter of an inch above the deck. By the routine of ship's duty, the carpenter should remove these caps each morning, and take soundings to ascertain whether the bilges are substantially dry, and it is the duty of the carpenter, under the supervision of the first mate, to replace and screw home the caps after this investigation.

Shortly after the vessel left New York, the carpenter fell ill, and so remained for a considerable time. During his illness the first officer declares that he performed this duty himself. The deck cargo of rosin was contained in barrels, old and of no great strength.

Within 12 hours after leaving port the *Newport News* encountered heavy weather, which lasted almost without intermission for about two weeks. I do not think that the honesty of the logbook can be attacked, and credence is given to repeated entries such as the following:

"February 8. Strong gale, with violent squall, very high, confused seas, vessel laboring and straining heavily, and shipping huge seas fore and aft,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

washing part deck cargo overboard. \* \* \* Huge seas swept vessel, breaking away rail of coal bulkhead and port bridge deck, and washing coal overboard."

"February 11. Vessel rolling and straining heavily and shipping very heavy water over all, washing part deck cargo overboard. Shifting boards used for securing deck cargo broken and washed overboard."

"February 15. Vessel pitching and rolling heavily, and shipping very heavy water over all, breaking deck cargo adrift, and washing part overboard."

"February 21. Vessel shipped huge sea, breaking deck cargo adrift and jamming steering gear."

Further excerpts are unnecessary. The evidence identifies the period when water got into the hold as some hours before 6 a. m. of February 12th, when the log records:

"Found plugs out from sounding pipes in the Nos. 4 and 5 tanks and after bilge. Sounded them, and found 1 ft. in No. 4," etc.

Subsequent investigation at Buenos Ayres showed that there must have been far more than a foot of water in the hold, and that the reason why the additional depth was not discovered was that rosin choked the sounding pipes. It is believed (though accuracy is impossible) that water, mixed with rosin, had been pouring down these pipes for some hours before discovery. The hour of discovery and notation in the log, taken in connection with the rest of the evidence, shows that no examination was made of these plugs or caps, except in the morning of each day, when the mate, or carpenter, or both, made their rounds.

The violence of the sea was sufficient to pick up and throw overboard whole barrels of rosin, of the great weight of which articles judicial notice is taken. The barrels themselves were broken, and the contents spread over the deck, and by the breaking of barrels the compact stowage of the deck cargo was destroyed. By the time comparatively calm seas were reached, some 200 barrels of rosin had been lost out of a total of about 800.

It is evident that this damage was proximately caused by one of three things, viz.: (1) Negligent stowage of the deck cargo; (2) peril of the sea (against which the bills of lading properly protect the ship); or (3) fault or error in the management of the vessel, within section 3 of the Harter Act.

It would not be useful to recite the evidence regarding the stowage of the rosin. There is nothing in the case to contradict the statements from the ship that it was well and sufficiently stowed, securely lashed and shored, and arranged in a seamanlike and customary manner. Openings were left in the deck cargo through which the deck caps could be reached. The man who took soundings lay on his belly on one or more barrels of rosin, and, reaching down with his arm, unscrewed the deck cap, took his soundings, and screwed it up again. It is said by both the master and mate that, when a vessel labors heavily and for a long time in a sea way, it is known to mariners that deck plugs or caps will loosen, though they never personally knew of any case of their not only loosening, but coming completely out and being lost, as happened on the Newport News. From this libelants argue that it was bad stowage of the deck cargo, so to plant

it around the deck plugs as to render it possible for the barrels moving in a sea way to knock out the plugs which might become loose.

To this contention I think there are two answers: (1) That considering the stowage, and the weight of the rosin barrels, and the rarity of loose plugs, such a contingency was not to be expected; and (2) that the plugs whose absence did the damage were found to have left uninjured threads in the flanged top of the standpipe, showing, in my opinion, that no severe blows were administered to the plugs as they were loosening and coming out.

I am therefore of opinion that the stowage was not only good as to the deck cargo, but safe according to human experience for the cargo under deck.

[1] Libelants, next observing that the Newport News herself suffered no serious injury, and that no other underdeck cargo received hurt, declare that no peril of the sea within the legal meaning of that phrase has been shown. But it is to be remembered that, in order to find peril of the sea, the losses sustained need not be extraordinary, in the sense of necessarily arising from uncommon causes. Rough seas are common incidents of a voyage, yet they are certainly sea perils, and damages arising from them are within the exception, if there has been no want of reasonable care and skill in fitting out the ship and in managing her. Carver (4th Ed.) § 87. The violence of the sea here shown, acting upon a well-stowed deck cargo, is, if sufficient to proximately account for all that happened, a peril of the sea, within the opinion in *The Frey*, 106 Fed. 319, 45 C. C. A. 309.

[2] Of course, it is not admitted by libelants that the proven peril of the sea does proximately account for the admitted injury. Their contention that the proximate cause was bad stowage has been already disposed of, and the only other cause suggested or shown is a failure on the part of the officers and crew to keep the caps properly screwed down. It is admitted that, if properly screwed down, they were water-tight, and no difficulty is seen in screwing them down properly when lying on the rosin barrels less than an arm's length above the standpipe hole. Those in charge of the steamship say they knew that, not by any action of deck cargo, but by the ordinary straining and twisting of the ship in heavy weather, these plugs were loosened; yet I find in the evidence nothing to show that they were ever looked at more than once in 24 hours. That they did loosen, that they did get completely out, and that their loss was not discovered until after several feet of water had gotten into the hold, is practically admitted, and in my judgment the danger was not discovered sooner only because insufficient inspection was made.

It is concluded as matter of fact that the cargo itself did not and could not start the plugs. If the cargo assisted the plugs in getting out, it did it in such gentle manner as not to injure the screw thread at all. Possibly—indeed, probably—the additional weight of the deck cargo increased the working or writhing of the deck; but that was to be expected, was not in itself dangerous, and only required more frequent inspection and tightening of the deck plugs, which was not given.

It is no answer to this to say that the violence of the seas rendered inspection impossible. Nothing of the kind appears in the evidence; but, if it be true, then the peril of the sea rises to the dignity of the act of God.

It is therefore found that this damage was proximately caused by error in the management of the vessel. The *Silvia*, 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241. It being abundantly proven that the *Newport News* was seaworthy when she began her voyage, it follows that the libel must be dismissed, but, under the circumstances, without costs.

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KAUS v. AMERICAN SURETY CO. OF NEW YORK.

(District Court, N. D. Iowa, W. D. June 29, 1912.)

No. 14, Law.

1. COURTS (§ 328\*)—JURISDICTION OF FEDERAL COURTS—AMOUNT IN CONTROVERSY—JOINDER OF CAUSES OF ACTION.

Code Iowa 1897, § 3465, provides that, where two or more are bound by contract or by statute jointly, jointly and severally, or severally only, action may be brought against any one or more of them on such liability. Under the law of Iowa, as settled by decision of its Supreme Court, persons each of whom become liable, under section 2418, for an injury to persons or property caused by the intoxication of another person to which each contributed, are liable jointly, and may be sued together. By section 2448, subd. 3, which is a part of the "Mulct Law," every saloon-keeper is required to execute a bond in the sum of \$3,000, conditioned, *inter alia*, for the payment of any civil damages for which he may become liable under said section 2418. *Held* that, where a surety company was surety on two such bonds, an action to recover damages resulting from the intoxication of a person alleged to have been caused by liquors sold to him by both the principals in such bonds could be maintained, at the option of the plaintiff, against the surety alone, and that, where the damages claimed were sufficient, the amount of defendant's liability on both bonds, or \$6,000, was the amount in controversy, for the purpose of determining the jurisdiction of a federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 890-896; Dec. Dig. § 328.\*]

Jurisdiction as determined by the amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 459; *O. J. Lewis Mercantile Co. v. Klepner*, 100 C. C. A. 288.]

2. COURTS (§ 310\*)—JURISDICTION OF FEDERAL COURTS—PERMITTING INTERVENTION.

In such case, where plaintiff and defendant surety company are citizens of different states, but the principals in the bond are citizens of the same state as plaintiff, they are not entitled to intervene as defendants, to oust the court of jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 857; Dec. Dig. § 310.\*]

At Law. Action by Lurene Ople Kaus, a minor, by her guardian and next friend, Annie Kaus, against the American Surety Company of New York. On motion of defendant to dismiss for want of jurisdiction, and motion of plaintiff to strike out petitions of intervention. Motion to dismiss denied. Motion to strike out sustained.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes



J. D. F. Smith and Claude Smith, both of Cherokee, Iowa, for plaintiff.

W. E. Johnston, of Ida Grove, Iowa, for defendant.

REED, District Judge. This action is by the plaintiff, a minor, to recover of the defendant surety company damages in the sum of \$10,000, alleged to have been sustained by her by reason of the unlawful sale of intoxicating liquors, in violation of the laws of Iowa, by Peter Arp and Robert Dahms, separately, in Holstein, Ida county, Iowa, to one William Tams, whereby he, the said Tams, became intoxicated, and who, while so intoxicated, invited one Andrew Kaus, the father of the plaintiff minor, to ride with him in an automobile, and then drove said automobile, in which they were so riding, in such a careless and reckless manner as to cause it to overturn and seriously injure the said Andrew Kaus physically in such manner as to permanently incapacitate him from performing any labor, or otherwise render to said minor any support whatever, thereby depriving her of her means of support.

[1] The action is based upon two separate bonds, each in the penal sum of \$3,000, made by the defendant to the county of Ida, in the state of Iowa, as surety for said Peter Arp and Robert Dahms, respectively, pursuant to and as authorized by section 2448, subd. 3, of the Code of Iowa (1897), one of which bonds is signed by Peter Arp, and the other by Robert Dahms, as principal, and both by the defendant as surety. Neither Arp nor Dahms is made a party to the action; the defendant alone being sued upon both bonds. The bonds are identical, except in the names of the principals. That in which Arp is principal is as follows:

"Exhibit A.

"Know all men by these presents: That we, Peter N. Arp, of Holstein, Iowa, as principal, and the American Surety Company of New York, as surety, are held and firmly bound unto the county of Ida, in the state of Iowa (for the use and benefit of any person damaged or injured), in the penal sum of three thousand dollars, for the payment of which we bind ourselves, our heirs, executors, administrators, and legal representatives. This obligation is on the following conditions, to wit:

"That, whereas, the said Peter N. Arp is about to engage in the liquor traffic and in the business of keeping for sale and selling intoxicating liquors in a mullet saloon in a building situated at Holstein, Iowa, under and in pursuance of the laws of the state of Iowa, and desires to avail himself of the benefits of the bar of the penalties provided by the laws of the state of Iowa, pertaining and authorizing the traffic in intoxicating liquors:

"Now, therefore, if the said Peter N. Arp shall faithfully observe all the provisions of the laws of the state of Iowa relating to the traffic in intoxicating liquors, and to the business of keeping for sale and selling intoxicating liquors, and pay the mullet tax and all damages that may result from the sale of intoxicating liquors, upon the premises occupied by the said Peter N. Arp, then this obligation to be void; otherwise, to remain in full force and effect.

"The right to do business under this bond is limited to the twelve months ending January 1, 1912.

"Dated at Des Moines, Iowa, this 5th day of January, 1911.

"Peter N. Arp. [Seal.]

"American Surety Company of New York,

"By F. H. Noble, Res. Vice President.

"Attest: B. C. Mather, Res. Asst. Secretary."

The cause of action sued upon accrued prior to January 1, 1912, but this action was commenced since that date; and the defendant moves to dismiss the suit for lack of the requisite amount to confer jurisdiction of the controversy upon this court, and contends in support of such motion that inasmuch as the defendant is bound, as surety only, for two different principals by each of the bonds, and that it is ultimately liable only for \$3,000 upon each bond, the two cannot be united in one action to confer upon this court the requisite jurisdictional amount as fixed by section 24 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1091 [U. S. Comp. St. Supp. 1911, p. 135]).

The action is primarily based upon section 2418 of the Code of Iowa (1897), which provides:

"Every wife, child, parent, guardian, employer or other person who shall be injured in person or property or means of support by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name against any person who shall, by selling or giving to another contrary to the provisions of this chapter any intoxicating liquors, cause the intoxication of such person, for all damages actually sustained, as well as exemplary damages. \* \* \*

The statute of Iowa forbids the sale of intoxicating liquors in that state under heavy penalties, except for medicinal and other specified purposes; but if a required majority of the legal voters of a city, county, or incorporated town shall give their consent to the sale of intoxicating liquors for other purposes within the limits of such city, county, or incorporated town, then any person who will comply with such law, and pay to the county a specified annual tax, called "mulet tax," and execute to the county a bond in the sum of \$3,000, with sureties to be approved by the clerk of the district court, conditioned that he will faithfully observe all of the provisions of the law relating to the "mulet tax," and pay all damages that may result from the illegal sale of intoxicating liquors upon the premises occupied by such person (the principal in such bond), he shall be relieved from the statutory penalty incurred by him in selling intoxicating liquors upon the premises so occupied by him in violation of law; but the payment of such tax, or the observance of all other provisions of the law relating to the tax, is not to be in any way considered to mean that the business of selling intoxicating liquors in Iowa (except for the lawful purpose) is in any way legalized.

Section 2448, subd. 3, under which the bonds sued upon were made, reads in this way:

"He [the person applying to sell liquor under the mulet law] shall file with the county auditor, to be approved by the clerk of the district court, a bond to the county, in the sum of three thousand dollars, conditioned upon the faithful observance of all the provisions of this chapter relating to the mulet tax, and for the payment of all damages that may result from the sale of intoxicating liquors upon the premises occupied by the obligor. Said bond shall be signed by himself as principal, and by two sureties who shall qualify each in double the amount of the bond, and neither of whom shall be surety on any other like bond."

The petition alleges that said Peter Arp and Robert Dahms were conducting separate saloons in Holstein, Ida country, Iowa, under the

provisions of the so-called mulct law of Iowa, relating to the sale of intoxicating liquors, and executed the bonds in suit to enable them to sell intoxicating liquors in that county under the provisions of said mulct law, and that in violation of law and the condition of such bonds they separately sold intoxicating liquor to said William Tams, which liquor so sold by them separately caused his intoxication, and that by reason of such intoxication he (the said Tams) caused the permanent injury, as before stated, to the father of the minor, thus incapacitating him from rendering the plaintiff any means of support, and that by reason thereof the defendant is liable to her upon said bonds for the amount of the damages she has thus sustained.

Section 3465 of the Code of Iowa (1897) provides:

"Where two or more persons are bound by contract or by judgment, decree or statute, whether jointly only, or jointly and severally, or severally only, including the parties to negotiable paper, common orders and checks, and sureties on the same or separate instruments, or by any liability growing out of the same, the action may at the plaintiff's option, be brought against any or all of them. When any of those so bound are dead, the action may be brought against any or all of the survivors, with any or all of the representatives of decedents, or against any or all such representatives. \* \* \*

This statute plainly authorizes the action to be brought against the defendant alone as surety upon each of said bonds. The Supreme Court of Iowa has held that, under section 2418 of the Iowa Code above, the unlawful sale by two or more persons, acting separately, to one whose intoxication is caused by such separate sales, renders them jointly liable to any person who may be injured in his person or property by means of such intoxication. *Faivre v. Mandercheid*, 117 Iowa, 724, 90 N. W. 76. It is the contention of the defendant that, while the persons who separately sold the liquors in violation of the law may be jointly liable for damages caused by such sale, the defendant's liability under its bonds is contractual only, and it is not liable for a tort. This may be conceded; but, if the principal in each of said bonds may be jointly liable with the other to the plaintiff, then the plaintiff is entitled to recover upon each of said bonds, notwithstanding the liability of the defendant thereunder is contractual only. In other words, defendant's contracts are to indemnify any one who may suffer an injury by the wrongful or unlawful acts of the principal in each bond.

If the defendant had signed as surety the separate negotiable promissory notes of Peter Arp and Robert Dahms individually to the plaintiff, it would not be seriously contended that she might not rightly sue the defendant in one action upon both of said notes without joining with it the principal of either of the notes. In such case there could be no doubt that the amount due upon each note might be added to produce an amount requisite to confer jurisdiction upon this court of a suit upon said notes. No reason is perceived why the same rule does not apply under the Iowa statute to these separate bonds; and as the amount for which the defendant may be liable to the plaintiff upon the two bonds is \$6,000, that amount is sufficient to confer jurisdiction upon this court of this suit. This view of the matter renders it unnecessary to consider or determine whether or

not in this cause the jurisdictional amount of \$2,000 fixed by the Act of 1887-88 is saved by section 299 of the Judicial Code.

Whether or not the sale of the liquor to Tams was the cause of the alleged injury to the plaintiff in this suit, within the meaning of section 2418 of the Iowa Code, is a question that does not arise upon this motion, and is not now considered.

The defendant's motion to dismiss because of want of jurisdiction is denied.

[2] Peter Arp and Robert Dahms, the principals in the two separate bonds, have each filed a petition, in which they respectively ask to be permitted to intervene and join the defendant in the defense of this suit. Each of the interveners is, and was when the suit was commenced, and still is, a citizen of the state of Iowa, as is, and was, the plaintiff also. They were not made defendants in the action originally, presumably because to have done so would have deprived this court of jurisdiction of the controversy, as this court would not have jurisdiction of a suit of the plaintiff against them. The application of each to intervene and become parties defendant in the suit is denied, and the plaintiff's motion to strike the intervening petition of each from the files is sustained, to which rulings the said interveners respectively except.

Orders will be entered accordingly.

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McCABE CONST. CO. v. UTAH CONST. CO.

(District Court, D. Oregon. October 21, 1912.)

No. 3,876.

CONTRACTS (§ 245\*)—RIGHT OF ACTION FOR BREACH—WAIVER BY EXECUTION OF SUBSTITUTED CONTRACT.

A party to a contract, which, on being notified by the other party that it would not perform, yielded to the demand of such other, and voluntarily, although under protest, entered into a new contract covering the same subject-matter, which was performed by both parties, cannot maintain an action for breach of the first contract, which was necessarily superseded.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1129, 1130; Dec. Dig. § 245.\*]

At Law. Action by the McCabe Construction Company against the Utah Construction Company. On motion by defendant for judgment on the pleadings. Motion sustained.

Lamoreaux & Sleight, of Portland, Or., for plaintiff.

Charles Stout, of Portland, Or., and Howat, Macmillan & Nebeker, of Salt Lake City, Utah, for defendant.

BEAN, District Judge. The purpose of this action is to recover damages for the alleged breach of an oral contract between the plaintiff and the defendant, and has been submitted on a motion for judgment on the pleadings.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It appears from the averments of the pleadings, which, for the purposes of this motion must be assumed to be true, that in 1909 the defendant had a contract for the construction of a portion of the railway line of the Oregon Eastern Railway Company from Natron to Klamath Falls. In August of that year it sublet part of the work by verbal contract to the plaintiff at certain stipulated prices and under certain classifications. Plaintiff thereafter transported its employes, machinery, and supplies to the place of the proposed work at great expense and commenced the performance thereof. After it had been engaged in the work for about 10 days, the defendant notified it that it would not "perform the contract as originally made, but would require the plaintiff to do such work at different prices [less] than those originally fixed and would require additional and different classifications." Plaintiff refused to assent to any such change in the contract and strenuously objected thereto; but the defendant, by its authorized agent, "then and there informed the plaintiff that it would not proceed with the contract as originally made, and that the plaintiff could either accept the changes then tendered or stop work and go no further under the original contract," and thereupon presented to the plaintiff a written agreement embracing the proposed changes in prices and classifications and in terms of payment, and "demanded that the plaintiff agree to said contract and substitute it in place of the original contract." Plaintiff strenuously objected and protested, and expressly refused to assent to the change by way of substitution; but since it had gone to great expense in taking its outfit, men, and supplies to the place of work, and would be under very great expense to take the same back to Portland, and did not then know any place where or party with whom it could enter into another contract which would keep it employed, if it discontinued work on the original contract on account of the breach thereof by the defendant, "under protest and only" for the purpose aforesaid, and to mitigate the damages, it signed and executed said written contract. Plaintiff thereafter performed the work in accordance with the terms of the written contract and has been paid in full therefor.

This is an action to recover for the breach of the original contract. the contention being that, when the defendant refused to be further bound thereby, it became the duty of the plaintiff to use every reasonable effort to mitigate the damages by obtaining other employment, and that the party of whom it could or might obtain such employment is immaterial, and therefore the making of a new contract with the defendant for the performance of the same work as the original at different prices and under different classifications did not waive or impair its rights to hold the defendant liable for a violation of the first contract, unless it was expressly so agreed.

Authorities of which *Endris v. Belle Isle Ice Co.*, 49 Mich. 279, 13 N. W. 590, is an example, have been cited, which seem to support the doctrine invoked in cases of partly performed contracts for sale and delivery of personal property; but it is not perceived how this principle, if sound, can have any application to the facts of the pres-

ent case. Here the plaintiff had its election, upon the breach of the original contract by the defendant, to either stand on the contract and hold the defendant responsible for damages for such breach, or to accept the defendant's demand that it enter into another contract covering the same work at different prices and under different classifications "as a substitute and in place of the original." It chose the latter. It entered into the second contract of its own accord, although unwillingly. It performed the work thereunder, and has received the compensation stipulated therein. The fact that it protested against executing the second contract, or did not expressly assent to the change by way of substitution, does not affect its position for the better. It did, in fact, execute the contract voluntarily, and not through fraud or duress. If it had desired to rely on the first contract, it should have refrained from acceding to defendant's demand and entering into the second contract; for, as said by Mr. Justice White in *International Contract Co. v. Lamont*, 155 U. S. 310, 15 Sup. Ct. 99, 39 L. Ed. 160:

"A party cannot avoid the legal consequences of his acts by protesting, at the time he does them, that he does not intend to subject himself to such consequences."

The second contract covers, and was intended by the parties to cover, the same subject-matter as the first and therefore superseded it. It is a legal impossibility for two inconsistent contracts covering the same subject-matter between the same parties, each intending to fix the entire compensation for the same services, to exist at the same time. When, therefore, the defendant required, as a condition to plaintiff proceeding with the work, that it enter into a new contract, fixing other and different prices for the entire work, and it acceded thereto, and signed the contract, such contract necessarily superseded, abrogated, and took the place of the first, as a matter of law, and became the measure of the obligation of both parties. *International Contract Co. v. Lamont*, supra; *Consumers' Cotton Oil Co. v. Ashburn*, 81 Fed. 331, 26 C. C. A. 436; *Krebs Hop Co. v. Livesley*, 59 Or. 574, 114 Pac. 944, 118 Pac. 165.

No damages are alleged to have accrued to the property of the plaintiff between the making of the first and the second contract, nor is any loss of any kind set out. The only claim is that, by the defendant's refusal to permit it to proceed under the verbal contract, the plaintiff was damaged in a large sum. As the plaintiff performed the work agreed upon, and was paid the price stipulated in the written contract, its damages, if it could recover at all, would be the difference between what was received and what was agreed to be paid under the first contract. What it really seeks to recover, therefore, is the price agreed to be paid under the first contract, less the amount paid and received under the second. In other words, it is seeking to recover on the verbal contract, notwithstanding a subsequent agreement covering the scope of the first contract in every detail. This it attempts to do by setting forth the reasons that impelled it to enter into the second contract, instead of standing on the first. The reasons, whatever they may be, do not change the legal effect of the act of the

plaintiff in making the second agreement. The court cannot inquire into the reasons which prompted the execution of the contract, as long as it was voluntarily done, but only whether the contract was in fact executed, and the legal effect thereof.

The motion will therefore be allowed.

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THE RIBSTON.

(District Court, E. D. Virginia. October 24, 1912.)

**COLLISION (§ 71\*)—ANCHORED VESSELS—DRAGGING ANCHORS IN HIGH WIND.**

A steamship anchored in the morning from one-half to three-quarters of a mile from three loaded coal barges, which had previously anchored alongside each other in Hampton Roads on the western side of the channel into Elizabeth river, during the day the wind was high, and she dragged her anchor, and drifted to within about three ship's lengths of the barges, which then separated; two moving further up the channel and anchoring some distance apart. The steamship put out another anchor, but during the evening that also dragged, and she drifted again, and came into collision with both the barges which had moved. *Held*, that the separation and moving of the barges was a proper maneuver to lessen the danger from the drifting vessel, and that the steamship was solely in fault for the collision, it being her duty to give the barges ample and safe berths, and that she had ample warning from the weather conditions, which did not materially change, and from her previous dragging, that there was danger of interfering with the barges, and could not avoid liability on the ground of inevitable accident.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. § 71.\*]

In Admiralty. Libel for collision by the Commercial Towboat Company, owner of the barges Alice and Clara, against the Steamship Ribston. Decree for libellant.

John W. Oast, Jr., of Norfolk, Va., for libellant.

Floyd Hughes, of Norfolk, Va., for respondent.

WADDILL, District Judge. On the morning of the 15th of February, 1912, three ocean-going barges—namely, the Clara, 190 feet in length, 35 feet beam, 18 feet draft, loaded with 1,459 tons of coal, with a freeboard of about 3 feet; the Alice, 165 feet in length, 33 feet beam, 15 feet draft, loaded with 1,024 tons of coal; and the Flora, 185.2 feet in length, 35.1 beam, 17.3 feet draft, loaded with 1,512 tons of coal—were anchored alongside, in Hampton Roads, on the western side of the channel of the Elizabeth river, about opposite the Virginian Railroad piers. About 9:30 o'clock of the same morning the British steamship Ribston, 350 feet in length, 43 feet beam, and 29 feet molded depth, came in light, and was anchored by a Virginia pilot in the Roads, from half to three-quarters of a mile to the northward of the barges, and also to the westward line of the channel. The wind during the day was blowing strongly from the northeast and northward, reaching, as shown by the Weather Bureau report at Norfolk at 12:08 p. m. a maximum of 36 miles an hour, and

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

at 3:20 and 3:45 p. m. reached the same velocity. At 5 p. m. the wind changed from northeast to north, reaching, as shown by the Weather Bureau report at Norfolk, a maximum velocity of 34 miles from the north at 8 p. m., and a maximum velocity between 9 and 10 p. m. of 32 miles an hour from the north at Norfolk, and 52 miles from the north at Cape Henry; both maximum velocities occurring at 9:10 p. m.

Between the time of anchorage and 2:30 in the evening, the Ribston dragged her anchor to within three ship's lengths of the barges, and drifted further to the westward. At the latter hour she put out her starboard anchor on 45 fathoms of cable, and lengthened her port cable from 30 to 45 fathoms. Between 3 and 4 o'clock in the evening, the barges cut loose one from the other, leaving the Flora in her original position—the Alice and Clara dropping back upstream, and to the southward, under the influence of a flood tide, a distance of a quarter of a mile and half a mile, respectively, and there anchored; the Alice being furthest from the Flora. The Ribston's master, shortly after anchoring in the morning, about 10 o'clock, went ashore, leaving his ship in command of the first officer. Upon returning at 5 o'clock, he observed the change in the location of the vessels, and his attention was called to the ship's having dragged her anchor. The several vessels remained in these positions, without further change or alteration, until about 9:30 p. m., when the Ribston again dragged her anchor, passing to the westward of the Flora, and collided with the other two barges.

The Ribston contends that this latter dragging of her anchor was caused by a sudden squall, with an unexpected change in the direction of the wind, during which the anchor gave way, causing her to collide with the two barges, and that the collision was thus the result of inevitable accident, from causes which the navigators of the Ribston could not have foreseen, and against which they could not reasonably have provided. Respondent further insists that the accident was brought about by the Clara and Alice having changed their positions from their original anchorage ground, and dropped back into the course in which the ship drifted.

The conclusions reached by the court are: First. That the Ribston owed the obligation and duty to the barges in question to give them ample and safe berths, and that there was no reason, because of the existence of weather or other conditions, or a crowded harbor, why the same should not have been done; that her first anchorage, as shown by the result, was not sufficient to prevent the ship from dragging, under the then weather conditions, in an exposed place of anchorage. Secondly. That likewise, for the same reason, her second anchorage was insufficient. Thirdly. That the ship had ample warning, by reason of the weather conditions throughout the day, and later in the evening, when her master came aboard, knowing the fact that the ship had already dragged a distance of from half to three-quarters of a mile, to a position of close proximity to the barges, and every precaution should have been taken to see that the barges were afforded a safe anchorage, and especially that there would be no fur-



ther dragging of the ship's anchors. Fourthly. The respondent having failed to meet the burdens imposed upon her in these respects, and damage having resulted therefrom to the libelant as a result of the collision between the Ribston and the barges, the former should be held solely liable to the latter, who were free from fault for the injury sustained.

The suggestion of the Ribston that the collision was caused by the change in the anchorage of the two barges in question cannot be maintained, for the reason that the Ribston owed to the barges, and not the barges to the Ribston, the obligation of providing safe anchorage, and the act of the barges in casting loose, and drifting further away from the Ribston, after she had drifted half a mile nearer to them, was a wise and seamanlike precaution, brought about because of the drifting ship, and they were not expected, in the selection of their new location, which was the natural and proper one for them to have made, to assume and anticipate that the Ribston would further drag her anchor and drift into them; and, moreover, separating the barges, when lashed one to the other, to positions of reasonable distances apart up and down stream, and out of the channel, was just what should have been done, having proper regard to the existing threatened weather conditions.

The respondent's defense of inevitable accident cannot be maintained under the circumstances and facts of this case, for the reason that in the opinion of the court the preponderance of the evidence, having regard to the locality of the collision, does not show the existence of such stormy weather conditions, and the sudden coming on of the same, as would excuse the Ribston from liability; and, moreover, the ship being entirely in fault by reason of the failure properly to maintain her anchorage, cannot interpose such defense as an excuse for her negligence.

It follows, from what has been said, that the steamship Ribston, being solely in fault for the happening of the collision in question, should be held liable for the damage sustained; and a decree will be entered so determining.

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THE JOHN I. CLARK.

(District Court, E. D. Virginia. October 24, 1912.)

**COLLISION (§ 102\*)—STEAM VESSEL COMING OUT FROM SLIP AND PASSING VESSEL—MUTUAL FAULTS.**

A tug coming out of a slip into the Elizabeth river at Norfolk in the daytime, immediately in front of the adjoining pier and about 80 or 100 feet therefrom, came into collision with and sunk a small gasoline sloop, which was passing down the river heavily loaded. The sloop was seen when 200 feet away, and could have been seen at a greater distance if an efficient lookout had been maintained; also the sloop could have kept at a greater distance from the piers, from the slips between which other vessels were likely to come out at any time. *Held*, that the case was one where the ordinary navigation rules did not apply, but was governed by the "special circumstance" rule, and that both vessels were in fault for

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

failure to exercise proper care, by which either could have avoided the collision.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 102.\*

Collision, overtaking vessels, see note to *The Rebecca*, 60 C. C. A. 254.]

In Admiralty. Suit for collision by J. F. Burns, master of the gasoline sloop William M. Brittain, against the steam tug John I. Clark. Decree for libellant for half damages.

On the morning of the 6th of February, 1912, about 10 o'clock, the gasoline sloop William M. Brittain was in collision with the steam tug John I. Clark, in the waters of the Elizabeth river, in front of the northernmost pier of the Norfolk & Western Railway at Lambert's Point, Norfolk, Va. The Brittain was 44 feet in length, 13 feet in breadth, 3 feet in depth, and about 10 tons burden, loaded with 15 tons of guano, having a small oyster batteau in tow, and was passing down the Elizabeth river from Norfolk to Chuckatuck creek. The Clark was 62 feet in length, 15½ feet in breadth, 6½ feet in depth, and about 50 tons burden, used as a water boat, and was coming out of the slip to the northward of the northernmost pier; the slip being about 125 feet wide. The collision occurred immediately in front of the pier, some 80 to 100 feet out in the channel; the tug striking the sloop on the starboard side slightly forward of amidships, causing it to sink at once.

The contentions of the parties, respectively, are: On the part of the libellant—that the sloop was in command of a competent master and crew, fully equipped and supplied, and that the collision occurred alone by the carelessness of the navigators of the tug, and without negligence or fault on its part; that the tug failed to give proper signals of its departure from the slip, and was running at a dangerously high rate of speed, and failed to stop and reverse; for her failure to keep an efficient lookout, and otherwise to so navigate as to avoid a collision. On the part of the tug—that she was in every respect properly manned and equipped, that she gave proper signals when departing from the slip, that the sloop approached at a rapid rate of speed in too close proximity to the end of the piers, and that the tug's navigators, upon observing danger of collision, immediately reversed her engines, and did everything on her part that could be done in order to avoid the collision.

John Upton and John W. Oast, Jr., both of Norfolk, Va., for libellant.

Hughes & Vandeventer, of Norfolk, Va., for respondent.

WADDILL, District Judge (after stating the facts as above). Without going into a general discussion of the several faults alleged by the respective parties one against the other, as accounting for the collision, the conclusion reached by the court is that, having due regard to all of the facts and circumstances of the case, including especially the nearness with which the sloop was navigating to the piers, the width of the slip out of which the tug came, the distance the tug could have seen and did see the sloop, the condition of the weather, the tide at the time, the size of the two crafts, and the speed at which they were respectively navigating, there was no reason why any collision should have taken place, had the navigation of either vessel been reasonably and prudently conducted in accordance with the rules governing them. The sloop, whether proceeding within 75 or 125 feet of the piers, as variously estimated by witnesses, was passing within sufficiently close proximity to a manifest place of danger as to call for the exercise of special care and caution, as well for its

\*For other cases, see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

own protection as for that of others lawfully using the waters, and particularly those liable to come out of the slips of the piers of the Norfolk & Western Railroad, bordering the eastern line of the channel for some distance. This it utterly failed to do. It is true the sloop's master testifies that, upon discovering the tug, he starboarded with a view of going further to port and from the tug, and that he was able to change his course but little, because of the swell from a passing steamer. This latter part of his statement is not borne out by the other testimony in the case, nor is his version supported by the only other person who was on the sloop and not called as a witness. While it is not probable, having regard to the heavily laden condition of the sloop, that much change could have been made in the course of its headway after the presence of the tug was observed, still every effort should have been made to that end, and the proof should have shown the fact, had it been true; and, moreover, the deck-hand, in passing this place of danger, should have been in a position to look out, and be of service, instead of in the cabin, where it is claimed he was, though it may be that his presence on deck would not have materially changed conditions.

On the part of the tug, whether it be that she was proceeding at the speed she claimed of some  $3\frac{1}{2}$  miles an hour, or something faster, or whether she gave the signal indicating her purpose to pass out of the slip just when she says she did, or not, is utterly immaterial, since she clearly saw, and could have seen, the sloop passing, and in a position of apparent danger, in time to have avoided her, by the exercise of reasonable prudence on her part. She confessedly saw the sloop 200 feet away, and might have seen it considerably further off, and there was no real reason why she should not have avoided running into it. The tug evidently proceeded upon the theory that the vessels were on crossing courses, and that the sloop, having the tug on its starboard, was charged with the duty of keeping out of the way, and that she would do so. Assuming that this rule applies, under the circumstances the tug should not have taken the risk it did, having due regard to the size of the two vessels, their locations, and the positions in which they respectively were. On the contrary, the "special circumstance" or "general prudential" rule should have governed the tug's navigation. The paramount duty imposed upon vessels in close proximity to each other, and particularly in waters like those at the scene of this accident, is to avoid the risk of collision, and for failure so to do reliance cannot be had on the ordinary rules of navigation to avoid responsibility. Moreover, it is not claimed by the tug that upon reversing its engines it gave the appropriate signals required by the rules of navigation; and it will not do to say they would have availed no purpose, as it cannot be said how the sloop would have navigated, had it been properly warned of imminent danger.

It follows, from what has been said, that the collision occurred as the result of the negligence of both vessels, and that the damages arising therefrom should be divided between them, and a decree to that end will be entered when presented.

In re KELLY.

(District Court, M. D. Pennsylvania. November 2, 1912.)

No. 1,964.

**BANKRUPTCY (§ 400\*)—EXEMPTION—SUFFICIENCY OF CLAIM.**

A claim to exemption, made by a bankrupt in his schedule, of "three hundred dollars cash from the proceeds, as provided by the exemption law of Pennsylvania, or stock to the value of three hundred dollars, to be set aside by the appraisers, as provided by law," was sufficient in form to authorize the trustee to set aside the exemption from the property of the bankrupt, which consisted of a stock of goods.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 670, 671-675; Dec. Dig. § 400.\*]

In Bankruptcy. In the matter of E. J. Kelly, bankrupt. On review of referee's order disaffirming report of trustee setting aside the bankrupt's exemption. Reversed.

W. G. Kline, of Galeton, Pa., for bankrupt.

Virgil D. Acker, of Galeton, Pa., for trustee.

Archibald F. Jones, of Coudersport, Pa., for exceptants.

WITMER, District Judge. Within 10 days after adjudication the bankrupt filed in court a schedule of his property, showing his claim for the exemption allowed insolvent debtors, in form as follows:

"Three hundred (\$300.00) dollars cash from the proceeds, as provided by the exemption law of Pennsylvania, or stock to the value of three hundred (\$300.00) dollars, to be set aside by the appraisers, as provided by law."

The bankrupt was engaged in the mercantile business, and at the time of filing his claim, it appears, his store stock was under levy and in the custody of the sheriff. After his election, this stock was turned over to the trustee, who immediately, on request of the bankrupt and pointing out the items of stock claimed by him, set apart the bankrupt's exemption and reported the items and estimated value thereof to the court. Exceptions were filed, and the report set aside by the referee, on the ground that the claim was improperly made.

The manner of claiming such exemptions and of setting apart and awarding them is regulated by the bankruptcy act. Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418). The bankrupt, if desiring to make such claim, shall indicate in his schedule "a claim for such exemptions as he may be entitled to." Section 7a (8). "The trustee shall set apart the bankrupt's exemption and report the items and estimated value thereof to the court." Section 47a (11). This was done in the case before us, and the report of the trustee should have been affirmed. As was said in *Burke v. Guarantee Title & Trust Co.* (C. C. A. 3d Cir.) 14 Am. Bankr. Rep. 31, 134 Fed. 562, 67 C. C. A. 486:

"While the form of claim is perhaps not commendable, it was sufficient."

The claim indicates the desire of the bankrupt to retain \$300 worth of property allowed insolvent debtors under the laws of Pennsylvania,

\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and, following it up as made, the bankrupt personally pointed out to the trustee particularly the property desired, thus enabling the trustee to set apart and report the items and their estimated value. The law expressly lays upon the trustee the duty to set apart the exemption and report the items and their value. It nowhere appears, as was said by Judge Dallas in the case cited:

"That Congress intended that the bankrupt himself should make an itemization and estimate, which the trustee, in performing the function expressly assigned to him, might wholly disregard."

The bankrupt rendered the trustee that assistance which enabled him in turn to do his duty in severing the exemption from the mass of property belonging to the estate, of the character and class indicated by the bankrupt. It is true that his claim in the schedule was in the alternative; but it is fair to presume that, to the extent it was invalid, it was afterwards withdrawn. It was surely abandoned and disregarded when the items were selected and set apart of the stock specified. And if the procedure was irregular, it may be excused, because it entailed no injury to any one, and, if requisite, was curable by amendment. General Order 11 (89 Fed. vii, 32 C. C. A. xiv); Rev. St. § 954 (U. S. Comp. St. 1901, p. 696); *In re Duffy* (D. C.) 118 Fed. 926; *In re White* (D. C.) 128 Fed. 513.

The order of the referee is reversed, and the report of the trustee, setting apart the bankrupt's claim for exemption, is affirmed.

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SMITH et al. v. BOWKER-TORREY CO.

(District Court, D. Massachusetts. November 6, 1912.)

No. 176 (C. C. No. 725).

1. EQUITY (§ 223\*)—PLEADING—ALLEGATION OF FRAUD—DEMURRER.

An allegation, in a petition by the receivers for a corporation against a third person, that in procuring a loan for the corporation at an exorbitant rate of interest he falsely represented that he was acting independently and pledging his own credit, whereas in fact he was acting as agent for a trust company, also joined as a defendant, which furnished the money on the security given by the corporation, is a sufficient allegation of fraud, as against a demurrer, to sustain a prayer for an accounting.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 502; Dec. Dig. § 222.\*]

2. EQUITY (§ 241\*)—PLEADING—DEMURRER.

If questions of law, sought to be raised by a demurrer in equity, may turn upon slight variations between the allegations and proofs, it is within the discretion of the court to overrule the demurrer and permit the defendant to insist on the same defense by answer.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 515; Dec. Dig. § 241.\*]

In Equity. Suit by Albert O. Smith, conservator, and others, against the Bowker-Torrey Company. On demurrer and exceptions of Grafton Sanderson and the Waltham Trust Company to receiver's petition for an accounting. Overruled.

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\*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Frederick H. Nash, of Boston, Mass., receiver, pro se.

Brandeis, Dunbar & Nutter, of Boston, Mass., for Grafton Sanderson and Waltham Trust Co.

BROWN, District Judge. [1] The receiver's petition alleges that Sanderson acted in the matter to which the petition relates as agent for the Waltham Trust Company, that the fact of said agency was undisclosed, and that Sanderson pretended to be acting in an independent capacity. It also sets forth certain representations by Sanderson, charged to be false, and that by said representations certain sums were procured.

The demurrers raise the question whether the representations set forth constitute in law such fraud as to entitle the receiver to a rescission.

It is at least doubtful whether the doctrine in respect to the latitude which is accorded to a merchant in commending or puffing his goods has a proper application to such false representations as are set forth in the petition. *Harris v. Rosenberger*, 145 Fed. 449, 455, 76 C. C. A. 225, 13 L. R. A. (N. S.) 762.

It cannot be said as a matter of law that the statement alleged to have been made by Sanderson, that he was pledging his own credit, was not a substantial inducement to a contract for the payment of so high a rate as 3 per cent. per month for a loan upon security which was immediately passed over to the Trust Company and was accepted by it as sufficient security for a loan at the rate of 6 per cent. per annum.

[2] The receiver contends that the present case is a proper one for the application of the rule that, if the questions of law may turn upon a slight variation between the facts as stated by the bill and those which may be established by the evidence, the court will not support a demurrer but will permit the respondent to insist upon the same defense by answer. This rule is well established, and was applied in this circuit in *Snyder v. De Forrest Wireless Telegraph Co.* (C. C.) 154 Fed. 142, 144. See, also, *Virginia v. West Virginia*, 206 U. S. 290, 27 Sup. Ct. 732, 51 L. Ed. 1068; *Kansas v. Colorado*, 185 U. S. 125, 144, 145, 22 Sup. Ct. 552, 46 L. Ed. 838; *Rankin v. Miller* (C. C.) 130 Fed. 229.

If it be true, as alleged, that the Trust Company was the undisclosed principal in the transaction, it would seem to be a proper party to the accounting, especially as the petition contains a prayer for general relief against it, as well as against Sanderson. The answers filed on behalf of Sanderson and the Trust Company raise direct issues, both as to the fact of agency and as to the fact of misrepresentation.

I am of the opinion that the proper course in this case is to overrule the demurrers and exceptions, reserving to final hearing all substantial questions of law appearing upon the face of the petition, and that the parties should proceed forthwith to take testimony upon the issues of fact made by the petition and answers.

A draft decree may be presented accordingly.

## MEMORANDUM DECISIONS

ADAMS v. ADAMS et al. (Circuit Court of Appeals, Fifth Circuit. October 30, 1912.) No. 2,394. Appeal from the District Court of the United States for the Southern District of Georgia; Wm. B. Sheppard, Judge. J. N. Talley, Alexander Akerman, and Charles Akerman, all of Macon, Ga., for appellant. Henry C. Cunningham, of Savannah, Ga., Robert L. Berner, of Macon, Ga., and Arthur G. Powell, of Atlanta, Ga., for appellees. Before PARDEE and SHELBY, Circuit Judges, and MEEK, District Judge.

PER CURIAM. The administratrix appellee cannot be controlled as to the forum in which she should prosecute her suit for damages. In the event she recovers judgment, the appellants here can then assert and protect any rights she may have in regard to distribution and proceeds of the judgment recovered. Affirmed.

COPELAND et al. v. STAPLES et al. (Circuit Court of Appeals, Second Circuit. November 11, 1912.) No. 45. Appeal from the Circuit Court of the United States for the District of Connecticut; James P. Platt, Judge. This cause comes here upon appeal from a decree dismissing a bill in equity Complainant Grace Fones Copeland on August 14, 1908, executed a conveyance of personal property, which had come to her from her father's estate, to Staples, as trustee, for certain purposes therein set forth; the object of the conveyance being to safeguard the property for herself and her daughter, and prevent her husband, who had deserted her and was living with another woman, from pressing any claim to such property, or any part of it, in the event of her death. This suit was brought to set aside the conveyance, or, in the alternative, for reformation thereof by inserting a clause of revocation. The opinion of the Circuit Court is found in 189 Fed. 256. Alva Collins, of New York City (Gilbert E. Roe, of New York City, and Ormond Rambo, of Philadelphia, Pa., of counsel), for appellants. J. S. Pullman, of Bridgeport, Conn., for appellees. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. We fully concur with Judge Platt's reasoning and conclusion, and think it unnecessary to add anything to his clear discussion of the facts and law of the case. The decree is affirmed, with costs.

DALE et al. v. PATTISON. (Circuit Court of Appeals, Sixth Circuit. July 16, 1912.) No. 2,340. Appeal from and Petition for Revision in Bankruptcy in the Circuit Court of the United States for the Southern District of Ohio. See, also, 196 Fed. 5. Matthews, James & Matthews, of Dayton, Ohio, for appellants. Healy, Ferris & McAvoy and Robertson & Buchwalter, all of Cincinnati, Ohio, for respondent.

PER CURIAM. Decision affirmed.

DALLAS CONSOL. ELECTRIC ST. RY. CO. v. GARRISON. (Circuit Court of Appeals, Fifth Circuit. November 27, 1912.) No. 2,308. In Error to the Circuit Court of the United States for the Northern District of Texas; Edward R. Meek, Judge. W. R. Harris and T. B. McCormick, both of Dallas, Tex., for plaintiffs in error. Lewis M. Dabney and Murphey W. Towusend, both of Dallas, Tex., for defendant in error. Before PARDEE and SHELBY, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. A majority of the judges find no reversible error in the rulings on the pleadings and in regard to the admission of evidence. The plea of contributory negligence on the part of the plaintiff was properly submitted to the jury, and we find no error in the instructions of the court.

Whether the damages allowed by the jury were excessive is beyond our province. *Erie Railroad Co. v. Winter*, 143 U. S. 60-75, 12 Sup. Ct. 356, 36 L. Ed. 71. Judgment affirmed.

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**DENVER & R. G. R. CO. v. OGDEN MILLS.** (Circuit Court of Appeals, Eighth Circuit. September 27, 1912.) No. 3,816. Appeal from the District Court of the United States for the District of Colorado. E. N. Clark and R. G. Lucas, both of Denver, Colo., for appellant. John Horne Chiles, Arthur C. Bartels, and Harry S. Silverstein, all of Denver, Colo., for appellee.

PER CURIAM. Temporary injunction (198 Fed. 137) suspended pendente lite, and cause remanded, with directions for further proceedings.

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**ETOWAH WATER & LIGHT CO. v. YANCEY.** (Circuit Court of Appeals, Sixth Circuit. July 18, 1912.) No. 2,256. In Error to the Circuit Court of the United States for the Eastern District of Tennessee. For opinion below, see 197 Fed. 845. McCroskey & Peace, of Madisonville, Tenn., for plaintiff in error. Cornick, Frantz & McConnell, of Knoxville, Tenn., for defendant in error.

PER CURIAM. Dismissed on motion of plaintiff in error.

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**FARMERS' COTTON OIL & TRADING CO. v. SOUTHERN COTTON OIL CO.** (Circuit Court of Appeals, Fifth Circuit. October 31, 1912.) No. 2,405. In Error to the District Court of the United States for the Southern District of Alabama; Harry T. Toulmin, Judge. Daniel Partridge, Jr., of Selma, Ala., for plaintiff in error. Leon Weil, of Montgomery, Ala., and E. W. Petrus, of Selma, Ala., for defendant in error. Before PARDEE and SHELBY, Circuit Judges, and MEEK, District Judge.

PER CURIAM. No one of the assignments of error in this case is well taken. The contract sued on is not tainted with illegality. The case seems to have been correctly ruled throughout in the court below, and the judgment of that court is therefore affirmed.

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**THE HARRY R. WHEELER. THE B LINE. THE CITY OF NEW YORK.** (Circuit Court of Appeals, Second Circuit. November 11, 1912.) No. 54. Appeal from the District Court of the United States for the Eastern District of New York. Archibald R. Watson, Corp. Counsel, of New York City (Terence P. Farley and G. P. Nicholson, both of New York City, of counsel), for appellant. Foley & Martin, of New York City (W. J. Martin and Frank A. Spencer, Jr., of counsel), for appellee claimant. Hyland & Zabriskie, of New York City (Nelson Zabriskie, of New York City, of counsel), for appellee libellant. Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. The narrow channel rule (section 1, art. 25, Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1909, p. 2883]), requiring vessels to keep on the starboard side, applies to navigation up or down. Vessels may cross a narrow channel or maneuver in it. In this case the tug got on the port side in rounding to and before she could move to go upon the starboard side she met the ferryboat. The real question on which the case turns then arose, viz.: Were the vessels meeting green to green or red to red? Upon this point the contradiction between the witnesses is absolute, and, adopting the findings of the District Judge that the vessels were meeting green to green, we agree with his conclusion that the tug was not in fault because of the narrow channel rule, and that the ferryboat was at fault in porting and going across the tug's course. Our doubt has been whether the tug was not



also at fault, because her green light was to some extent obscured. As the city, though fully advised of the situation, did not set this up as a fault in its answer, and the District Judge has held that, even if so, it did not contribute to the collision, the decree is affirmed, with interest and costs.

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HOOD et al. v. McGEHEE et al. (Circuit Court of Appeals, Fifth Circuit. November 22, 1912.) Appeal from the Circuit Court of the United States for the Northern District of Alabama; Wm. I. Grubb, Judge. Augustus Benners, of Birmingham, Ala., and Francis P. Pace and Samuel Proskauer, both of New York, N. Y., for appellants. John P. Tillman, of Birmingham, Ala., for appellees. Before PARDEE and SHELBY, Circuit Judges, and MEEK, District Judge.

PER CURIAM. On the record we reach the same conclusion as the judge of the lower court (189 Fed. 205), and we are constrained to affirm the decree appealed from. It is so ordered.

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LOVELL-McCONNELL MFG. CO. et al. v. INTERNATIONAL AUTO-MOBILE LEAGUE. (Circuit Court of Appeals, Second Circuit. November 12, 1912.) No. 78. Appeal from the District Court of the United States for the Western District of New York. Motion by appellants to amend the petition of appeal, citation, and assignment of errors by substituting for the words and figures "9th of March, 1912," the words and figures "12th of March, 1912"; the latter being the date of the order which appellants seek to review. J. B. Corcoran, of Buffalo, N. Y., for the motion. Drury W. Cooper, of New York City, opposed. Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. The affidavit submitted by appellants after argument at the suggestion of the court shows that this is an instance of "clerical error," and we see no reason why the relief should not be granted. There is power to grant such relief, because the original notice of appeal described the order sought to be appealed from, not only by its date, but also by a description of one of the papers on which it was based and of the relief it granted. It is merely making certain what, on the papers as they stood, was uncertain. The motion is granted.

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MANUEL et al. v. MARTIN. (Circuit Court of Appeals, Fifth Circuit. November 27, 1912.) No. 2,320. In Error to the Circuit Court of the United States for the Northern District of Texas; Edward R. Meek, Judge. E. S. J. Whitehead, of Brownwood, Tex., for plaintiff in error. Wm. J. Berne, of Ft. Worth, Tex., for defendant in error. Before PARDEE and SHELBY, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. The Circuit Court had jurisdiction of this case by reason of diverse citizenship of the parties and as between the original parties to the note sued on. See Annotated Statutes, vol. 4, page 310, and Parker v. Ormsby, 141 U. S. 81, 11 Sup. Ct. 912, 35 L. Ed. 654. Judgment was correctly given against the plaintiffs in error, because the plaintiff below was the assignee of a purchaser for value and before maturity without notice of any equities existing between the original makers to the note. The judgment of the Circuit Court is affirmed.

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OMAHA WATER CO. v. CITY OF OMAHA. (Circuit Court of Appeals, Eighth Circuit. July 8, 1912.) No. 3,786. Appeal from the District Court of the United States for the District of Nebraska. See, also, 187 Fed. 1005; 192 Fed. 246, 112 C. C. A. 504. Howard Mansfield, of New York City, John F. Stout, of Omaha, Neb., Halleck F. Rose, of Omaha, Neb., and Herbert

C. Lakin, of New York City, for appellant. John L. Webster, of Omaha Neb., and W. D. McHugh, of O'Neill, Neb., for appellee.

PER CURIAM. Dismissed, with costs, per stipulation of parties.

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PECOS MERCANTILE CO. v. TOOLEY et al. (Circuit Court of Appeals, Fifth Circuit. November 27, 1912.) No. 2,401. Appeal from the District Court of the United States for the Western District of Texas; Thomas S. Maxey, Judge. J. A. Gillett, of El Paso, Tex., for appellant. T. A. Falvey, Wm. H. Burges, and Robt. L. Holliday, all of El Paso, Tex., for appellees. Before PARDEE and SHELBY, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. This case involves the marshaling of liens on the mortgaged property of the bankrupt. On the facts shown, the subrogation and priority allowed the First National Bank of El Paso over the appellant was just and equitable, and the decree appealed from is affirmed.

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PHILLIPS v. TRAUTMAN. (Circuit Court of Appeals, Fifth Circuit. October 30, 1912.) No. 2,429. In Error to the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge. Burton Smith, of Atlanta, Ga., for plaintiff in error. Jno. P. Ross, of Macon, Ga., for defendant in error. Before PARDEE and SHELBY, Circuit Judges, and MEEK, District Judge.

PER CURIAM. Judgment (197 Fed. 325) affirmed.

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RASMUSSEN v. HOME INDUSTRY IRON WORKS. (Circuit Court of Appeals, Fifth Circuit. November 27, 1912.) No. 2,425. Appeal from the District Court of the United States for the Southern District of Alabama; Harry T. Toulmin, Judge. H. Pillans and Palmer Pillans, both of Mobile, Ala., for appellant. D. P. Bestor, Jr., of Mobile, Ala., for appellees. Before PARDEE and SHELBY, Circuit Judges, and MEEK, District Judge.

PER CURIAM. On the facts we concur in the finding and decree of the District Court. 197 Fed. 661. To enforce the contract as claimed by appellant, without proof of actual damages, would be inequitable, permitting the appellant to enrich himself at the expense of the appellee. Decree affirmed.

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ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. November 27, 1912.) No. 2,304. In Error to the District Court of the United States for the Western District of Texas; Thos. S. Maxey, Judge. E. B. Perkins, of Dallas, Tex., and S. P. Ross, of Waco, Tex., for plaintiff in error. Chas. A. Boynton, of Waco, Tex., and Philip J. Doherty, Sp. Ass't. U. S. Atty., of Washington, D. C., for the United States. Before PARDEE and SHELBY, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. The judgment of the District Court (189 Fed. 954) is affirmed. See *United States v. Atchison, Topeka & Santa Fé Ry. Co.*, 220 U. S. 37, 31 Sup. Ct. 362, 55 L. Ed. 361, and *Baltimore & Ohio R. R. v. Interstate Commerce Commission*, 221 U. S. 612, 31 Sup. Ct. 621, 55 L. Ed. 878.

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In re SHAFFER et al. (Circuit Court of Appeals, Second Circuit. November 11, 1912.) No. 10. Petition to Revise Order of the District Court of the United States for the Eastern District of New York. Thomas & Op-

penheimer, of New York City (L. Oppenheimer, of New York City, of counsel), for petitioner. E. L. Bondy, of New York City, for respondent. Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. This cause comes here on petition to revise an order (185 Fed. 549) of the District Court, Eastern District of New York, which adjudged that Harry Shaffer, one of the bankrupts, was withholding from the trustee \$2,500 belonging to the bankrupt's estate, and ordered him to turn over the same to the trustee. A majority of the court concur to affirm the order on the opinion of the District Judge.

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SHAUP v. MAY. (Circuit Court of Appeals, Fifth Circuit. October 31, 1912.) No. 2,339. Appeal from the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge. Henry Kirk White, of Birmingham, for appellant. G. W. Yancey, of Birmingham, Ala., for appellee. Before PARDEE and SHELBY, Circuit Judges, and MEKK, District Judge.

PER CURIAM. On consideration of all the evidence in the transcript, we conclude that the bankrupt was entitled to his discharge. The decree of the District Court is affirmed.

END OF CASES IN VOL. 199